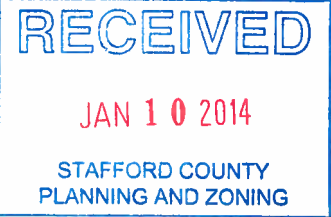




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**WALSH COLUCCI
LUBELEY EMRICH
& WALSH PC**

January 10, 2014



Via Hand Delivery

Ms. Susan Blackburn
Zoning Administrator
Stafford County, Virginia
1300 Courthouse Road
Stafford, Virginia 22554

Re: Zoning Determination Request for Assessor's Parcel 35-22, 45 and 60 Jack Ellington Road, Fredericksburg, Virginia 22406, Owned by Crucible Properties II, LLC

Dear Ms. Blackburn:

On behalf of our client Westlake Development, LLC ("Westlake"), the owner of Stafford County Assessor's Parcel Numbers 35-20, -20a, -21 and -31, which is adjacent to the above-referenced land, we request an official, binding Zoning Determination pursuant to Va. Code Ann. § 15.2-2286(4) and Stafford County Zoning Ordinance § 28-295. Accompanying this request is the completed Zoning Administrator Determination Application and a check in the amount of \$441.84. The request relates to the current use of Assessor's Parcel 35-22, addressed as 45 and 60 Jack Ellington Road, Fredericksburg, Virginia 22406 (the "Crucible Property"), presently titled in the name of Crucible Properties II, LLC.

Specifically, Westlake requests that you determine that the current uses of the Crucible Property, zoned M-1, for i) outdoor weapons training using live ammunition, ii) the detonation of explosives outdoors as a simulation of improvised explosive devices ("IEDs"), and iii) outdoor vehicle defense training, are in violation of the Stafford County Zoning Ordinance. Our client has knowledge that each of these activities is occurring regularly on the Crucible Property.

As revealed by the timeline attached as **Exhibit A**, and the additional supporting information set out below, the Crucible Property has never been authorized for use as an outdoor weapons training facility where IEDs may be detonated and outdoor driver training could be provided. This is in part because these uses were not expressly permitted under the applicable Zoning Ordinance provisions when they commenced on the Crucible Property, and the M-1 regulations have required for all relevant periods that "all uses shall be conducted within enclosed buildings." Zoning Ordinance § 28-39(b)(1)

Attached as **Exhibit B** is a list of the Description of Proposed Improvements and Uses attached to the Impact Statement submitted by Team Crucible, LLC (the "Crucible") with its Conditional Use Permit Application (the "CUP Application") that identifies the areas of training

presently taking place on the Crucible Property, including weapons training, personal security measures training, motorcade and driver training, off road vehicle and motorcycle training, and training scenarios. Attached as **Exhibit C** is a list of current courses offered by the Crucible and based on the Description of Proposed Improvements and Uses it appears that these courses are in fact offered at the Crucible Property. Since the detonations of IEDs and outdoor vehicle training were never permitted by the Zoning Ordinance or otherwise, the current use cannot be classified as a lawful non-conforming use pursuant to Article XV of the Zoning Ordinance.

What follows is a detailed justification for our position and grounds for a Zoning Determination consistent with our request.

The Prior Use of the Property

Based on discussions with County staff, our review of documents received in response to our numerous FOIA requests, and the Crucible's CUP application materials, it is our understanding that prior to 1999 the Crucible Property was used by National Testing, which performed automotive crash testing and other testing for the government. However, no public documents or other evidence shows that National Testing used the property for weapons training using live ammunition, the detonation of explosives, or vehicle defense training.

M-1 Uses When Shooting Range Began to Operate

It also appears that in 1999 the County issued a Certificate of Use for a shooting range on the Crucible Property to an entity named "Measures Personal Defensive." See attached **Exhibit D**. Based on the issuance of this Certificate of Use, and the representations made by The Crucible in its CUP Application, the use of the Crucible Property for, at the least, shooting range activities began in 1999. At that time, the Crucible Property was zoned M-1, and attached as **Exhibit E** are the permitted M-1 district uses as of January 1, 1999.¹ A shooting range is not listed as a permitted or conditional use in the M-1 district, and neither are i) outdoor weapons training using live ammunition, ii) the detonation of IEDs, or iii) outdoor vehicle defense training.

M-1 Performance Standards Require All Uses be Indoors

Attached as **Exhibit F** are the M-1 performance standards that were in effect on January 1, 1999. As of this date, the M-1 performance standards required that "all uses shall be conducted within enclosed buildings." Zoning Ordinance § 28-39(b)(1) (emphasis supplied). This remains a requirement in the Zoning Ordinance currently in effect.

If the shooting range constructed in 1999 is consistent with that which exists today, then it could not have been permitted under the Zoning Ordinance, since it was never enclosed. While

¹ All documents attached to this letter are documents we received from the County in response to our various Freedom of Information Act ("FOIA") requests, except Exhibit C—the list of courses the Crucible offers.

Stafford County has enacted a separate Chapter 26 in its Code of Ordinances entitled "Weapons" that identifies where shooting ranges are prohibited, and thus by implication elsewhere permitted, and the process for obtaining approvals, the M-1 standards requiring uses to be contained within enclosed buildings were, and remain, requirements that must be met then and now. This is because the Zoning Ordinance in 1999 provided, as it does today, that "[i]f any portion of this chapter is in conflict with another portion of this chapter, or with another section of the Stafford County Code, the more restrictive provision shall prevail." Zoning Ordinance § 28-106 (in effect in 1999), now codified at § 28-6.

The Expansion of The Crucible's Illegal Use

Following the issuance of the Certificate of Use for a shooting range in 1999, the permit has been renewed for each year except 2001 according to the records we have received from the County. The applicant/user became Kroll/The Crucible in 2000, an entity that presumably leased the property from then owner, Approved Engineering Test Laboratories, Inc. Attached as **Exhibit G** are all applications and permitting records through 2006, and note that the applications indicate that the use is for only an "OUTDOOR SMALL ARMS SHOOTING RANGE".²

In 2004, the County issued the Crucible a Notice of Fire Prevention Code Violation, attached as **Exhibit H**, in part because there was in place no permit for the storage of a large amount of small arms ammunition and the detonation of explosives on the property. This document constitutes the first public evidence that Kroll/The Crucible had begun detonating explosive devices as a part of its training exercises.

In 2007, Team Crucible, LLC became the applicant for the Certificate of Use, and the permit was "renewed" each year through 2012 per the documents attached as **Exhibit I**. We have noted that the original permit for the operation of a shooting range on the property was for an outdoor small arms shooting range. However, based on the class offerings of the Crucible, its CUP Application materials, and statements of its representatives at Planning Commission hearings on the application, the shooting ranges are also being used for weapons training for a "Medium and Light Machinegun", p. 8 of Exhibit C, for H&K MP-5 sub-machineguns, M-4 assault rifles, M203 grenade launchers, Remington 870 combat shotguns and AK-47s. Pg. 10 of Exhibit A. It is possible that some of the weapons do not qualify as small arms.

In 2009, a fire prevention code permit was issued in 2009 for "explosives/fireworks storage," attached as **Exhibit J** along with the application, but we have received no evidence from the County that this permit was issued in consultation with the Zoning Administrator. The

² The Crucible Property currently has a total of five (5) outdoor shooting ranges, whereas only one was originally permitted. The original permit for one range was renewed annually for a single range, with the exceptions of the years 2001, where we have no record of a renewal, and 2002 where the County's records indicate that there are "shooting ranges (2) built" and operated on the Crucible Property.

application for this permit notes that it is the initial application for the use of explosives on the Crucible Property.

Furthermore, at some point in time, outdoor defensive vehicle courses, where drivers are trained to evade simulated enemies and obstacles, began to be offered at the Crucible Property. There are no provisions in the M-1 district regulations permitting this use which clearly violates the requirement that all uses be conducted within enclosed buildings.

This record reveals that the use originally approved by the director of code compliance or his/her designee as a small arms shooting range (not permitted in M-1 in any event) expanded into a far more significant weapons and combat training facility. This expansion was done without any regard for the M-1 regulations and without approval, it appears, from the Zoning Administrator.

The "School" Determination from 2004

In 2004, Kroll/The Crucible desired to move from its current location to Assessor's parcel 36-57, zoned A-1, and obtained an undated letter from the then Zoning Administrator that its proposed use for that other property, which was consistent with its use currently in existence, qualified as a "school". In *Bd. of Supervisors v. Crucible, Inc.*, 278 Va. 152 (2009), the Virginia Supreme Court held that this letter from the Zoning Administrator did not confer vested rights to the Crucible pursuant to either Va. Code Ann. § 15.2-2307 or -2311(C).

Although we disagree with the substance of the 2004 letter, it indicates that it was the County's view that the Crucible's operations were properly characterized under the Zoning Ordinance as a school. However, the M-1 district did not permit a school in 2004. Therefore, if the use of the Crucible Property had evolved into a school as of 2004, it was again not a permitted use in the M-1 district.

The Requirement for a Conditional Use Permit for the Crucible's Use

In 2006, the Board of Supervisors amended the Zoning Ordinance to include as a conditional use in the M-1 district, "school, industrial," and defined that use. A copy teste of this amendment is attached as **Exhibit K**. The definition of "school, industrial" states in part that it is "[a]n establishment which primarily teaches usable skills that prepare students for jobs in a trade or business that include, but not limited to: ... (d) the discharging of firearms (e) defensive driving techniques...." By creating a definition for "school, industrial," the Board clearly demonstrated that prior to the 2006 amendment such uses were not defined in the ordinance and therefore not permitted except under the provisions of Zoning Ordinance § 28-37.³ Therefore, the Crucible's

³ This Zoning Ordinance section states that "[i]f a use is not specifically permitted anywhere in Table 3.1, an application may be made by a property owner to the administrator for such use as a conditional use pursuant to section 28-185." We have received no evidence that the Crucible ever applied for a conditional use permit pursuant to this provision.

operations did not become lawfully nonconforming with the adoption of the 2006 amendment since the operations were never lawful in the first place.

We are in receipt of a "Zoning Verification" referencing the Crucible Property, sent to Hirschler Fleischer, dated March 10, 2010, and issued by a Senior Zoning Technician. This verification is attached as **Exhibit L**. The verification states:

A copy of Section 28-35, Table 3.1, "District Uses & Standards," M-1 (Light Industrial) is enclosed for your records. This parcel was part of the 1978 Comprehensive rezoning. The training facility that exists has become nonconforming with the definition changes for schools in the Stafford County Code, Section 28-25 "Definitions of specific terms."

This verification does not authorize the use of the Crucible Property for i) outdoor weapons training using live ammunition, ii) the detonation of IEDs outdoors, and iii) outdoor vehicle defense training. First, the verification discusses only a "training facility", and today and presumably in 2010 the Crucible had enclosed training facilities. Therefore, this verification did not address the fact that the Crucible operates outdoor weapons training ranges, an outdoor defensive vehicle training program and detonates IEDs outdoors.

Second, the verification specifically states that it "is subject to change with approval from Stafford County." As noted above, the Virginia Supreme Court decided that the Zoning Verification the Crucible received in 2004 did not confer a vested right, and there is no substantive difference between the 2004 Zoning Verification and the one sent to Hirschler Fleischer in 2010. The Court stated that "[a] statement of zoning classification, such as contained in the zoning verification letter, is not a significant affirmative governmental act," and therefore cannot serve to establish a vested right. *Bd. of Supervisors v. Crucible, Inc.*, 278 Va. 152, 160-161 (2009).

Third, the 2010 Zoning Verification cannot be used to establish a vested right because

Code § 15.2-2307 provides for the vesting of a right to a *permissible* use of property against any future attempt to make the use impermissible by amendment of the zoning ordinance; it is not intended to permit, nor does it provide for, the vesting of a right to an impermissible use under the existing ordinance.

Goyonaga v. Bd. of Zoning Appeals, 275 Va. 232, 244 (2008).

Finally, even though the Crucible's uses have now been defined and may become permitted by the issuance of a Conditional Use Permit, the M-1 district regulations still require, in § 28-39(b)(1), that all uses be "conducted within enclosed buildings." Therefore, the current Conditional Use Permit application cannot be approved since it proposes to keep the weapons training areas and the driving course outdoors.

The Current Use is Not a Shooting Range

Based on the information collected, including the Crucible's CUP Application materials, the statements its representatives have made at the Planning Commission hearings, and its own class offerings, we submit that the weapons training, detonation of explosives, and driver training uses are not consistent with a shooting range operation. The County defines a "shooting range" as "any area or structure designed for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting." Stafford County Code § 16-8 (emphasis supplied). Thus, even if Stafford County were to ignore the requirement that M-1 uses be located in enclosed buildings, the County cannot properly permit these uses to continue on the Crucible Property.⁴

The Use is Not Grandfathered

The Crucible's use is not "grandfathered"; grandfathering is an act of legislative grace whereby the legislative body expressly permits a use that is no longer legal to continue to operate lawfully (while sometimes including a sunset provision and imposing other conditions). The Stafford County ordinances are devoid of any provision that "grandfathers" the Crucible's use.

Conclusion

As we hope this record makes clear, the current uses of the Crucible Property as the site of weapons training, explosive device storage, and detonations and vehicle defense training are not lawful nonconforming uses because the uses were never lawful in the first place. The 2006 Zoning Ordinance amendment defining the Crucible's current use and requiring a Conditional Use Permit for such a use did not render the uses lawfully nonconforming because they were not permitted at the time of the amendment.

Therefore, we request that you issue a determination that the current uses of the Crucible Property as the site of i) outdoor weapons training using live ammunition, ii) the detonation of explosives outdoor (IEDs), and iii) outdoor vehicle defense training are in violation of the Stafford County Zoning Ordinance. We also request that you determine that the currently pending Conditional Use Permit application cannot be approved unless all uses are included in enclosed buildings.

Finally, we submit that the CUP Application should be deferred until you render the requested decisions, as the determinations our client has requested are germane to whether the application should be approved. Please do not hesitate to contact me with any questions regarding these requests, and we appreciate your attention to this matter.

⁴ We note that validly issued shooting range approvals are only valid for 12 months. Stafford County Code § 26-33.

Sincerely,

WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.

A handwritten signature in black ink, appearing to read 'M. J. Coughlin', with a long horizontal flourish extending to the right.

Michael J. Coughlin

cc: Westlake Development, LLC (via e-mail)
Supervisor Gary Snellings (via Federal Express)
Mr. Jeffrey Harvey (via hand delivery)
Charles W. Payne, Jr., Esq. (via First Class Mail)