

**MINUTES OF A MEETING OF THE BOARD OF ZONING APPEALS**  
**WEDNESDAY, FEBRUARY 6, 2008**

On Wednesday, February 6, 2008, the Board of Zoning Appeals held a public hearing in the Fifth Floor Conference Room, 900 East Broad Street, at 1:00 p.m.; display notice having been published in the Richmond Times-Dispatch on January 23, 2008, and January 30, 2008, and written notice having been sent to interested parties.

Members Present:     Marlene Moses-Ciula, Chairman  
                              Melvin Brown, Vice-Chairman  
                              Rodney M. Poole  
                              Roger York  
                              Edward Winks

Member(s) Absent:    Jean Thompson Williams

Staff Present:         Roy W. Benbow, Secretary  
                              William Davidson, Zoning Administrator  
                              J. Neil Brooks, Planner II  
                              Jan Reid, Assistant City Attorney

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The Chairman called the meeting to order and read the Board of Zoning Appeals Introductory Statement which explains the proceedings of the meeting. The chairperson informed those in attendance that the Rules of Procedure provide that in the case of an appeal of the decision of the Zoning Administrator, interested parties shall be permitted a total of 10 minutes for their case in chief and for their rebuttal. Further, interested parties shall be required prior to beginning their presentation to declare to the Board how many of their allotted minutes shall be devoted to their case in chief and their rebuttal.

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**CASE NO. 3-08**

APPELLANT(S):        Mr. and Mrs. Richard H. Rose Jr.  
                              Mr. Michael J. Brickhill

PREMISES:             20 River Road  
                              Tax Parcel No. W021-0469/003

SUBJECT:              A reversal of the decision of the Zoning Administrator

DISAPPROVED by the Zoning Administrator based on Sections 114-402.1, 114.402.2, & 114.640.2 of the zoning ordinance for the reason that: In an R-1 Single Family Residential District, the use (helicopter landing field) is not permitted, as it is not customarily incidental nor is it listed as a use permitted at 20 River Road

APPLICATION was filed with the Board on January 4, 2008.

APPEARANCES:

For Appellant: Michael Brickhill

Against Appellant: William Davidson  
John Easter  
Richard Cromwell

CASE IN CHIEF: Mr. Michael J. Brickhill representing Mr. and Mrs. Richard H. Rose Jr. has filed an appeal for a reversal of the decision of the Zoning Administrator based on 114-402.1, 114-402.2, & 114-640.2 of the zoning ordinance regarding a determination that the use (helicopter landing field) is not permitted, as it is not customarily incidental nor is it listed as a use permitted at 20 River Road, located in an R-1 Single Family Residential District. Mr. Rodney Poole advised the Board that he was a member of the Country Club of Virginia but did not feel as if this would disqualify him from voting on the case. The remaining Board members concurred. Mr. Michael Brickhill, attorney for the applicant, testified that his clients, Mr. and Mrs. Rose, purchased the property at 20 River Road last year. Mr. Brickhill stated that his client has numerous properties in the area and had occasionally utilized a helicopter to visit his properties. Mr. Brickhill indicated that his clients had received permission from the Country Club of Virginia on five occasions to land their helicopter on the club's property. Mr. Brickhill stated that the Country Club of Virginia had permitted helicopters to land on its property on numerous occasions in the past. Mr. Brickhill indicated that his clients' property abuts that of the Country Club. Mr. Brickhill stated that the Country Club of Virginia informed his clients late last year that they would not be permitted to land their helicopter on the club's property. Mr. Brickhill indicated that subsequent to the club's notification his clients began to land the helicopter on their own property. Mr. Brickhill stated that the only other property owner along River Road, which abuts the club's property, has written a letter of support. Mr. Brickhill explained that the Country Club of Virginia filed a complaint with the city concerning the subject landings. Mr. Brickhill stated that the zoning ordinance contains no specific provisions allowing for any kind of landing paths within the city. Mr. Brickhill indicated that his client is not seeking a special use permit or a rezoning, but is contending that the zoning ordinance permits his client to utilize his property in order to land a helicopter. Mr. Brickhill explained that the issue is not whether the helicopter is sitting stationary on the property but whether it is flying to and from the property. Mr. Brickhill stated that the question of whether the helicopter is permitted to fly within the city is not the province of the city. Mr. Brickhill stated that the Federal Aviation Administration has sole province over the flight of any type of aircraft including helicopters. Mr. Brickhill contended that the issue is not the flight of the helicopter but the parking of the helicopter. Mr. Brickhill explained that the city

ordinance already contains a provision regarding the parking of vehicles. Mr. Brickhill stated that §114-640.2 of the zoning ordinance permits the parking of vehicles that do not exceed an empty weight of 6,500 pounds. Mr. Brickhill stated that his clients' helicopter weighs approximately 2,500 pounds. Mr. Brickhill contended that the helicopter could be placed on a flatbed trailer and brought to the property without violating the zoning ordinance. Mr. Brickhill informed the Board that §5.1 of the Code of Virginia includes a definition of a landing area or landing field which requires that the subject area or field must be open to the public. Mr. Brickhill indicated that no such operation is engaged in by his client.

Speaking in opposition to the appellant, Mr. Richard Cromwell, representing the Country Club of Virginia, testified that landings were no longer permitted based on safety concerns and member's ability to utilize the facilities.

Speaking in opposition to the appellant, Mr. John Easter, representing the Country Club of Virginia, testified that the City of Richmond's zoning ordinance is permissive in nature and since there is nothing related to permitting the landing of a helicopter, it is not allowed by the zoning ordinance. Mr. Easter stated that the landing of a helicopter in a residential district is not an accessory use because that helicopter landings in a residential district are not customarily incidental and subordinate to the principal residential use. Mr. Easter informed the Board that he had identified four cases throughout the country which had found that the landing of a helicopter in a residential district did not qualify as an accessory use. Mr. Easter stated that in looking at the city at large there was no evidence that the landing of helicopters was a customarily incidental use in a residential district. Mr. Easter point out that if the Board was to find in favor of the appellant, it would be permitting everyone within every residential zoning district to land helicopters at their property. Mr. Easter took issue with the appellants' contention that state law only governs landing fields opened to the public. Mr. Easter informed the Board that §5.1-7.2 of the Code of Virginia applies to registration of private landing areas. Mr. Easter stated that although licensing is not required that all aircraft must be registered. Mr. Easter explained that the Virginia Aviation Authority provides that airports and landing areas except private landing areas, have to be licensed and that private landing areas must be registered. Mr. Easter noted that the Virginia Aviation Authority regulations relating to private or personal airports require that the applicant must provide the state with information that the subject airport complies with local zoning. Mr. Easter indicated that the local government has a role to play in determining whether private airports are permitted. Mr. Easter noted that the zoning ordinance requires that vehicles of greater than 6,500 pounds must be parked within an enclosed structure, but the zoning ordinance by implication does not necessary permit all vehicles of under 6,500 pounds. Mr. Easter stated that the appellants' contentions that the zoning ordinance is only able to regulate vehicles sitting on the ground, and that the FAA regulates vehicles in flight is not accurate. Further, FAA regulations do not preempt local regulations governing airports. Mr. Easter indicated that the issue

indicated that the issue in this case is the actual landing of the helicopter and the noise, dust and the distraction caused by the landing. Mr. Easter indicated that no evidence has been provided to support the contention that the landing of the helicopter is customarily incidental and subordinate to the principal residential use. Mr. Easter closed by stating that the zoning administrator's decision was absolutely correct and that the appellant had not sustained their burden.

In response to a question from Mr. Poole, Mr. Easter stated that even assuming that FAA regulations were preemptive in this case that parking a helicopter in a residential district is not an accessory use. Mr. Poole asked if there was a definition of a parking area in the zoning ordinance. Mr. Benbow indicated that the definition of a parking area reads as follows "a parcel of land or portion thereof for the parking of motor vehicles for which there is no direct charge to the user, a direct charge shall be construed to be a charge which is levied at the parking area." Mr. Poole inquired if utilization of the appellant's property for the landing of the helicopter meets the state definition of a private airport. Mr. Easter responded by stating that he is not an expert in fact field, but in his opinion a private airport is a place which is utilized for the landing of any type of aircraft. Mr. Easter stated that in his opinion it does meet the definition of a private airport and would require registration through the state. Mr. Poole asked if the foregoing discussion relating to helicopter landings also applied to the Country Club of Virginia. Mr. Easter stated that the regulations also applied to the country club.

Speaking in opposition to the appellant, Mr. William Davidson, Zoning Administrator, testified that the zoning regulations are unique to the community in question. Mr. Davidson stated that the zoning ordinance is permissive and if uses are not specifically identified as being permitted, they are not allowed. Mr. Davidson indicated that the primary question before the Board was whether the landing of helicopters in a residential district is a permitted accessory use. Mr. Davidson stated that in his opinion it was not for the reason that the landing of helicopters is not customarily incidental and subordinate to the residential use. Mr. Davidson indicated that he is only empowered to enforce the zoning ordinance and not FAA regulations and that in his opinion landing areas or landing fields are not permitted within the underlying R-1 Single-Family Residential District. Mr. Davidson noted that the City Charter allows the Board to permit landing fields as a special exception. Mr. Davidson further noted that since the M-2 Heavy Industrial District regulations permit all uses not otherwise allowed in the remaining zoning districts that a landing field would be permitted in an M-2 district. Mr. Davidson indicated that the question of whether landing fields are permitted must be considered in the context of the entire city. Mr. Davidson reiterated that in his opinion landing fields of any type are not permitted within the city except in an M-2 district. Mr. Davidson concurred with case law furnished to the Board by Mr. Easter regarding the permissibility of landing helicopters within a residential district.

Mr. Brown noted that the letters of objection focused on the dangerous nature of the helicopter landings, the negative impacts on the country club and questioned whether or not helicopter landings could be restricted to a certain time of the day. Mr. Brickhill indicated restricting flights as suggested would likely not be possible and noted that the adjoining neighbor, which was most affected by the helicopter landings did not object to the subject landings.

Mr. Brickhill stated that cases not cited by the Country Club's attorney are listed in the United States Code annotated titled 49 of the USC, §40103. Mr. Brickhill stated that there are at least 40 cases that specifically state that city ordinances governing helicopter landings or takeoffs were specifically preempted by federal law. Mr. Brickhill indicated that the operation of aircraft is the specific purview of the FAA. Mr. Poole stated that his understanding of Mr. Brickhill's FAA preemptive argument involves the actual landing of the aircraft. Mr. Brickhill stated that he does not agree with the city's contention that what is being discussed is a landing area or landing field. Mr. Brickhill stated that what is being discussed is the aircraft being on the ground within the city's territorial limits. Mr. Poole questioned how the appellant reconciled the language in the city charter which requires a special exception for a landing field in a district where it is not otherwise permitted. Mr. Poole further questioned whether the city has a right to control the land within its boundaries. Mr. Poole asked that if the city charter controls landing fields through the special exception process, how does the appellant reconcile that the landing field is in fact a parking area and how does the appellant reconcile the fact that the definition of a parking area regulates the parking of vehicles. Mr. Brickhill responded that on behalf of his clients' he had attempted to determine from the city what specific provision precludes landing of helicopters and that the city responded by stating that if a use it is not identified as being permitted, it is precluded. Mr. Brickhill stated that he would concede that the city could legitimately control the land within its boundaries. Mr. Brickhill conceded that hierarchically speaking the City Charter supersedes the zoning ordinance. Mr. Brickhill indicated that the Zoning Administrator had not relied on the City Charter in rendering the opinion that was being appealed. Mr. Poole questioned whether Mr. Brickhill agreed that the Board could uphold the zoning administrator's decision as being correct despite the appellant's contention that the City Charter had not been relied upon in rendering the zoning administrator's opinion. Mr. Brickhill agreed that the Board had such authority.

Speaking in rebuttal, Mr. Brickhill stated that it was disingenuous for the Country Club of Virginia to oppose landing of a helicopter on his clients' property when they have been engaging in the same activity for a number of years. Mr. Brickhill contended that if his client is unable to land a helicopter in his property, there is no provision in the zoning ordinance for anyone to land a helicopter by right within the city. Mr. Brickhill stated that according to the freedom of information request, which was filed on behalf of his clients' there have been no special use approvals for the landing of the helicopter within the city. In Mr. Brickhill's

opinion neither VCU or the state are permitted to utilize their properties for the landing of helicopters. Mr. Poole pointed out that the Commonwealth of Virginia is not subject to the city zoning regulations. Mr. Brickhill replied that VCU would then not be permitted to land a helicopter anywhere other than one of their properties.

In response to a question from Mr. Brown, Mr. Brickhill indicated that federal law precludes a local jurisdiction from limiting the times in which an aircraft may take off or land.

Mr. Poole inquired that if there were a provision in the Code of Virginia or within the city ordinance which permitted emergency landings would that not negate the appellant's argument. Mr. Brickhill agreed that if such a provision existed that would be true, but it would then not apply to other than emergency situations. In response to a question from Mr. Poole, Mr. Brickhill acknowledged that his client was not landing his helicopter for emergency purposes.

Ms. Moses-Ciula pointed out that if the appellants' contention is correct, which is that anyone can land helicopters within the city, every resident would have the right to land a helicopter on their roof. Mr. Brickhill replied that it may be legally permissible but it would not be practical.

In response to a question from Mr. Winks, Mr. Brickhill indicated that FAA approval was not required for his client to land a helicopter at his premises.

Speaking in rebuttal, Mr. Easter stated that a landing area or field must be registered with the Virginia Aviation Authority. Mr. Easter pointed out that the cases which he had cited were from various federal courts of appeal. Mr. Easter read from the 6th Circuit's opinion, which read in part "however we believe that the United States sovereign regulation of the airspace over the United States and the regulation of aircraft and flight is distinguishable from the regulation of the designation of plane landing sites which involves local control of land... in contrast in the present case an examination of the Federal aviation act and regulations concerning seaplanes and aircraft landing sites indicates that the designation of plane landing sites is not or basically regulated by federal law but is instead a matter left primarily to local control."

Mr. Poole inquired if Mr. Easter had found a 4th Circuit or a Supreme Court opinion. Mr. Easter pointed out that there is an older Supreme Court decision which is distinguishable from the aforementioned 6th Circuit cases in that the court is saying that the general preemption stated in the context of the FAA does not apply to the local land use regulations.

In response to a question from Ms. Moses-Ciula, Mr. Easter replied that the city has jurisdiction when the helicopter touches the ground. Mr. Easter went on to

state that the city could also regulate the storing of a helicopter on someone's property in a residential district.

In response to a question from Mr. York, Mr. Davidson indicated that consistent with the city's long-standing opinion that an event is anything which is conducted three or fewer times, it would be possible to land a helicopter up to three times without it being considered a use.

A motion was made by Mr. Poole and seconded by Mr. Winks that the appeal for a reversal of the decision of the Zoning Administrator based on 114-402.1, 114-402.2, & 114-640.2 of the zoning ordinance regarding a determination that the use (helicopter landing field) is not permitted, as it is not customarily incidental nor is it listed as a use permitted at 20 River Road, located in an R-1 Single Family Residential District be denied. Mr. Poole stated that the Zoning Administrator's decision was correct in that the zoning ordinance is permissive and that a helicopter landing area or field is not permitted within the zoning ordinance in a residential district. Mr. Poole further stated that a helicopter landing area or field is not a customarily incidental or subordinate accessory use within a residential district. Mr. Poole observed that since a landing field is specifically addressed in the city charter and requires a special exception that by implication it is not a permitted use within a residential district.

**RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS** that the appeal of Mr. and Mrs. Richard H. Rose Jr. for a reversal of the Zoning Administrator's decision regarding a determination that a helicopter landing field is not permitted as a customarily incidental nor principal use within an R-1 Single-Family Residential District be denied.

**ACTION OF THE BOARD:** Denied (4-0-1)

Vote to Deny the Appeal

affirmative: Poole, Winks, Moses-Ciula, York,

negative: none

abstention: Brown

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Upon motion made by Mr. Poole and seconded by Mr. Brown, the Board members voted (4-0) to approve the minutes of the January 2, 2008 meeting.  
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The meeting was adjourned at 2:10 p.m.

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Chairman

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Secretary