STAUNTON
VIRGINIA

OFFICE OF THE CLERK OF COUNCIL

July 20, 2018

HAND-DELIVERED

Thomas E. Roberts, Clerk
Staunton Circuit Court
113 E. Beverley Street
Staunton, VA 24401

Re: Case CL18000404-00

Dear Mr. Roberts:

Pursuant to the order issued by Judge Ricketts on July 11, 2018, I am submitting certified copies of the complete record of the proceeding had before and considered by the Board of Zoning Appeals in the above referenced case. I certify to the best of my knowledge and belief that this is a true and complete record of that proceeding.

Sincerely,

Suzanne F. Simmons

Suzanne F. Simmons
Clerk of Council

Cc: Victor Santos, Esq.
Mark Obenshain, Esq.
Rodney Rhodes

CITY OF STAUNTON BOARD OF ZONING APPEALS (BZA)

Record of Proceedings

Item 1	June 5, 2014 Application for Appeal of Administrative Decision	0001
Item 2	December 13, 2017 Letter from Mark Obenshain to City of Staunton BZA	0004
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* The Staunton Board of Zoning Appeals approved the minutes at its July 10, 2018 meeting.

OBENSHAIN
LAW GROUP

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June 11, 2014

Via e-mail and mail

Sharon E. Angle
Director of Planning/Zoning Administrator
City of Staunton
P. O. Box 58
Staunton, VA 24402

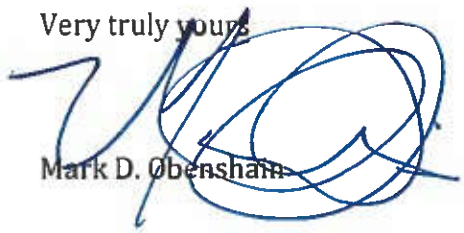
Re: Debra Chilton-Belloni
1403 North Augusta Street, Staunton, VA

Dear Ms. Angle:

Please find attached Ms. Chilton-Belloni's form appealing your May 30, 2014 determination to the Board of Zoning Appeals, attachments and her check in the amount of $200. Please let me know the schedule established for the public hearing and for consideration of this appeal and application for a variance.

With best regards,

Very truly yours,



Mark D. Obenshain

MDO/
HB262986.DOCX
Enclosures

cc: Victor M. Santos, Esquire (by e-mail and mail)
Mrs. Debra Chilton-Belloni (by e-mail)

APPEAL TO THE BOARD OF ZOING APPEALS
CITY OF STAUNTON

Applicant: Debra Chilton-Belloni Date: 6/5/2014

Mailing Address: 161 Seclusion Manor Phone: 540-872-4354
Mineral, VA 23117

I (we) respectfully request that the Board of Zoning Appeals review the decision made on May 30, 2014 by the Zoning Administrator.

Address of Property: 1403 N. Augusta St., Staunton, VA 24401

Legal Description (Block No., Lot No., Section): 1400 block of N. Augusta St., Lots 1 and 23, Chilton Hall and Cottage - (Lot 4, BLK B) Map No. 310

Applicable Provision of Zoning Code: 18.120.010(3)

The following action is requested:

☐ An interpretation of the zoning map/Zoning Code.

☒ An appeal of an administrative decision.

Description of Problem: I am seeking a variance from the above referenced ordinance with respect to size, height, location or features of a structure -- a wall -- built on the property. My deceased husband and I sought and received approval from the City planning office before building the wall. The application of the above cited ordinance in the manner sought by the City will subject me to an undue hardship warranting a variance. See attached letter dated May 9, 2014 submitted in support.

Has the applicant previously filed an appeal in connection with this property? yes, prior to law change

List and explain any existing special use permit or variance previously granted on this property:
Not Applicable

What is the applicant's interest in the property?

☒ Owner

☐ Contract purchaser (attach copy of pending contract or option agreement)

☐ Owner's agent

☐ Other (explain)

Explanation of purpose to which property will be put: Residential

Attach supporting material such as a site plan, tax map, topographic map, drainage map, utility easement map, building elevation map, etc.

Signature of Applicant

Fee Paid: $200

OBENSHAIN LAW GROUP

MARK D. OBENSHAIN
ATTORNEY AT LAW

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FAX: 540.266.3568

December 13, 2017

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I represent Debra Chilton-Belloni and write this letter to you in your capacity as Chairman of the Staunton City Board of Zoning Appeals in order to request a hearing on Mrs. Chilton-Belloni's June 5, 2014 appeal to the Board of Zoning Appeals (BZA) following the issuance of a Supreme Court of Virginia Opinion in this matter on November 9, 2017.

Because of the long history involved in this matter, I will provide some historical background. In 2006, Dr. and Mrs. Chilton-Belloni bought a historic home at 1403 North Augusta Street in Staunton. Because of heavy traffic they wanted to build a wall in front to block the road noise. There was no application process for the approval of such a wall and no permit to issue, but the Bellonis nonetheless consulted city zoning officials and after a site visit they were told that the wall they planned to build would comply with the City's zoning ordinances.

After the wall was nearly complete, on September 20, 2007, the City Zoning office issued a notice to the Bellonis telling them that the wall actually violated the zoning ordinances. In response, the Bellonis citing hardship, asked the City's BZA to grant a variance. After considering the circumstances, on February 20, 2008, the BZA voted unanimously in favor of the variance.

The City then appealed the variance, arguing that the BZA had exceeded its authority. The City cited *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004), in which this Court held that the only hardships sufficient to justify the grant of a variance are those that are Constitutional in dimension—those that approach confiscation. The Staunton City Circuit Court agreed and reversed the BZA's grant of a variance.

After those proceedings, nothing happened for 2 years. The City took no action and the Bellonis took no steps to remove the wall. In 2011, the City filed criminal charges against Dr. Belloni citing the wall as violating its zoning ordinances. That case was dismissed at trial for the City's failure to take action within the period allowed by the statute of limitations.

Once again, nothing happened for two more years. The Bellonis reasonably believed that the City had exhausted its efforts. Then in late 2013, after a truck damaged a part of the wall, the City once again renewed its efforts to secure the removal of the wall. It sent a letter stating that the repair of the damage to the wall would be viewed as a new violation of the zoning ordinances and the City again demanded the removal of the wall.

Since the beginning of this process, and after the reversal of the 2008 variance by the Circuit Court, the Code of Virginia provisions defining a hardship sufficient to justify the award of a variance had been changed. The 2009 statutory amendment eliminated the *Cochran* requirement that hardship justifying a variance must be one that is confiscatory in favor of language allowing a variance if it will "alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. Given that the BZA had voted unanimously in favor of the variance in 2007 and that it would have stood but for the *Cochran* requirement, Mrs. Chilton-Belloni made her new 2014 request for a variance citing the code change as a significant change of circumstance.

The City Zoning Administrator summarily rejected the 2014 variance request and Mrs. Chilton-Belloni again appealed that ruling to the BZA. It is that variance request that remains pending and upon which Mrs. Chilton-Belloni is now requesting a hearing.

As you will recall, before a hearing was scheduled on Mrs. Chilton-Belloni's appeal, she was sued by the Zoning Administrator. Although Mrs. Chilton-Belloni asked for the Circuit Court proceeding to be stayed pending the BZA proceedings, the Staunton City Circuit Court refused and ruled that because Mrs. Chilton-Belloni had requested a variance in 2009, she was "not entitled to relitigate, or have additional review of the matter." As a consequence, when a BZA meeting was scheduled, the attorney for the Zoning Administrator shared the ruling of the Circuit Court and argued that it could take no action on Mrs. Chilton-Belloni's appeal. The BZA then declined to take any action at all on Mrs. Chilton-Belloni's request for a variance, which remains pending. The Circuit Court proceeded to enter an injunction requiring Mrs. Chilton-Belloni to tear down the wall that had been constructed in front of her property and which was the subject of her request for a variance.

Mrs. Chilton-Belloni appealed to the Supreme Court of Virginia which issued a November 9, 2017 Opinion and Order reversing the ruling of the Staunton City Circuit Court and remanding the case for further proceedings. I enclose a full copy of the Opinion.

In the Opinion, the Supreme Court of Virginia absolutely rejected the City's position – that the legal doctrine of *res judicata* should be applied to prevent a subsequent variance request, especially where circumstances and the law have changed. The Supreme Court of Virginia expressly ruled as follows:

> Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a

> property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a land owner from potential benefits to his or her property merely because he or she, or a previous owner had engaged in a prior appeal of the matter under different law.
>
> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error.

The Supreme Court ruled that the circuit court should have delayed taking any action and that it should have allowed the Board of Zoning Appeals to proceed with the consideration of Mrs. Chilton-Belloni's appeal given that the BZA has taken no action to grant or deny the variance.

I respectfully request a hearing by the Board of Zoning Appeals to consider the rezoning request and that such hearing be scheduled as soon as possible.

Thank you for your consideration of this request and the ruling of the Supreme Court of Virginia.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/eis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Mrs. Debra Chilton-Belloni

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12 NORTH NEW STREET

THOMAS R. NELSON (1899-1980)
RICHARD F. MCPHERSON (1925-2002)
FRANK L. SUMMERS (RETIRED)
VICTOR M. SANTOS
THOMAS P. MCPHERSON
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B. SPENCER CROSS

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www.nelsonmcpherson.com

January 5, 2018

COPY

Mr. Paul Vames, Chair
Staunton Board of Zoning Appeals
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Repeated Variance request of Debra Chilton-Belloni
with respect to 1403 N. Augusta Street

Dear Mr. Vames:

As you may know, this firm represents the Zoning Administrator of the City of Staunton and the City of Staunton with respect to the repeated variance request of Debra Chilton-Belloni concerning a wall (the Wall) located at 1403 North Augusta Street (the Property). For approximately ten years, Ms. Belloni has been in violation of the zoning provisions of the Staunton City Code. Given your role as Chairman of the Staunton Board of Zoning Appeals (BZA), I write to reply initially to the December 13, 2017 correspondence of Mark Obenshain, counsel for Ms. Chilton-Belloni.

It is helpful to recall that, while the BZA plays an important role, its discretion in passing upon variance applications is limited. "Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals." *Martin v. City of Alexandria*, 286 Va. 61, 69 (2013). Variances may not be approved for reasons other than those set forth in the Virginia Code. *Adams Outdoor Adver. v. Bd. of Zoning Appeals*, 261 Va. 407 (2001).

The "historical background" cited by Mr. Obenshain in that correspondence omits several important details and fails to acknowledge the decade-long zoning violation by his client. It further risks sowing confusion as to the issues before the BZA. As but one example, this matter does not concern "rezoning," contrary to the assertion on the third page of Mr. Obenshain's correspondence. I write to provide a more complete, albeit preliminary and not comprehensive at this time perspective, which we anticipate supplementing at a later time.

In 2006, Mr. and Mrs. Belloni purchased the Property, which is located at the intersection of North Augusta Street and Ridgeview Road. At that time, as you may recall, there was significant construction taking place across North Augusta Street, at the site of the former Kings Daughters Hospital. Supposedly in the interest of creating a sound barrier from that temporary work, the Bellonis decided to construct a hollow-core block wall (the Wall) running parallel to both North

Augusta Street and Ridgeview Road.

Prior to commencing construction of the Wall, Mr. Belloni met with Tim Hartless, a City Zoning Inspector, who later testified before the BZA on February 28, 2008 that he told Mr. Belloni that "the City Code would prohibit a wall taller than 3 ½ feet in height in a front yard, and ... that since he did live on the corner of both N. Augusta Street and Ridgeview Road, that we would consider, uh, his property to have two front yards-because he fronted on two separate City streets" (Transcript of 2/28/08 BZA meeting, page 12.) The Zoning Ordinances were, of course, both then and now, easily accessible to the general public, both in print and via the internet, and clearly stated the 3 ½ ft. limit and other restrictions.

The Bellonis nonetheless proceeded to construct the Wall to a height of about 6-8 feet, well in excess of the 3 ½ ft. maximum authorized pursuant to Code § 18.120.010, asserting that they received advice from Earl Thompson, a (now former) official in the City's building office, that such construction was acceptable. Prior to the Bellonis' completion of the Wall, however, the initial advice received from Mr. Hartless, confirming that the Wall was illegal, was repeatedly confirmed, both orally and in writing, by zoning staff, including by Mr. Thompson himself (See 9/29/07 correspondence from Earl Thompson to Mr. and Mrs. Belloni). John Glover, then Zoning Administrator, hand-delivered a written notice of violation, again specifying the applicable provisions of the Zoning Ordinance and instructing the Bellonis of their right to appeal or to seek a variance. The Wall had not been completed as of that time (see, e.g., transcript of 2/28/08 BZA meeting, page 13), but the Bellonis defied Mr. Glover's notice and continued the construction, citing Mr. Thompson as authority, although under the law Mr. Thompson had no more authority to amend the Zoning Ordinance, or grant the Bellonis the right to defy it, than a police officer would to permit a motorist to disregard a posted speed limit. "[N]o subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [municipality's] ordinances." *Dick Kelly Enters. v. City of Norfolk*, 243 Va. 373, 382, 416 S.E.2d 680, 685 (1992). 'We must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute." *Richmond v. County of Henrico*, 185 Va. 176, 189 (1946).

The Bellonis appealed Mr. Glover's interpretation of the clear provisions of the Code and sought a variance from the BZA. A transcript of that proceeding is available and instructive, as it reveals the complete lack of any legal grounds for the Bellonis' application. Notwithstanding the City's arguments, the BZA unanimously upheld the Zoning Administrator's finding that the Wall violated the Zoning Ordinance, but, in defiance of the clear dictates of the law, nonetheless granted the variance. One member of the BZA at the time in fact referred to the law as "dumb" and helped lead the other members to disregard it, in effect prompting the litigation which the City had to pursue to uphold the rule of law.

The City appealed the BZA's grant of a variance to the Bellonis, as well as the BZA's grant of variances to two other property owners, to the Circuit Court, which in 2009 reversed the BZA in all three cases and invalidated the variances, noting that the BZA "acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the

law." The Bellonis noted no further appeal, the legal wrangling over the Wall appeared to be at an end, and the City looked forward to the property owners' compliance.

Though the other two property owners worked cooperatively with the City zoning staff and brought their properties into compliance, and despite the Court's invalidation of the variance granted by the BZA, the Bellonis continued to defy the law and refused any modification to the Wall. The City made numerous overtures to the Bellonis to work cooperatively and continued to encourage compliance, in the hope that further litigation could be avoided. For example, on September 9, 2013 Sharon Angle, the Zoning Administrator at the time, wrote Mr. and Mrs. Belloni, noting the existence of the "continuing illegal wall around your property," and the fact that "the City has continued to be extraordinarily patient in affording you more than reasonable time to bring the wall into compliance."

Finally, given the Bellonis' recalcitrance, they were charged in the General District Court with their continued violations of the Zoning Ordinance. Because the General District Court found that the language chosen in the Summons did not allege a continuing violation, but rather merely that the defendants did "unlawfully erect" the Wall, the one-year statute of limitations applicable to misdemeanors was applied, and the charge was dismissed.

On March 18, 2014 Ms. Sharon Angle, who by then had been appointed Zoning Administrator, again wrote Ms. Belloni, extending the City's condolences over Mr. Belloni's passing the previous summer but noting that the "zoning violation unfortunately remains unresolved even after the City's successful litigation in Circuit Court several years ago which invalidated the Board of Zoning Appeals' wrongful grant of a variance-and after all of the City's letters since then to [Mr.] Belloni and you as the owners of the property." Ms. Angle observed that Ms. Chilton-Belloni remained in violation of the City's zoning requirements and respectfully urged her to take action to achieve compliance before May 14, 2014, after which date, she noted, the City would "explore all of its options to take enforcement action, including the filing of necessary papers."

Further correspondence between Ms. Angle and Ms. Chilton-Belloni's counsel continued thereafter until on May 9, 2014 Mr. Obenshain wrote Ms. Angle to request "a modification from the zoning ordinance ... with respect to the size, height, location or features of a structure-in this instance, a wall-on her property." Ms. Angle responded on May 30, 2014, noting that she had no authority to grant a "modification" to the Staunton City Code and observing that "the matter of hardship already has been fully adjudicated with the Staunton Circuit Court having ruled several years ago against the property owners' position and in favor of the City-and reversing the board of zoning appeals because the board of zoning appeals had acted contrary to law." Ms. Chilton-Belloni then filed what she identified as "an appeal of an administrative decision" and requested "a variance from the above referenced ordinance with respect to size, height, location or features of a structure-a wall-built on the property."

In the meantime, the Zoning Administrator exercised the prerogative, pursuant to the Virginia Code (See, e.g., Va. Code Sec. 15.2-2208 and 2286 and City Code Sec. 18.225.010), to petition for an

injunction from the Staunton Circuit Court, seeking to compel Ms. Chilton-Belloni's compliance with the law. Facing a ruling on the legal merits of the issue—a ruling she clearly wanted to avoid at all costs, as she knew that the Wall continued to be plainly illegal—Ms. Chilton-Belloni sought a stay (that is, delay) of that proceeding while the new BZA appeal was pending. After consideration of written briefs from both sides, the Court heard argument from counsel and denied the stay, finding that the legal doctrine of *res judicata* prevented relitigation of a matter–Ms. Chilton-Belloni's request for a variance–which had been conclusively resolved pursuant to the earlier Court ruling in 2009. On June 30, 2015, following a trial which included the introduction of demonstrative evidence and the presentation of witnesses, the Court granted the Zoning Administrator's request for an injunction.

That ruling was appealed by Ms. Chilton-Belloni to the Supreme Court of Virginia, but no ruling was issued until November 9, 2017. A copy of that opinion has been provided to the BZA. The Court concluded that the doctrine of *res judicata* should not have barred Ms. Chilton-Belloni's application for a variance, and that the Circuit Court should have stayed the injunction proceeding while that application was pending before the BZA.

It is important to note that the Supreme Court neither ruled nor commented upon the substantive merits of Ms. Chilton-Belloni's request for a variance; nor did it rule upon the merits of the Zoning Administrator's request for an injunction. Instead, the ruling was technical and narrow, focused solely upon the question of whether the Circuit Court should have stayed the injunction proceeding until after Ms. Chilton-Belloni received a hearing before the BZA on her new variance application. The Court concluded:

> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error. As a result, the final order granting an injunction, when Chilton-Belloni had not in fact been afforded the opportunity to exhaust her administrative remedies, was also in error.

No adjudication was rendered at all as to the question of whether Ms. Chilton-Belloni's application should be approved, and the case was remanded (that is, returned) "for further proceedings consistent with this opinion."

Accordingly, the City has asked that the matter be heard in the Circuit Court for a status conference on January 9, 2018. Mr. Obenshain, however, has asserted his privilege, as a member of the General Assembly, to a continuance under Virginia Code § 30-5 (copy enclosed). This raises the question of whether the BZA can proceed with a March 13, 2018 hearing, as we understand was scheduled earlier this week by the Chairman. Mr. Obenshain's pleading indicates that the General Assembly is not scheduled to adjourn until March 10, 2018, so unless Mr. Obenshain or his associate make themselves available for a status conference with the Court prior to then we would not have an opportunity to receive guidance from the Court in advance of the BZA hearing. Plus, Virginia Code

§ 30-5 specifies that it applies to quasi-judicial tribunals and extends the delay period to a "period ... ending 30 days after the adjournment [of the General Assembly]."

Regardless, the litigation remains and, in accordance with the Supreme Court decision, and subject to any guidance, direction or action by the Circuit Court, the BZA should substantively address whether Ms. Chilton-Belloni is entitled to a variance. We would anticipate extensive argument concerning the matter, but at this early stage would simply encourage the BZA's careful review of the strict requirements of the Virginia Code, in particular §§ 15.2-2201 and 15.2-2309 (1) and (2). A copy of those statutes, as well as a worksheet which sets forth the specific required findings, are attached. Even as a threshold matter Ms. Chilton-Belloni's application obviously fails to meet the statutory requirements for a variance; for example, the variance she seeks would not "alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance." (See Va. Code Sec. 15.2-2309(2).)

As stated, the Supreme Court remanded the injunction case for further proceedings, and with that in mind we have filed a praecipe to place the matter on the motions day docket of January 9, 2018 for further direction. For over ten years Ms. Chilton-Belloni has defied the same ordinances with which her neighbors are expected to comply, resisting every effort the City has made to encourage her compliance, including a compromise offer by the City to supply the means of removing the wall from the Property. The City looks forward to a final conclusion which reflects the limited role of a BZA and respects the rule of law.

Thank you for your time and attention to this matter.

Respectfully,

Victor M. Santos

Encls.

cc: Mr. Hal Sharp, Board of Zoning Appeals (w/encls.)
Mr. Willard H. Keeling, Board of Zoning Appeals (w/encls.)
Ms. Judith Wiegand, Board of Zoning Appeals (w/encls.)
Mr. Bradley G. Bryant, Board of Zoning Appeals (w/encls.)
Mark D. Obenshain, Esq. (w/encls.)

VMS/anh

BOARD OF ZONING APPEALS – VARIANCE REQUIREMENTS

Specific Requirements	Va. Code Section	
The burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria set out in § 15.2-2309, and specifically § 15.2-2309(2).	§ 15.2-2309	
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, __ a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure __ when the strict application of the ordinance would: __ unreasonably restrict the utilization of the property, __ **and** such need for a variance would not be shared generally by other properties, __ **and** provided such variance is not contrary to the purpose of the zoning ordinance. "Variance" shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	
Notwithstanding any other provision of law, general or special, a variance shall be granted __ if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property	§ 15.2-2309(2)	

0012

BOARD OF ZONING APPEALS – VARIANCE REQUIREMENTS, CONTINUED

___ or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, **and**		
___ (i) **and** the property interest for which the variance is being requested was acquired in good faith ___ **and** any hardship was not created by the applicant for the variance;	§ 15.2-2309(2)	
___ (ii) **and** the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area;	§ 15.2-2309(2)	
___ (iii) **and** the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;	§ 15.2-2309(2)	
___ (iv) **and** the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property;	§ 15.2-2309(2)	

0013

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 22. Planning, Subdivision of Land and Zoning

§ 15.2-2201. Definitions

As used in this chapter, unless the context requires a different meaning:

"Affordable housing" means, as a guideline, housing that is affordable to households with incomes at or below the area median income, provided that the occupant pays no more than thirty percent of his gross income for gross housing costs, including utilities. For the purpose of administering affordable dwelling unit ordinances authorized by this chapter, local governments may establish individual definitions of affordable housing and affordable dwelling units including determination of the appropriate percent of area median income and percent of gross income.

"Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

"Development" means a tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.

"Historic area" means an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation.

"Incentive zoning" means the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features, design elements, uses, services, or amenities desired by the locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development.

"Local planning commission" means a municipal planning commission or a county planning commission.

"Military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under jurisdiction of the U.S. Department of Defense, including any leased facility, or any land or interest in land owned by the Commonwealth and administered by the Adjutant General of Virginia or the Virginia Department of Military Affairs. "Military installation" does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

"Mixed use development" means property that incorporates two or more different uses, and may include a variety of housing types, within a single development.

"Official map" means a map of legally established and proposed public streets, waterways, and public areas adopted by a locality in accordance with the provisions of Article 4 (§ 15.2-2233 et seq.) hereof.

"Planned unit development" means a form of development characterized by unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses in which project planning and density calculation are performed for the entire development rather than on an individual lot basis.

"Planning district commission" means a regional planning agency chartered under the provisions of Chapter 42 (§ 15.2-4200 et seq.) of this title.

"Plat" or "plat of subdivision" means the schematic representation of land divided or to be divided and information in accordance with the provisions of §§ 15.2-2241, 15.2-2242, 15.2-2258, 15.2-2262, and 15.2-2264, and other applicable statutes.

"Preliminary subdivision plat" means the proposed schematic representation of development or subdivision that establishes how the provisions of §§ 15.2-2241 and 15.2-2242, and other applicable statutes will be achieved.

"Resident curator" means a person, firm, or corporation that leases or otherwise contracts to manage, preserve, maintain, operate, or reside in a historic property in accordance with the provisions of § 15.2-2306 and other applicable statutes.

"Site plan" means the proposal for a development or a subdivision including all covenants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.

"Special exception" means a special use that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith.

"Street" means highway, street, avenue, boulevard, road, lane, alley, or any public way.

"Subdivision," unless otherwise defined in an ordinance adopted pursuant to § 15.2-2240, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

"Working waterfront" means an area or structure on, over, or adjacent to navigable waters that

provides access to the water and is used for water-dependent commercial, industrial, or governmental activities, including commercial and recreational fishing; tourism; aquaculture; boat and ship building, repair, and services; seafood processing and sales; transportation; shipping; marine construction; and military activities.

"Working waterfront development area" means an area containing one or more working waterfronts having economic, cultural, or historic public value of such significance as to warrant development and reparation.

"Zoning" or "to zone" means the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as "zones," by legislative action and the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.

Code 1950, § 15-961.3; 1962, c. 407, § 15.1-430; 1964, c. 547; 1966, c. 344; 1975, c. 641; 1976, c. 642; 1977, c. 566; 1978, c. 320; 1987, c. 8; 1989, c. 384; 1990, c. 685; 1993, c. 770; 1995, c. 605; 1997, c. 587;2008, cc. 635, 718;2011, c. 257;2012, c. 554;2013, cc. 149, 213;2015, c. 597;2017, c. 216.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 22. Planning, Subdivision of Land and Zoning

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.

2. Notwithstanding any other provision of law, general or special, to grant upon appeal or original application in specific cases a variance as defined in § 15.2-2201, provided that the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application.

No variance shall be considered except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

In granting a variance, the board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public

interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, general or special, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555;1997, c. 587; 2000, c. 1050; 2002, c. 546;2003, c. 403;2006, c. 264;2008, c. 318;2009, c. 206;2015, c. 597.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 30. General Assembly
Chapter 1. General Assembly and Officers Thereof

§ 30-5. Continuance or time for filing pleading, etc., where party or attorney is connected with General Assembly or Division of Legislative Services

Any party to an action or proceeding in any court, including the Court of Appeals and the Supreme Court of Virginia, commission or other tribunal having judicial or quasi-judicial powers or jurisdiction who is an officer, employee or member or member-elect of the General Assembly or employee of the Division of Legislative Services, or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is or becomes an officer, employee or member or member-elect of the General Assembly or employee of the Division of Legislative Services, shall be entitled to a continuance as a matter of right (i) during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment thereof, and (ii) during a period beginning one day prior to the meeting date of any reconvened or veto session or of any commission, council, committee or subcommittee created by the General Assembly at which such officer, employee or member is scheduled to attend and ending one day after the adjournment of such meeting; however, no continuance need be granted under clause (ii) unless it shall have been requested in writing at least three days prior to the first day for which the continuance is sought and filed with the court. The requesting party, when practicable, shall strive to notify all other parties to the proceeding of such request.

Any pleading or the performance of any act relating thereto required to be filed or performed by any statute or rule during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment of the session shall be extended until not less than 30 days after any such session. The failure of any court, commission or other tribunal to allow such continuance when requested so to do or the returning of such filing or act during the period hereinabove specified shall constitute reversible error; provided that this section shall not prevent the granting of temporary injunctive relief, or the dissolution or extension of a temporary injunction, but the right to such relief shall remain in the sound discretion of the court or other such tribunal.

Code 1919, § 298; 1926, p. 18; 1934, p. 370; 1940, p. 363; 1952, c. 234; 1960, c. 147; 1973, cc. 242, 322; 1984, c. 703; 1987, c. 192; 2002, cc. 584, 617;2012, c. 394.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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March 27, 2018

Via Email and US Mail

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401
ppv@verizon.net

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I write this letter in anticipation of the upcoming April 3 hearing on the variance request submitted by Debra Chilton-Belloni on June 5, 2014, with respect to 1403 North Augusta Street.

I have carefully reviewed the guidance submitted to the Board by Mr. Santos and by the City's new Senior Planner and Zoning Administrator, Rodney Rhodes. I write in order to point out that the materials they provided and the guidance offered by each is just plain wrong. That same erroneous guidance also is reflected in the published public hearing notice.

Mr. Santos and Mr. Rhodes both cite statutory language that was added by amendment and which did not become effective until more than a year after Ms. Chilton-Belloni's variance request was filed. Ms. Chilton-Belloni's right to request a variance is a substantive right, which vested at the time at the time the request was made in June of 2014. The statutory amendments cited by Mr. Rhodes and Mr. Santos were not passed by the General Assembly until its 2015 Session, and they did not become effective until July 1, 2015. Had the variance request been taken up in 2014, as the Supreme Court of Virginia held should have occurred, the variance would have been decided under the then existing law and long before the 2015 amendments.

The 2015 amendments cannot be retroactively applied to Ms. Chilton-Belloni's 2014 request. I have taken the worksheet that both Mr. Rhodes and Mr. Santos have provided you and have added in the right column notes concerning when the referenced provisions were added. As you will see, virtually every single one of the requirements cited by the City in these letters and in the public hearing notice are requirements that were added in the 2015 amendments.

This application for a variance must be decided in accordance with the law as it existed in 2014. I have enclosed a copy of Virginia Code § 15.2-2309 as it existed in 2014. Virginia law empowered the Board of Zoning Appeals to authorize a variance provided that:

1. The variance will not be contrary to the public interest, and
2. Literal enforcement of the provisions will result in unnecessary hardship; and
3. The property owner can show that his property was acquired in good faith; and
4. The Board is satisfied, upon the evidence heard by it, that the granting of a variance will alleviate a clearly demonstrable hardship
    a. as distinguished from a special privilege or convenience sought by the applicant; and
    b. the variance shall be in harmony with the intended spirit and purpose of the ordinance.
5. The hardship is not shared generally by other properties in the same zoning district and the same vicinity; and
6. The authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

See Virginia Code § 15.2-2309(2014).

In Mr. Santos' letter, he refers to the 2008 variance hearing. In that hearing, the BZA members were clearly moved by the hardship the City sought to impose by strict enforcement of the zoning ordinance. The particular hardship arose from the Bellonis' reliance upon the advice provided by City officials. Mr. Santos correctly cites Virginia law in pointing out that the Bellonis could not claim that the erroneous advice provided by the building official could bind the City. The Bellonis never argued that the City was bound, only that they built the wall in reliance upon the erroneous advice, and that it was a sufficient demonstration of hardship to permit a variance. The Board of Zoning Appeals members agreed in 2008 and granted the variance. The City's attorney argued that while the Bellonis had endured a hardship, perhaps even an undue hardship, it was not one that "approached confiscation." The Board simply thought in 2008 that it was unfair of the City to strictly enforce the zoning ordinance and it granted the variance. Mr. Santos is correct in his assertion that in 2009 the Circuit Court overturned the BZA's decision. However, a significant change in circumstance occurred shortly thereafter.

The change of circumstance that in 2014 led Ms. Chilton-Belloni to request a new variance is that in 2009 the General Assembly of Virginia removed the requirement that an undue hardship be one that "approached confiscation." Therefore, the hardship no longer has to be one that deprives the owner of all use of the property. It is clear that had there been no "approaching confiscation" language in the statute in 2008, Ms. Chilton-Belloni's variance would have been perfectly proper and the Board would have been within its rights to uphold her request and it would have been upheld on appeal. The Supreme Court of Virginia in its 2017 ruling clearly expressed that the amendment of the statute in 2009 was a change of circumstance that entitled Ms. Chilton-Belloni to make the variance request that she filed in 2014.

It had certainly been Ms. Chilton-Belloni's hope that after 10 years, after the death of her husband, after a failed criminal prosecution, and after a trip to the Supreme Court, the City would at long last drop its opposition to her variance request, bring an end to this ordeal, stop spending taxpayers' money and move on to address other issues that will make a meaningful difference in the citizens of the City of Staunton.

Thank you for your consideration of Ms. Chilton-Belloni's variance request. I look forward to seeing you on April 3.

Respectfully yours,

Mark D. Obenshain

MDO/eis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Ms. Debra Chilton-Belloni

BOARD OF ZONING APPEALS - VARIANCE REQUIREMENTS		
Specific Requirments	**Va. Code Section**	
The burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria set out in § 15.2-2309, and specifically § 15.2-2309(2).	§ 15.2-2309	Added by amendement in 2015
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, -- a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure. -- when the strict application of the ordinance would; -- unreasonably restrict the utilization of the property, -- **and** such need for a variance would not be shared generally by other properties, -- **and** provided such variance is not contrary to the purpose of the zoning ordinance "Variance" shall not include a changed in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	changed in 2018 from unnecessary or unreasonable hardship "and spirit" deleted in 2015
Notwithstanding any other provision of law, general or special, a variance shall be granted -- if the evidence shows that the strict application of the terms of the ordinance would unreasonably restirct the utilization of the property -- or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, **and**	§ 15.2-2309(2)	Added 2015 Added 2015

-- (i) **and** the property interest for which the variance is being requested was acquired in good faith -- **and** any hardship was not created by the applicant for the variance;	§ 15.2-2309(2)	Added 2015
-- (ii) **and** the granting of the variance will not be of substantial detriment to the adjacent property and nearby properties in the proximity of that geographical area;	§ 15.2-2309(2)	Added 2015
-- (iii) **and** the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendement to the ordinance;	§ 15.2-2309(2)	Added 2015
-- (iv) **and** the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property;	§ 15.2-2309(2)	Added 2015

2014 Va. Code Ann. § 15.2-2309

2014 Virginia Code Archive

CODE OF VIRGINIA > TITLE 15.2. COUNTIES, CITIES AND TOWNS > SUBTITLE II. POWERS OF LOCAL GOVERNMENT > CHAPTER 22. PLANNING, SUBDIVISION OF LAND AND ZONING > ARTICLE 7. ZONING

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision.

2. To authorize upon appeal or original application in specific cases such variance as defined in § 15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

   When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

No variance shall be authorized except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of

abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the

property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

History

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555; 1997, c. 587; 2000, c. 1050; 2002, c. 546; 2003, c. 403; 2006, c. 264; 2008, c. 318; 2009, c. 206.

CODE OF VIRGINIA
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B. SPENCER CROSS

JESSICA L. ROBINSON
DANIEL E. LOWRY

March 28, 2018

Via Fax (540-886-7425) and Mail
Mr. Paul P. Vames, Chair
Staunton Board of Zoning Appeals
P.O. Box 2442
Staunton, VA 24402

Re: Variance request by Debra Chilton-Belloni / 1403 N. Augusta Street

Dear Mr. Vames:

In Mr. Obenshain's correspondence of yesterday afternoon, he argues that because Ms. Chilton-Belloni's variance application was filed in 2014, the current statutory framework governing the Board's consideration of a variance should not be applied, and that instead the statutes, as they existed prior to amendment in 2015, govern this matter.

On behalf of the Zoning Administrator, we maintain our position that the existing statutory framework applies, but would note that, even if the Code as it existed in 2014 governed, Ms. Chilton-Belloni plainly cannot show that she is entitled to a variance. Under no circumstances would "strict application of the ordinance ... produce undue hardship relating to the property" as Va. Code §15.2-2309 required in 2014. That statute in 2014 contained several provisions which continue to exist in the existing statute, including (contrary to the chart provided with Mr. Obenshain's letter) the requirement that the Board find "that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance."

Mr. Obenshain acknowledges that we were correct in earlier pointing out that it cannot be bound by erroneous advice provided by a building official, as that is plainly the law in this state. It is inconsistent for him to then argue, as he does, that Ms. Chilton-Belloni is entitled to a variance because her alleged reliance on that advice produced a hardship. The case law is clear that the prospect of a mere financial loss, standing alone, does not constitute sufficient "hardship" to justify a variance, and whichever version of the statute the Board were to apply Ms. Chilton-Belloni cannot show the existence of an "undue hardship related to the property."

Finally, there is no basis to conclude that the Circuit Court clearly would have upheld the Board's earlier grant of a variance to the Bellonis, absent the statutory requirement prior to 2009 that they demonstrate a hardship "approaching confiscation." A simple examination of the Court's letter opinion reflects no reference whatsoever to that phrase, and it did not form the basis for that ruling.

Regardless, given that Mr. Obenshain raises this issue at this late date, shortly prior to the scheduled hearing, a short continuance of approximately one month would be helpful to the Board and perhaps narrow what evidence may be necessary, as it would allow the parties to research and brief the question of which version of the statute applies. Although, as stated, we maintain our position that this Application should be treated no differently than any other coming before the Board, and that the existing statutory framework should be implemented, we certainly want to avoid a circumstance in which Ms. Chilton-Belloni raises yet another procedural ground for appeal. We will cooperate and consent to a postponement (we would suggest one month) for the purpose of more thoroughly addressing this issue.

By copy of this letter to Mr. Obenshain, I am asking that he concur in the request for a continuance or, should he object, that we schedule a brief telephone conference to address this.

We look forward to hearing from you.

Respectfully,

Victor M. Santos

cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Mark D. Obenshain, Esq. (via fax and mail)

STAUNTON VIRGINIA
COMMUNITY DEVELOPMENT
Planning & Zoning Division

MEMORANDUM

To: Board of Zoning Appeals Members

From: Rodney S. Rhodes, Senior Planner/Zoning Administrator

Date: March 23, 2018

RE: April 3, 2018 Board of Zoning Appeals Meeting

The City of Staunton Board of Zoning Appeals will meet on Tuesday, **April 3, 2018, at 2:00 p.m.** in City Council Chambers on the first floor of City Hall, 116 West Beverley Street.

If you **cannot** attend this meeting, please contact the Community Development Department, Division of Planning & Zoning at 332-3862 by no later than **noon on Monday, April 2, 2018**.

AGENDA

		Action Taken
1.	Call to Order	_____
2.	Moment of Silence	_____
3.	Approval of Minutes: Regular Meeting of February 13, 2018	_____
4.	New Business	

	a. A request by Ms. Debra Chilton-Belloni of 1403 N. Augusta St. Staunton, Virginia, for a variance to sections 18.120.010(2) and 18.120.010(3)(b) and 18.120.010(3)(d) Yard, Building Setback, and Open Space Exceptions, of the Code of the City of Staunton, to allow a wall over 3 and ½ feet in the front yard and over 2 and ½ feet at the intersection of N. Augusta St. and Ridgeview Rd.	_____
5.	Old Business	_____
6.	Other Business	_____
7.	Adjournment	_____

BOARD OF ZONING APPEALS
City of Staunton, Virginia
February 13, 2018
2:00 P.M.

BZA MEMBERS PRESENT:	Paul Vames, Chair
	Willard Keeling, Vice Chair
	Bradley Bryant
	Hal Sharp
	Judith Wiegand
[]CITY OFFICIALS PRESENT:	Rodney Rhodes, Zoning Administrator
	Timothy Hartless, City Planner
	Linda Nesselrodt, Zoning Technician
	Suzanne F. Simmons, Clerk of Council

Call to Order

Mr. Vames called the meeting to order at 2:00 p.m. and asked that a moment of silence be observed at that time.

Election of Officers

Mr. Keeling moved that Mr. Vames be elected Chair. The motion was seconded by Mr. Bryant. The nomination carried 4-0-1, with Mr. Vames abstaining.

Mr. Keeling moved that Mr. Bryant be elected as Vice Chair. The motion was seconded by Mr. Sharp. The nomination carried unanimously.

Establishing Meeting Dates and Times for 2018-2019

The second Tuesday of each month at 2:00 p.m. was the consensus of the Board for the established meeting date and time, as needed.

Approval of Minutes

Ms. Wiegand stated she would abstain as she was not a member of the board at that time.

Mr. Sharp moved for approval of the minutes of the March 14, 2017, meeting. The motion was seconded by and carried 4-0-1.

NEW BUSINESS:

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Annual Report:
Board of Zoning Appeals
Staunton, VA
Annual Report
January 1, 2017 – December 31, 2017

Mr. Sharp made a motion to accept the annual report as presented. Ms. Wiegand stated she would abstain as she was not a board member. The motion was seconded and carried 4-0-1.

OLD BUSINESS:

There was no old business.

CLOSED MEETING: Discussion on Possible Appointment of Legal Counsel per Virginia Code 2.2-3711(A)(7) and 2.2-3711(A)(8) as noted in Mr. Shmidheiser's January 23, 2018 Letter

Mr. Vames questioned if the Board wished to go into closed session. He then asked if the Board wished to have a short discussion and then asked Mr. Shmidheiser to present information to the board regarding legal representation.

Mr. Bill Shmidheiser stated he had briefly represented the board approximately 7-8 years ago on the appeal from this Board's decision regarding the Belloni case. He stated the City's insurance carrier then retained counsel, Mr. John Conrad, who handled the appeal from that time forward. Mr. Shmidheiser stated the initial decision by the Board was reversed by the circuit court because the board did not follow the proper procedure in making its decision. He stated the reason that the Belloni case is back before the court now is the law has changed which sets forth the standards that the BZA is supposed to apply and the Virginia Supreme Court rendered a decision in November, 2017 stating Mrs. Belloni could ask the BZA to reconsider the prior decisions made in the matter.

Mr. Shmidheiser stated he had represented Mr. Vames years ago, but currently did not have any legal connections. Mr. Shmidheiser stated he had received a call from Mr. Vames asking if he thought it would be appropriate for the Board to retain counsel on this rehearing. Mr. Shmidheiser stated there had been some exchanges of letters regarding why was Mr. Vames was communicating with him and felt he was exploring if the Board wanted and/or needed an attorney, or were they allowed to have an attorney that was their attorney. Mr. Shmidheiser stated he answered in the affirmative that they were under the statute which creates the Board of Zoning Appeals and is entitled to retain independent legal counsel of its own. He then cited an example of a fellow partner working with the Rockingham County BZA and the City of Harrisonburg. In that case, he stated the wrong process was followed with litigation ensuing and appeals followed.

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Mr. Shmidheiser stated he was aware that preliminarily the City of Staunton has indicated they did not wish to pay for the BZA to have legal counsel. He stated at this point the BZA has not decided if they would like to have legal counsel and would hope the City would hear with an open mind the request if and when it came through. Mr. Shmidheiser stated he believed Mr. Vames asked him to be present today at this point for the BZA to consider a) does it, not so much for Bill Shmidheiser to be seeking a job, but to consider does the BZA for this matter want to have legal counsel? He stated his understanding was they already have an advance of any hearing briefs from some of the finest lawyers in Staunton on both sides.

Mr. Shmidheiser stated the role of an attorney is not to tell the BZA what to do. He stated the board members do not question the attorney about what they should do. Mr. Shmidheiser stated the only role of the attorney would be to make sure that the right process is followed in making the decision so that there's not another 8-10 years of litigation. He stated he was not there to sell his services. Mr. Shmidheiser stated he understood there was a concern that at one time he was partners with Mark Obenschain, but he was also at one-time partners with Doug Guynn, City Attorney. He noted Mr. Vames asked him to look at whether this would be something that would have the option of going into closed session.

Mr. Vames stated they were in a position where the board members could ask Mr. Shmidheiser questions or go into closed session. Mr. Bryant questioned if the board chose to go into a closed session, who is left, just the five of them, and who is excluded? Mr. Vames stated it would only be the five board members and anyone that the board members wanted to invite.

Mr. Keeling stated since the issue had been raised, should the board go ahead and go into closed session. He noted if the Chairman feels strongly that they should go into closed session. Mr. Vames stated he wanted to take a neutral position in this matter as much as he can and noted the law has since changed. [] Mr. Keeling stated when the Belloni case started, he was one of two people on the board at the time, and it has been an interesting process to observe over the past ten years and that they supposedly made the wrong decision. Mr. Keeling stated while listening to Mr. Shmidheiser, his feeling is that his role if the board were to retain him, would not to be to tell the board what to do, but to help them make sure that they don't make that mistake again. Mr. Keeling stated for that reason, he would be inclined to say the BZA does not need a closed session,but would like to make a motion that the board considers retaining Mr. Shmidheiser for assistance to make the proper decision for no other reason.

Mr. Bryant stated he would like to table that motion in order to have a greater discussion regarding it. Mr. Keeling replied that was fine. Mr. Bryant stated he was not feeling comfortable that the board was ready to vote on whether to retain counsel or not. He stated that he felt the board needed some intake from the City.

Mr. Vames stated that in the way that Mr. Guynn's letter addressed the BZA most

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recently is that the BZA would have to go back through and make an appeal to the City he thought. Mr. Vames stated he did not think the City would accept a third party making any payments to Mr. Shmidheiser.

Mr. Shmidheiser stated it was correct that the counsel cannot be paid anything more than the City authorizes. He noted this actually came up in the appeal because the BZA was a party to that appeal in the first place and when the BZA suggested they needed counsel for their appeal, the City stated they would not pay for counsel. Mr. Shmidheiser noted the judge who was in charge of appointing counsel stated he would ask them to do that and hoped they would take his request seriously. Mr. Shmidheiser stated he did not think counsel could be paid except as authorized by the City. He stated it would seem to him of the possibility of saving a lot of money to make sure the BZA follows the right process this time under the changed statute.

Mr. Vames questioned the board if they felt comfortable continuing the discussion or did they need to go into closed session. Ms. Wiegand stated she did not think the BZA needed a closed session from her perspective. Mr. Shmidheiser stated he would bifurcate this and ask themselves if they wanted an attorney of their own.

Mr. Sharp noted if in the past City Council or someone else replaced Mr. Shmidheiser with another attorney which the insurance company wanted, would the same thing happen if the BZA were to engage counsel. Mr. Shmidheiser stated that procedure was a little odd because under the procedure then obtained, the appeal from the decision of the BZA was styled City of Staunton versus Staunton Board of Zoning Appeals and Mr. and Mrs. Belloni. He stated in this case, the BZA has not been sued by anyone. Mr. Shmidheiser then explained that procedure to the board members.

Mr. Sharp questioned the board and staff if any attorney would only give the board legal opinion, but the board would be responsible for following the process, does the Virginia state code give the board sufficient guidance to follow the process to make a decision.

Mr. Bryant questioned where the BZA gets their guidance for the procedure stating that is what came into question and that is where the appeal was won. Mr. Bryant then questioned if the board is only able to ask their counsel about how they are proceeding and if the process is correct.

Mr. Keeling stated he was sure with all of the legality and all of the information that is available to guide the BZA, the right decision can be made if the BZA is able to properly interpret the legal wording.

Ms. Wiegand stated she was probably the most recent board member to take the course and she noted while reading the material she found it to be clear regarding the process for deciding variances. She stated she was not convinced at that point if an attorney was needed to tell her what the process is. Ms. Wiegand stated she was not sure if an attorney was needed.

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Mr. Vames stated the one thing he was concerned about is the new guideline. He asked Mr. Rhodes if he could read it out for the board members. Mr. Vames then stated the board could just take one step at a time and not necessarily do any action on making an agreement or trying to find an attorney. He stated if the board gets to a situation where they have questions, then they could possibly approach the City.

Mr. Shmidheiser stated the BZA of each jurisdiction is not made up of lawyers, so the idea is each member brings their experience as citizens to the decisions of what is an undue hardship, etc. He remarked the BZA members are somewhat similar to being a jury. He then gave members an example of a case from Rockingham County. Mr. Shmidheiser stated he agreed with Ms. Wiegand on threshold issue and with the training and experience of the board members, is a lawyer needed or could it be decided on common sense principles.

Mr. Sharp stated it seemed to him that only if the BZA thought they would be in some type of legal jeopardy, would they need counsel. He added if the BZA goes beyond this level, to a higher level and to a higher court, and if the BZA would be subject to legal action, would the board need an attorney. Mr. Sharp stated all types of cases are always represented by two parties where everyone interprets codes or statutes differently. He stated to that extent if the BZA needs guidance at some point then that would be a good time to obtain legal counsel, but if the BZA would not be facing "legal jeopardy" then the board could probably follow the statutes as they are written for the state codes.

Mr. Vames stated Mr. Sharp made a good point as far as both sides presenting their cases. Mr. Vames stated it would suit him if the closed session be delayed to where it may be in the future to go in that direction the board would have that option to do so.

Ms. Wiegand stated she was inclined to agree with Mr. Sharp that it would be a very good idea for the BZA to consider this and see what comes before the board. She stated she did not necessarily think that was where it was heading. She felt the board would be given a set of facts and an application for the board to make a decision. She stated that those members who had taken the course have an idea of what the process should be. Ms. Wiegand stated after having a meeting and discussing it, then if the board needs an attorney, she felt it would be more obvious and it would be much easier for the board at that time to ask City Council to fund an attorney for the BZA. She stated she felt the process would be better to see how the board is doing and then if the board needs something to ask City Council to grant permission to obtain someone.

Mr. Bryant thanked Mr. Vames for bringing the matter before the board. He stated it was very pertinent for what is pending and that Mr. Vames had the forethought to get it going in their direction. Mr. Bryant then read "that a well-trained BZA should be able to able to complete its work decisively and with confidence because it knows the legal principles that apply to the matter pending before it. Understands which facts are relevant to those legal principles and is able to identify and discard the irrelevant information from the decision-making process". Mr. Bryant stated everything within their training which they have been going through is that they should not be heart-lead and that they are here as a

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board of five members to only decide what one member of the zoning administration is their interpretation of the rule which is in question. He stated between the five members, they were intelligent enough to stay out of the weeds and stay into the regulation which they are questioning. Mr. Bryant stated he felt very comfortable that if the board maintains a position that the board will stop the proceedings or table a motion or come back to it so they don't get over their heads with legal jargon. He stated that the retention of counsel is not possibly necessarily later.

Mr. Vames asked if any of the members felt like making a motion. Mr. Bryant stated he had a motion earlier to table the voting for counsel and to stay in the discussion mode. Mr. Vames stated Mr. Bryant could remake the motion and state it again if he wanted to.

Mr. Bryant moved that the BZA table making a decision as to obtain legal counsel at this time. Ms. Wiegand seconded the motion.

Mr. Sharp asked if Mr. Vames was satisfied with the discussion. Mr. Vames replied that he was satisfied. Mr. Sharp stated he wanted to be sure everything had been covered to make this decision. Mr. Vames replied that he felt they had, but if the board gets to the point where things change and anyone feels uncomfortable, the situation could always be revisited.

Mr. Bryant stated the BZA was not bound because they are in session to make a decision this day. He questioned if that gave the BZA the perfect opportunity to obtain counsel at that time if they wished. Mr. Shmidheiser stated the only disadvantage of that would be presumably then whatever counsel the BZA would retain would not have heard the discussions and might not understand the context of your questions. Mr. Bryant questioned if at that point in time would the BZA not be able to present the minutes to their counsel if they had been approved for the BZA and would the BZA then be able to go into a closed session to discuss and bring their counsel up to date. Mr. Shmidheiser stated he believed the answer is yes and he could concede it might even be of an advantage because at that point whatever counsel is retained would be purely advising on process. Mr. Shmidheiser stated if the hearing goes forward on April 3, 2018 it would be fine and not at a disadvantage to wait until after the hearing and then request counsel.

Mr. Vames stated if the BZA got into that situation at that meeting and did not feel comfortable, the board could table the vote and then at that time retain counsel. Mr. Bryant stated felt that all parties involved would rather the BZA make the proper decision.

Mr. Vames questioned members all in favor of the motion as it stands now.

Mr. Bryant restated the motion of tabling a decision or a vote on invoking counsel at this time. Ms. Wiegand seconded the motion.

Paul Vames, Chair	aye
Willard Keeling, Vice Chair	aye

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Bradley Bryant	aye
Hal Sharp	aye
Judith Wiegand	aye

The motion carried 5-0.

OTHER BUSINESS:

Mr. Rhodes stated although the board has established the second Tuesday of each month for this meeting if any cases are pending, there is a case pending on April 3, 2018 at 2:00 p.m. as the second Tuesday of that month did not work for the City or for the applicant.

There was no other business.

There being no further business, the meeting adjourned at 2:46 p.m.

_____

Suzanne F. Simmons
Clerk of Council

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N O T I C E OF MEETING AND PUBLIC HEARING
REGARDING REQUESTED ZONING VARIANCES

The City of Staunton Board of Zoning Appeals, established under Chapter 18.200 of the Staunton City Code will meet and hold a public hearing on Tuesday, **April 3, 2018 at 2:00 p.m.**, local time, in City Council Chambers on the first floor of City Hall, at 116 West Beverley Street, Staunton, Virginia, to consider the following:

A request by Ms. Debra Chilton-Belloni, owner, for after-the-fact zoning code variance(s) at 1403 North Augusta Street, Staunton, Virginia, to Staunton City Code, Title 18, Chapter 18.120 Yard, Building Setback, and Open Space Exceptions from the following generally applicable Staunton City Code zoning requirements:

Section 18.120.010(2): On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections;

Section 18.120.010(3)(b): In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent; and

Section 18.120.010(3)(d): Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot;

to allow violative wall(s) at the intersection of North Augusta Street and Ridgeview Road. The property is identified as City of Staunton Parcel ID #3060 and is zoned P-1 Professional District.

Under the provisions of Virginia Code § 15.2-2309, the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in Virginia Code § 15.2-2309, specifically including: notwithstanding any other provision of law, general or

special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of Virginia Code § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of Virginia Code § 15.2-2286 at the time of the filing of the variance application.

Members of the public may attend the meeting and hearing, and persons affected may appear and present their views.

Also, members of the Board of Zoning Appeals will meet and conduct a field trip to visit the site, 1403 North Augusta Street, on Tuesday, **April 3, 2018 at 1:15 p.m.**, local time, prior to the meeting. Members of the public may be present for the field trip.

Copies of the variance application, Staunton City Code provisions and other materials may be examined at the Community Development Department, Division of Planning & Zoning, 116 West Beverley Street, third floor. Persons with hearing loss or speech impairment desiring to attend the meeting and hearing may contact the Clerk of Council directly by phone at 540-332-3810 or by email at SimmonsSF@ci.staunton.va.us to request an interpreter.

Provisions of the Virginia Code may be accessed online at: https://law.lis.virginia.gov/vacode. Provisions of the Staunton City Code may be accessed online at: http://www.codepublishing.com/VA/Staunton/.

Notice of the hearing is being given to the owners, their agents, and occupants of abutting property and property immediately across the street from the property affected.

Rodney S. Rhodes,
Senior Planner/ Zoning Administrator

City of Staunton
Board of Zoning Appeals

April 3, 2018

BOARD OF ZONING APPEALS

AGENDA BRIEFING

Staunton, VA

Meeting Date:	**April 3, 2018**	**Zoning Administrator:** **Rodney Rhodes, Certified Zoning Admin.**
Item #	**4a**	
Applicant	**Debra Chilton-Belloni: Variance Request**	
Location	**1403 North Augusta Street**	
Code Section	**Staunton City Code Sections 18.120.010(2), 18.120.010 (3)(b), 18.120.010(3)(d)**	

Introduction

A resident of Louisa County, Ms. Debra Chilton-Belloni owns the property located at 1403 North Augusta Street, Staunton, Virginia. In her landlord capacity, she appears to lease various parts of the property for residential apartment use and perhaps for other purposes, such as storage.

Ms. Chilton-Belloni requests that the Staunton Board of Zoning Appeals (BZA) grant a special privilege, called a variance, to avoid wall height and location restrictions, which are generally applicable to everyone else in the same zoning district and neighborhood through the operation of the following zoning restrictions of the Staunton City Code, Title 18, Chapter 18.120 Yard, Building Setback, and Open Space Exceptions:

Section 18.120.010(2): On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections;

Section 18.120.010(3)(b): In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent; and

Section 18.120.010(3)(d): Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

The applicant has yet to provide any specifics on the variance request. The application seeks a variance from the maximum height restrictions; however, no particular height limits are specified at all, providing no measurements after all of these years of violation. The BZA Application form requires "supporting material such as a site plan, tax map, topographic map, drainage map, utility easement map, building elevation map, etc." The application only includes a Google Street view of the wall.

The wall has been for approximately 10 years and remains in continuing violation of the wall restrictions despite efforts by the Staunton Zoning Administrator to seek compliance. Ms. Chilton-Belloni has chosen not to lower the wall or otherwise bring it into compliance with the cited provisions of the Staunton City Code although she has had all of this time to do so. Neither has she sought from the Staunton Planning Commission nor from the Staunton City Council during all of this time what would need to be proposed amendments of the Staunton City Code to modify the restrictions to permit generally for everyone's property what she now wants for her property. The City's Zoning Administrators before me and I now continue to find that the violation(s) continue.

As Zoning Administrator, I respectfully oppose the granting of the variances and offer this briefing, along with the presentation of other information and argument, in support of my position. Not only can Ms. Chilton-Belloni not satisfy each and every required element of the showing necessary under Virginia law to be granted variances, but for the BZA to grant the variances or any aspect of them would be contrary to law and essentially mean that every other property in the zoning district and neighborhood could have such a wall configuration. The BZA could not, on a neutral principled basis under the law, grant this variance and not grant other such variance requests, changing dramatically the nature of this largely residential neighborhood.

Background

The subject property is identified as City of Staunton Parcel ID #3060 and is zoned P-1 Professional District, which is described in Staunton City Code Section 18.50. The property is a corner lot with frontage both on North Augusta Street and Ridgeview Road. The property has two front yards, as defined under the Staunton City Code Section 18.120.010 (3)(d). The primary front yard fronts on North Augusta Street and the secondary front yard fronts on Ridgeview Road.
City records indicate that the property consists of 1.29 acres and was developed in 1910 at that time as a single-family dwelling (9,905 gross square feet) and a bungalow (1,449 gross square feet). From indications, it now is used, at least in effect, as separate apartments.

In 2007, Ms. Chilton-Belloni and her late husband, Dr. Frank Belloni, had a hollow core cinder block wall constructed and painted along their North Augusta Street frontage and

along 112 feet of their Ridgeview Road frontage. Under provisions of the Staunton City Code, which was then and is now easily available online through the City's website, the wall was and is clearly prohibited under the Staunton City Code for the following reasons:

> The corner of the brick column obstructs sight lines noted in Section 18.120.010(2). A survey plat prepared by Professional Land Surveyor Howard Vance, dated June 11, 2015, documents the corner of the column encroaching the sight-line triangle at a height that is approximately eight feet taller than the crown of the adjacent roadway (brick column elevation of 1529.2 feet and road crown elevation of 1521.3 feet). At the time of the wall's construction the zoning provisions of the Staunton City Code required a greater sight-line triangle, which is also shown on the June 11, 2015 plat.
>
> The wall along North Augusta Street exceeds the three and one-half foot height limit noted in Section 18.120.010(3)(b). The attached photos, taken March 6, 2018, document that the height of the wall varies along its length; however, some sections of the wall consist of 10 courses of cinderblock with a substantial concrete cap. The brick columns are taller than the block wall, as also documented in the images.
>
> The wall along Ridgeview Road exceeds the three and one-half foot height limit noted in Section 18.120.010(3)(d) for secondary front yards. According to that provision, no wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot. The required front setback in the P-1 District is 25 feet. The plat prepared by Professional Licensed Surveyor Howard Vance documents that the wall along Ridgeview Road is a maximum of 5.4 feet from the property line. Therefore, the maximum height allowed is three and one-half feet. City staff measured the height of several sections of the wall; these measurements ranged from seven feet to eight feet. The attached photos document that the wall is significantly taller than the City's six-foot four-inch City Planner, Tim Hartless.

The property owners sought a variance from the BZA for the wall in 2008. Over the Zoning Administrator's opposition, the BZA granted the variance on February 20, 2008. The decision of the BZA (along with two other cases in which the BZA granted fence variances) was appealed to the Circuit Court, which reversed the BZA's decision (and the other two decisions) by Final Order entered June 17, 2009, in that the wall was in violation of the Staunton City Code and that no variance was warranted. No motion was filed to reconsider the Court's decision and no appeal was taken as to that Final Order.

Variance Standards

Under the provisions of Virginia Code Section 15.2-2201, the term "variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which

change shall be accomplished by a rezoning or by a conditional zoning.

Under the provisions of Virginia Code Section 15.2-2309, the burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in Virginia Code § 15.2-2309, specifically including all of the following: notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would *unreasonably* restrict the utilization of the property or that the granting of the variance would alleviate a hardship *due to a physical condition relating to the property or improvements thereon* at the time of the effective date of the ordinance, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; and (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; and (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; and (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of Virginia Code § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of Virginia Code § 15.2-2286 at the time of the filing of the variance application.

2015 Amendments to State Code Regarding Variances

In 2015, what were considered by informed commentators to be relatively minor changes to the Virginia Code were enacted regarding the definition of a variance and the criteria for issuance of a variance. There has been some confusion over the impact of the change. Mr. Greg Kamptner, Albemarle County Attorney, regarded widely as a foremost authority on variances and a long-time instructor and author of training materials for the Virginia Board of Zoning Appeals Certification Program, noted the following:

> The 2015 amendments to the definition replaced the phrase "unnecessary or unreasonable hardship to the property owner" with "unreasonably restrict the utilization of the property" It is an open question whether the amended definition effects a material change in how variances are reviewed by BZA's and by the courts. The concepts of regulations that unreasonably restrict utilization of the property or cause hardship remain in the standards for granting variances in Virginia Code § 15.2-2309(2). Moreover, an unreasonable restriction on the utilization of property, even if it is not joined with the concept of hardship to the owner, remains a very high bar to satisfy.

Greg Kamptner, et al., The New Variance Standard in Virginia: Implications for Zoning and BZAs (2015)

Planning Commission Notification

In accordance with Section 15.2-2310 of the Virginia Code, a copy of the variance application was transmitted by me, as the Zoning Administrator, to the Planning Commission members on January 12, 2018. Upon consideration of my recommendation, given the long history of this matter, the Planning Commission not only took no action on the application but also did not ask that it be placed on its agenda for any discussion.

Illustrative Analysis

I offer the following illustrative analysis of some aspects to show that a variance cannot, within the law, be granted in this situation, and Ms. Chilton-Belloni must show that all requirements are satisfied, as reflected in the table which is part of the attachments to this briefing.

As Zoning Administrator, my analysis is—as it must be—anchored to the law, being also informed by the experience and training I've received over the course of my career in local government. For the past 22 years I've served local jurisdictions as Zoning Administrator and principal staff member for BZAs. Most recently, for example, prior to joining the City of Staunton, I served as Zoning Administrator for the City of Williamsburg for 10 years. The City of Staunton is the fourth locality I've served in this capacity. In 2007 I was recognized as a Certified Zoning Administrator by the Virginia Association of Zoning Officials (VAZO) after completing the required training and successfully demonstrating my qualifications through written examinations established by Virginia Tech and the Education Committee of VAZO. In order to maintain the certification I've taken numerous training sessions during the past decade. Included in this training were sessions on the 2015 Amendments to the Virginia Code regarding variances. I also have brought a fresh set of professional eyes to a consideration of the pending request for a variance.

Over the course of my career, rooted in the law and informed by my own background and the teachings of others, I have found the following principles helpful when reviewing variance applications:

- Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance.

- Variances should be sparingly granted; a high number of variance applications on a recurring issue indicate problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications. Very few applications for variances meet the criteria for approval.

- If there is an existing reasonable use of the property, an unreasonable restriction does not exist and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add accessory structures to a parcel, should be denied if the use of the existing structure is reasonable.

Greg Kamptner, et al., The New Variance Standard in Virginia: Implications for Zoning and BZAs (2015)

The subject property does not have any unique physical condition (shape, size, slope, etc.) that restricts the use of the property more so than other lots in the same zoning district or in the vicinity. The lot is rectangular, nearly 1.3 acres, relatively level with a front yard of approximately 100 feet. The P-1 District requires a minimum set back from the street right-of-way of 25 feet. A variance is not needed to reach parity with other lots in the district and, actually, to grant a variance in this instance would be affording this property and its owner preferential treatment compared to other properties.

Strict application of the zoning regulations does not deprive Ms. Chilton-Belloni of reasonable use of her property. To the contrary, the property has been utilized as residential for over 100 years. It's still residential today. The property may continue to be used for this purpose without the granting of a variance. The wall as currently configured is an accessory structure which, by definition, is incidental to the main building or house and, even without it, the reasonable utilization of the property remains and will remain as all along.

At its last meeting, although I did not know or expect it would be a subject of conversation, especially given the absence of counsel for Ms. Chilton-Belloni and counsel for the Zoning Administrator, the BZA had some discussion of the concept of "hardship." But, let me be sure the BZA understands that "hardship"—under the controlling law—must be *due to a physical condition relating to the property or improvements thereon* at the time of the effective date of the ordinance. There is no such connection to a physical condition relating to the property or improvements on it. None.

The applicant, Ms. Chilton-Belloni, fails to meet the other applicable requirements as well. All the BZA need do to readily discern this reality is use as a framework the table, drawn from the controlling provisions of the Virginia Code, provided earlier in Mr. Santos' January 5, 2018 letter and also attached to this briefing.

The applicant has failed to prove and cannot prove by a preponderance of the evidence—which is the legal burden the law imposes— that her application meets the standard for a variance as defined in 15.2-2201 and the criteria set out in Virginia Code 15.2-2309. A variance issued for a lesser reason or simply because the BZA feels it is doing "justice" or following its "heart," a word used at the BZA's February 13, 2018 meeting, would constitute a disregard of the law and plainly wrong decision-making.

Staff Recommendation

The Zoning Administrator recommends denial of the variance request.

Exhibits:

Exhibit A – Site Location Map

Exhibit B – Virginia Code Section 15.2-2201

Exhibit C – Virginia Code Section 15.2-2309

Exhibit D – Staunton City Code Section 18.120.010(2)

Exhibit E – Staunton City Code Section 18.120.010(3)(b)

Exhibit F – Staunton City Code Section 18.120.010(3)(d)

Exhibit G – The New Variance Standard in Virginia: Implications for Zoning and BZAs

Exhibit H – Zoning Administrator Table Entitled "Board of Zoning Appeals – Variance Requirements"

Exhibit I – Circuit Court Final Order Dated June 17, 2009

Exhibit J – June 5, 2014 Application for Variance with Attachments

Exhibit K – Mr. Obenshain's Letter to Chairman Vames, dated December 13, 2017

Exhibit L – Mr. Santos' Letter to Chairman Vames, et al. dated January 5, 2018

Exhibit M – Plat Showing Locations and Elevations at the Intersection of N. Augusta St. & Ridgeview Rd. by Howard L. Vance, dated 6-11-2015

Exhibit N – Photos of Wall, taken by City Staff, dated March 6, 2018

EXHIBIT A

Vicinity Map of 1403 N. Augusta St

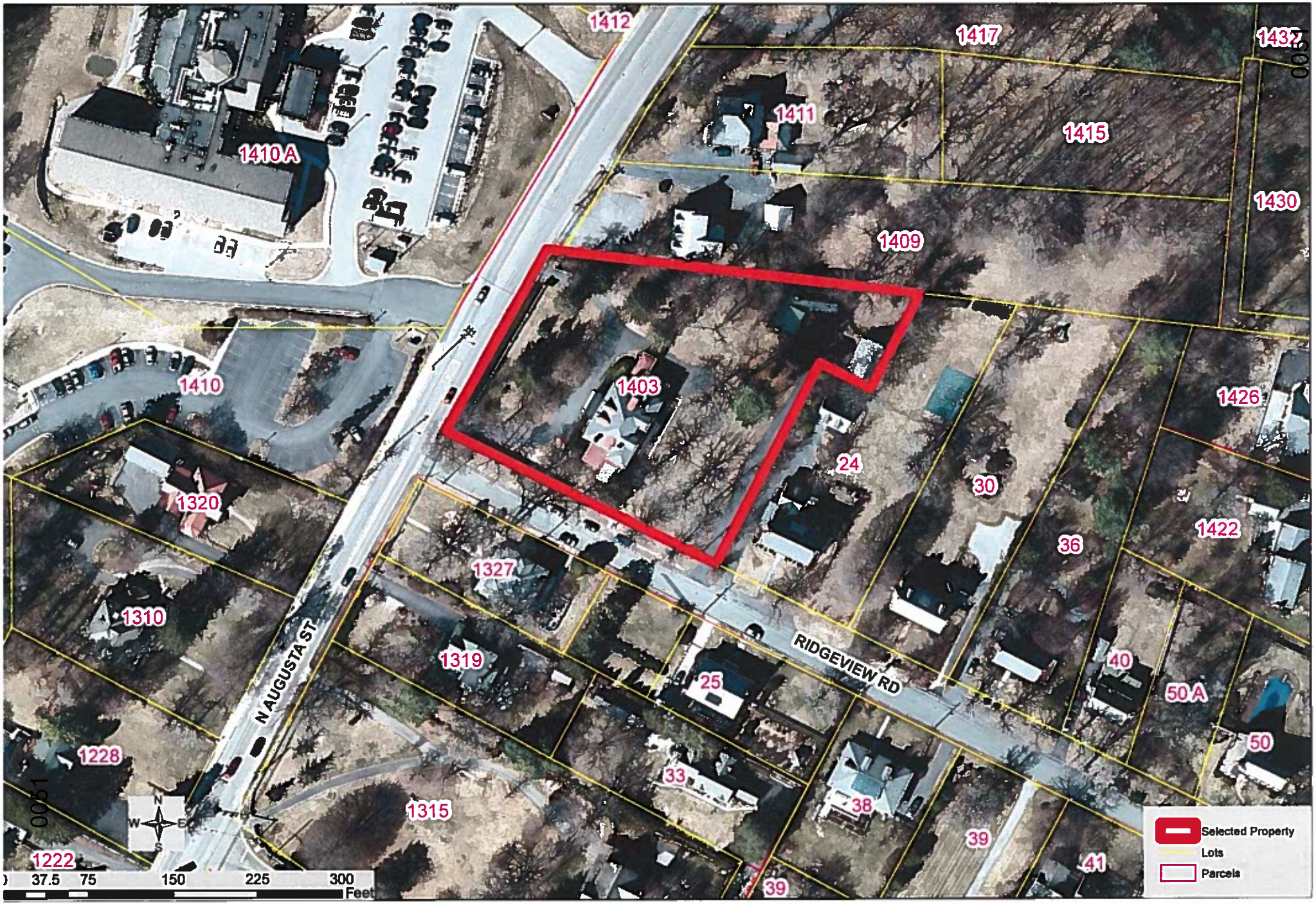

EXHIBIT B

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 22. Planning, Subdivision of Land and Zoning

§ 15.2-2201. Definitions

As used in this chapter, unless the context requires a different meaning:

"Affordable housing" means, as a guideline, housing that is affordable to households with incomes at or below the area median income, provided that the occupant pays no more than thirty percent of his gross income for gross housing costs, including utilities. For the purpose of administering affordable dwelling unit ordinances authorized by this chapter, local governments may establish individual definitions of affordable housing and affordable dwelling units including determination of the appropriate percent of area median income and percent of gross income.

"Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

"Development" means a tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.

"Historic area" means an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation.

"Incentive zoning" means the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features, design elements, uses, services, or amenities desired by the locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development.

"Local planning commission" means a municipal planning commission or a county planning commission.

"Military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under jurisdiction of the U.S. Department of Defense, including any leased facility, or any land or interest in land owned by the Commonwealth and administered by the Adjutant General of Virginia or the Virginia Department of Military Affairs. "Military installation" does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

"Mixed use development" means property that incorporates two or more different uses, and may include a variety of housing types, within a single development.

"Official map" means a map of legally established and proposed public streets, waterways, and public areas adopted by a locality in accordance with the provisions of Article 4 (§ 15.2-2233 et seq.) hereof.

"Planned unit development" means a form of development characterized by unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses in which project planning and density calculation are performed for the entire development rather than on an individual lot basis.

"Planning district commission" means a regional planning agency chartered under the provisions of Chapter 42 (§ 15.2-4200 et seq.) of this title.

"Plat" or "plat of subdivision" means the schematic representation of land divided or to be divided and information in accordance with the provisions of §§ 15.2-2241, 15.2-2242, 15.2-2258, 15.2-2262, and 15.2-2264, and other applicable statutes.

"Preliminary subdivision plat" means the proposed schematic representation of development or subdivision that establishes how the provisions of §§ 15.2-2241 and 15.2-2242, and other applicable statutes will be achieved.

"Resident curator" means a person, firm, or corporation that leases or otherwise contracts to manage, preserve, maintain, operate, or reside in a historic property in accordance with the provisions of § 15.2-2306 and other applicable statutes.

"Site plan" means the proposal for a development or a subdivision including all covenants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.

"Special exception" means a special use that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith.

"Street" means highway, street, avenue, boulevard, road, lane, alley, or any public way.

"Subdivision," unless otherwise defined in an ordinance adopted pursuant to § 15.2-2240, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

"Working waterfront" means an area or structure on, over, or adjacent to navigable waters that

provides access to the water and is used for water-dependent commercial, industrial, or governmental activities, including commercial and recreational fishing; tourism; aquaculture; boat and ship building, repair, and services; seafood processing and sales; transportation; shipping; marine construction; and military activities.

"Working waterfront development area" means an area containing one or more working waterfronts having economic, cultural, or historic public value of such significance as to warrant development and reparation.

"Zoning" or "to zone" means the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as "zones," by legislative action and the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.

Code 1950, § 15-961.3; 1962, c. 407, § 15.1-430; 1964, c. 547; 1966, c. 344; 1975, c. 641; 1976, c. 642; 1977, c. 566; 1978, c. 320; 1987, c. 8; 1989, c. 384; 1990, c. 685; 1993, c. 770; 1995, c. 603; 1997, c. 587;2008, cc. 635, 718;2011, c. 237;2012, c. 554;2013, cc. 149, 213;2015, c. 597;2017, c. 216.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

EXHIBIT C

Code of Virginia
Title 15.2. Counties, Cities and Towns
Chapter 22. Planning, Subdivision of Land and Zoning

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.

2. Notwithstanding any other provision of law, general or special, to grant upon appeal or original application in specific cases a variance as defined in § 15.2-2201, provided that the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application.

No variance shall be considered except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

In granting a variance, the board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public

interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, general or special, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555;1997, c. 587; 2000, c. 1050; 2002, c. 546;2003, c. 403;2006, c. 264;2008, c. 318;2009, c. 206;2015, c. 597.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

EXHIBIT D

Chapter 18.120
YARD, BUILDING SETBACK, AND OPEN SPACE EXCEPTIONS

Sections:

18.120.010 Setback exceptions.

18.120.010 Setback exceptions.

SHARE

The following requirements are intended to provide exceptions or qualify and supplement, as the case may be, the specific district regulations set forth except in Division II of this title.

(1) No yard, open space, or lot area required for a building or structure shall, during its life, be occupied by any other building or structure except:

(a) Awnings and canopies, as provided for in the building code and SCC 12.05.110.

(b) Bay windows and chimneys, not to exceed two feet.

(c) Driveways, curbs, sidewalks, and steps; provided, however, steps or stairs to a dwelling, nonenclosed, not to exceed six feet.

(d) Fences, walls, and hedges, subject to the regulations as set forth in this chapter.

(e) Garbage disposal equipment, nonpermanent.

(f) Landscape features, planting boxes, and recreational equipment.

(g) Overhanging roof, eave, gutter, cornice, or other architectural feature, not to exceed three feet. Open fire escapes may extend into any required yard not more than six feet.

(h) Parking space subject to the regulations set forth in Chapter 18.125SCC.

(i) Signs, subject to the regulations set forth in Chapter 18.140 SCO.

(j) Terraces (open) and porches (nonenclosed) not to exceed six feet.

(k) Trees, shrubs, flowers, and other plants subject to the vision requirements in this chapter.

(2) On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections.

(3) The following regulations shall apply to fences and walls in residential districts, or in any other district when constructed, placed, and/or used for residential purposes:

(a) The height of a fence or wall shall be measured from the elevation at the base of the fence or wall, on the side away from the principal structure, vertically to the highest point of the fence or wall, including any posts or decorative caps. In the case offences on top of retaining walls or immediately adjacent to retaining walls, the height of the fence shall be measured from the top of the wall.

(b) In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent.

(c) In any required side or rear yard, no fence or wall shall be permitted above the height of eight feet.

(d) Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

(e) On any through lot, as to any secondary front yard(s), as established in subsection (3)(d) of this section, no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back the full front setback required for the lot, or the average setback established by the adjacent existing dwellings or structures in the block, whichever is greater.

(4) The following regulations also apply to certain conditions with respect to the use of lots and access points:

(a) If 25 percent or more of the lots on one side of the street between two intersecting streets are improved with buildings all of which have effectively established an average front setback line which is different from that which is specified for that district, then no building shall be erected unless the front of such building is within five feet of such established setback line.

(b) Lots having frontage on more than one street shall provide the required front yards along those streets.

(c) Division of a Lot. No recorded lot shall be divided into two or more lots unless such division results in the creation of lots, each of which conforms to all of the applicable regulations of the district in which the property is located. No reduction in the size of a recorded lot below the minimum requirements of this title shall be permitted.

(d) Dwellings on Small and/or Narrow Lots. Where there are existing recorded lots which do not meet the minimum lot area and/or width requirements, single-family dwellings may be constructed (provided the building front yard setback is 15 feet or the average setback established by dwellings or structures existing at the start of construction, whichever is greater) and as long as a side yard shall be not less than four feet and the sum of the side yards shall be not less than 10 feet and as long as all other requirements, except lot size and lot width, are met.

(e) Principal Uses Without Buildings. Where a permitted use of land involves no structures, such use, excluding agricultural uses, shall nonetheless comply with all yards and minimum lot area requirements applicable to the district in which located, as well as obtain any other license or permit applicable to that particular use.

(f) No dwelling shall be erected on a lot which does not abut on at least one street for at least 30 feet. A street shall form the direct and primary means of ingress and egress for all dwelling units. Alleys, where they exist, shall form only a secondary means of ingress and egress.

(g) An attached or detached private garage which faces on a street shall not be located closer than 25 feet to the street right-of-way line.

(h) Accessory buildings shall not be located in any required front yard. (Ord. 2011-07; Ord. 2009-22; Ord. 2009-20; Ord. 2004-06. Zoning ordinance Art. 5, § 4).

EXHIBIT E

Chapter 18.120
YARD, BUILDING SETBACK, AND OPEN SPACE EXCEPTIONS

Sections:

18.120.010 Setback exceptions.

SHARE

18.120.010 Setback exceptions.

The following requirements are intended to provide exceptions or qualify and supplement, as the case may be, the specific district regulations set forth except in Division II of this title.

(1) No yard, open space, or lot area required for a building or structure shall, during its life, be occupied by any other building or structure except:

(a) Awnings and canopies, as provided for in the building code and SCC 12.05.110.

(b) Bay windows and chimneys, not to exceed two feet.

(c) Driveways, curbs, sidewalks, and steps; provided, however, steps or stairs to a dwelling, nonenclosed, not to exceed six feet.

(d) Fences, walls, and hedges, subject to the regulations as set forth in this chapter.

(e) Garbage disposal equipment, nonpermanent.

(f) Landscape features, planting boxes, and recreational equipment.

(g) Overhanging roof, eave, gutter, cornice, or other architectural feature, not to exceed three feet. Open fire escapes may extend into any required yard not more than six feet.

(h) Parking space subject to the regulations set forth in Chapter 18.125SCC.

(i) Signs, subject to the regulations set forth in Chapter 18.140 SCO.

(j) Terraces (open) and porches (nonenclosed) not to exceed six feet.

(k) Trees, shrubs, flowers, and other plants subject to the vision requirements in this chapter.

(2) On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections.

(3) The following regulations shall apply to fences and walls in residential districts, or in any other district when constructed, placed, and/or used for residential purposes:

(a) The height of a fence or wall shall be measured from the elevation at the base of the fence or wall, on the side away from the principal structure, vertically to the highest point of the fence or wall, including any posts or decorative caps. In the case offences on top of retaining walls or immediately adjacent to retaining walls, the height of the fence shall be measured from the top of the wall.

(b) In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent.

(c) In any required side or rear yard, no fence or wall shall be permitted above the height of eight feet.

(d) Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

(e) On any through lot, as to any secondary front yard(s), as established in subsection (3)(d) of this section, no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back the full front setback required for the lot, or the average setback established by the adjacent existing dwellings or structures in the block, whichever is greater.

(4) The following regulations also apply to certain conditions with respect to the use of lots and access points:

(a) If 25 percent or more of the lots on one side of the street between two intersecting streets are improved with buildings all of which have effectively established an average front setback line which is different from that which is specified for that district, then no building shall be erected unless the front of such building is within five feet of such established setback line.

(b) Lots having frontage on more than one street shall provide the required front yards along those streets.

(c) Division of a Lot. No recorded lot shall be divided into two or more lots unless such division results in the creation of lots, each of which conforms to all of the applicable regulations of the district in which the property is located. No reduction in the size of a recorded lot below the minimum requirements of this title shall be permitted.

(d) Dwellings on Small and/or Narrow Lots. Where there are existing recorded lots which do not meet the minimum lot area and/or width requirements, single-family dwellings may be constructed (provided the building front yard setback is 15 feet or the average setback established by dwellings or structures existing at the start of construction, whichever is greater) and as long as a side yard shall be not less than four feet and the sum of the side yards shall be not less than 10 feet and as long as all other requirements, except lot size and lot width, are met.

(e) Principal Uses Without Buildings. Where a permitted use of land involves no structures, such use, excluding agricultural uses, shall nonetheless comply with all yards and minimum lot area requirements applicable to the district in which located, as well as obtain any other license or permit applicable to that particular use.

(f) No dwelling shall be erected on a lot which does not abut on at least one street for at least 30 feet. A street shall form the direct and primary means of ingress and egress for all dwelling units. Alleys, where they exist, shall form only a secondary means of ingress and egress.

(g) An attached or detached private garage which faces on a street shall not be located closer than 25 feet to the street right-of-way line.

(h) Accessory buildings shall not be located in any required front yard. (Ord. 2011-07; Ord. 2009-22; Ord. 2009-20; Ord. 2004-06. Zoning ordinance Art. 5, § 4).

EXHIBIT F

Chapter 18.120
YARD, BUILDING SETBACK, AND OPEN SPACE EXCEPTIONS

Sections:

18.120.010 Setback exceptions.

SHARE

18.120.010 Setback exceptions.

The following requirements are intended to provide exceptions or qualify and supplement, as the case may be, the specific district regulations set forth except in Division II of this title.

(1) No yard, open space, or lot area required for a building or structure shall, during its life, be occupied by any other building or structure except:

(a) Awnings and canopies, as provided for in the building code and SCC 12.05.110.

(b) Bay windows and chimneys, not to exceed two feet.

(c) Driveways, curbs, sidewalks, and steps; provided, however, steps or stairs to a dwelling, nonenclosed, not to exceed six feet.

(d) Fences, walls, and hedges, subject to the regulations as set forth in this chapter.

(e) Garbage disposal equipment, nonpermanent.

(f) Landscape features, planting boxes, and recreational equipment.

(g) Overhanging roof, eave, gutter, cornice, or other architectural feature, not to exceed three feet. Open fire escapes may extend into any required yard not more than six feet.

(h) Parking space subject to the regulations set forth in Chapter 18.125SCC.

(i) Signs, subject to the regulations set forth in Chapter 18.140 SCO.

(j) Terraces (open) and porches (nonenclosed) not to exceed six feet.

(k) Trees, shrubs, flowers, and other plants subject to the vision requirements in this chapter.

(2) On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections.

(3) The following regulations shall apply to fences and walls in residential districts, or in any other district when constructed, placed, and/or used for residential purposes:

(a) The height of a fence or wall shall be measured from the elevation at the base of the fence or wall, on the side away from the principal structure, vertically to the highest point of the fence or wall, including any posts or decorative caps. In the case offences on top of retaining walls or immediately adjacent to retaining walls, the height of the fence shall be measured from the top of the wall.

(b) In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent.

(c) In any required side or rear yard, no fence or wall shall be permitted above the height of eight feet.

(d) Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

(e) On any through lot, as to any secondary front yard(s), as established in subsection (3)(d) of this section, no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back the full front setback required for the lot, or the average setback established by the adjacent existing dwellings or structures in the block, whichever is greater.

(4) The following regulations also apply to certain conditions with respect to the use of lots and access points:

(a) If 25 percent or more of the lots on one side of the street between two intersecting streets are improved with buildings all of which have effectively established an average front setback line which is different from that which is specified for that district, then no building shall be erected unless the front of such building is within five feet of such established setback line.

(b) Lots having frontage on more than one street shall provide the required front yards along those streets.

(c) Division of a Lot. No recorded lot shall be divided into two or more lots unless such division results in the creation of lots, each of which conforms to all of the applicable regulations of the district in which the property is located. No reduction in the size of a recorded lot below the minimum requirements of this title shall be permitted.

(d) Dwellings on Small and/or Narrow Lots. Where there are existing recorded lots which do not meet the minimum lot area and/or width requirements, single-family dwellings may be constructed (provided the building front yard setback is 15 feet or the average setback established by dwellings or structures existing at the start of construction, whichever is greater) and as long as a side yard shall be not less than four feet and the sum of the side yards shall be not less than 10 feet and as long as all other requirements, except lot size and lot width, are met.

(e) Principal Uses Without Buildings. Where a permitted use of land involves no structures, such use, excluding agricultural uses, shall nonetheless comply with all yards and minimum lot area requirements applicable to the district in which located, as well as obtain any other license or permit applicable to that particular use.

(f) No dwelling shall be erected on a lot which does not abut on at least one street for at least 30 feet. A street shall form the direct and primary means of ingress and egress for all dwelling units. Alleys, where they exist, shall form only a secondary means of ingress and egress.

(g) An attached or detached private garage which faces on a street shall not be located closer than 25 feet to the street right-of-way line.

(h) Accessory buildings shall not be located in any required front yard. (Ord. 2011-07; Ord. 2009-22; Ord. 2009-20; Ord. 2004-06. Zoning ordinance Art. 5, § 4).

EXHIBIT G

The New Variance Standard in Virginia: Implications for Zoning and BZAs

2015 Land Use Education Program Legal Seminar

Charlottesville Omni Hotel

Charlottesville, Virginia

May 29, 2015

Greg Kamptner, Deputy County Attorney, County of Albemarle

Sharon Pandak, Attorney, Greehan, Taves, Pandak and Stoner

Mike Chandler, Director of Education, LUEP, Virginia Tech

Program Materials of

Greg Kamptner
Deputy County Attorney
County of Albemarle

The New Variance Standard in Virginia: Implications for Zoning and BZAs

2015 Land Use Education Program Legal Seminar
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Greg Kamptner
Deputy County Attorney
County of Albemarle
May 29, 2015

1. Introduction[1]

By statute, a variance is a "reasonable deviation from" certain provisions of a locality's zoning ordinance. *Virginia Code § 15.2-2201*; *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). Specifically, a *variance* is defined as:

> [A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Virginia Code § 15.2-2201(effective July 1, 2015)

The 2015 amendments to the definition (see Appendix A) replaced the phrase "unnecessary or unreasonable hardship to the property owner" with "unreasonably restrict the utilization of the property" It is an open question whether the amended definition effects a material change in how variances are reviewed by BZA's and by the courts. The concepts of regulations that unreasonably restrict utilization of the property or cause hardship remain in the standards for granting variances in Virginia Code § 15.2-2309(2). Moreover, an *unreasonable* restriction on the utilization of property, even if it is not joined with the concept of hardship to the owner, remains a very high bar to satisfy.

A variance "allows a property owner to do what is otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982); *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012) (county's regulations which allowed the disturbance of steep slopes only if a "waiver" was obtained after county review to ensure that the disturbance would not create adverse effects was not a variance; therefore, the criteria for variances in Virginia Code § 15.2-2309(2) did not apply); *Horner v. Board of Zoning Appeals of Fairfax County*, 74 Va. Cir. 124 (2007) (variance is not required to expand a structure that is located within the otherwise applicable setbacks under a previously approved variance where the proposed expansion would not be located in the setbacks to which the variance pertained). As the *Bell* court explained, variances allow someone to do something "in violation of the ordinance."

In contrast, special use permits (which include special exceptions and conditional use permits) do not allow a landowner to do something in violation of the zoning regulations but, instead, allow the property to be developed in a way consistent with those regulations, but only with approval of the locality after specified conditions are met. Therefore, a locality desiring to allow for flexibility in its zoning regulations, or in how they are administered, may do so by expanding the use of special use permits.

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[1] These materials provide a summary of the law pertaining to variances as of July 1, 2015, the date that HB 1849 becomes effective. These materials are for educational purposes only and do not constitute legal advice.

2. The nature of variances

Because a facially valid zoning ordinance may prove to be unconstitutional in its application to a particular property, some device is needed to protect landowners' rights without destroying the viability of zoning ordinances. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch," or "escape valve." *Packer, supra.* The variance process furnishes "elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner." *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976).

Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property (*Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994)) or because the ordinance imposes an *unreasonable restriction.* A variance insures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57, 278 S.E.2d 814 (1981).

Five Key Principles to Know About Variances

- Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance.
- Variances should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications.
- Variances run with the land, and the consequences of a BZA's decision to grant a variance may last for years.
- Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a similar variance in the same neighborhood.
- If there is an existing reasonable use of the property, neither an unreasonable restriction nor a hardship exists and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.

The grant of a variance cannot confer upon a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra.* It also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008) (grant of variance did not immunize the owners from the city's regulation that a nonconforming structure cannot be removed or demolished or damaged). In addition, a variance may not allow a change in use, which only may be accomplished by a rezoning or a conditional zoning. *Virginia Code § 15.2-2201; Tolman v. Richmond Board of Zoning Appeals*, 46 Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are addressed in section 8.

3. The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. *Virginia Code § 15.2-2309(2).*

When considering an application for a variance, a BZA is acting in an administrative capacity and, under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

4. The application

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. *Virginia Code § 15.2-2310.* Applications are made to the zoning administrator. *Virginia Code § 15.2-2310.* Before a variance application is considered by the BZA, the application and accompanying maps, plans or other information must be transmitted to the secretary of the BZA, who must place the matter on the docket. *Virginia Code § 15.2-2310.*

5. Procedural requirements prior to and during a hearing on a variance application

A number of procedural rules apply to the conduct of a hearing on a variance application:

- *Scheduling the hearing on the variance application.* The BZA must "fix a reasonable time for the hearing" on a variance. *Virginia Code § 15.2-2312.*

- *Notice of the hearing.* The BZA must "give public notice thereof as well as due notice to the parties in interest." *Virginia Code § 15.2-2312.* Notice of the hearing must be provided as required in Virginia Code § 15.2-2204. *Virginia Code § 15.2-2310.*

- *Prior to the hearing; contact by parties with BZA members.* The *non-legal staff* of the governing body, as well as the applicant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA prior to the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law in fact occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions prior to a public meeting to which the applicant, landowner or his agent or attorney are all invited. The *non-legal staff of the governing body* is "any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542]. *Virginia Code § 15.2-2308.1(A) and (C).* The legal staff of a governing body is not similarly prohibited from having *ex parte* communications with BZA members.

- *Prior to the hearing; sharing of locality-produced information.* Any materials relating to a variance, including a staff recommendation or report furnished to a BZA member must be available without cost to the applicant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the applicant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code § 2.2-3700, et seq.*). *Virginia Code § 15.2-2308.1(B).*

- *At the hearing; the right to equal time for a party to present its side of the case.* The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code § 15.2-2308(C).*

- *At the hearing; the burden of proof is on the applicant.* The applicant has the burden of proof to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria in Virginia Code § 15.2-2309(2). *Virginia Code § 15.2-2309(2).*

- *Decision.* The BZA *must grant a variance* if the evidence shows that the strict application of the terms of the zoning ordinance would "unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance" and "(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to

the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application." *Virginia Code § 15.2-2309(2). See section 6 for further discussion.*

- *Time for the decision.* The decision must be made within 90 days. *Virginia Code § 15.2-2312.* This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

- *Required vote.* The concurring vote of a majority of the BZA's membership is necessary to grant a variance. *Virginia Code § 15.2-2312.* This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

- *Findings to support the decision.* In order to facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, "the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal"). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) ("In fact, the verbatim transcript contains numerous findings of fact in support of the BZA's decision"). The findings must address the elements that must be established by the applicant in order for the BZA to grant a variance.

6. Elements to establish a right to a variance

The criteria that the BZA must consider when reviewing an application for a variance are referenced in section 5 (under "*Decision*"). These criteria became effective on July 1, 2015 and are, in many respects, reformulations of Virginia Code § 15.2-2309(2)'s evidentiary and finding requirements for variances that existed prior to that date.

Appendix B provides summaries of variance cases decided by Virginia's courts under the prior statutory criteria. Although the new criteria are similar, not all of them are identical. Therefore, while it is anticipated that many of the cases cited in this outline provide valuable guidance as to how variance applications should be evaluated, the revised criteria nonetheless may lead to different results.

The reader may be confident that the overwhelming majority of variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists. Moreover, many years' experience and Virginia case law confirm that very few variance applications actually pertain to circumstances involving truly unreasonable restrictions or hardship conditions.

6-1 The strict application of the terms of the zoning ordinance would *unreasonably restrict the utilization of the property* or that granting of the variance would *alleviate a hardship* due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The evidence must show "that the strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance." *Virginia Code § 15.2-2309(2)(¶2).*

6-1.1 Unreasonable restrictions or hardships

The key element that must be established in order for a variance to be granted is whether there is an *unreasonable restriction* or a *hardship* arising from a physical condition of the property. Of those two criteria, the *hardship* that may arise if a variance is not granted has been by far the more commonly analyzed criterion. That may change under the new variance laws effective July 1, 2015 because of a peculiarity in the required showing for a hardship – under either the unreasonable restriction or hardship standard, the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201 which includes the "standard" that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, an applicant seeking a variance under the *hardship* criterion must establish both a hardship and an unreasonable restriction, whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be high standard to satisfy).

There are few if any cases where the *unreasonable restriction* criterion has been analyzed or formed the basis for granting a variance. The word "unreasonable" cannot be overlooked. Something is "reasonable" when it is "[f]air, proper, or moderate under the circumstances; sensible." *BASF and James City County v. State Corporation Commission*, ___ Va. ___, 770 S.E.2d 458 770 S.E.2d 458 (2015). Something is "unreasonable" if it, in the context here, is "absurd, inappropriate," "exceeding the bounds of reason or moderation," or "unconscionable". *Webster's Third New International Dictionary.*

One unreasonable restriction case is *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E. 2d 295 (1986), where the Virginia Supreme Court concluded that a regulation that prohibited apartments from being converted to condominiums under the state Condominium Act with no changes in the land use constituted an unreasonable restriction. If an application for a variance is based on the criterion that a restriction is *unreasonable*, the locality should consider whether the restriction – the regulation – should be amended or repealed because unreasonableness raises an issue of whether the regulation is constitutional or facially valid.

The *hardship* criterion, has, at least on paper, experienced a profound evolution since 2009. Prior to 2009, the criterion called for an *undue hardship approaching confiscation*. Beginning in 2009, the applicant was required to merely show an *undue hardship*, though the BZA still had to find an undue hardship approaching confiscation. Beginning in 2015, Virginia Code § 15.2-2309(2) now merely asks for a *hardship*. Upon review of the variance case law, however *hardship* has been modified over the years, it is clear that those cases in which a hardship was not found one would likely be similarly decided under the current criterion, and those cases in which a hardship was found likewise would be similarly decided under the current criterion. These cases are summarized in Appendix B.

6-1.2 The physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The attributes composing the *physical condition of the property* are not described in either the definition of variance in Virginia Code § 15.2-2201 or in the variance elements in Virginia Code § 15.2-2309(2). However, the reader should consider the property's narrowness, shallowness, size, shape, exceptional topographic conditions, or any other similar physical conditions. All of these conditions were delineated in the version of Virginia Code § 15.2-2309(2) that existed prior to July 1, 2015. These conditions refer to the natural physical characteristics of the property itself, not to man-made objects placed on the property. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (rejecting argument that utility markers placed on the property were a situation or condition of the property). These conditions, in effect, define the *hardship* the BZA must find in order to grant a variance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The attributes of any *improvements* on the property existing on the effective day of the zoning ordinance may also be considered, an element added effective July 1, 2015. This amendment would not have aided the owners in *Steele*, referenced above, because the improvements that created the need to vary the applicable setback standard were established after the zoning ordinance became effective. However, it appears that this new element will allow a way for a landowner seek a variance to transform a nonconforming structure into a conforming structure.

If the zoning regulation from which the variance is sought existed before the property was created (so as to be a lot of record), a variance may not be granted. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 675, 628 S.E.2d 324, 326 (2006) ("the applicant failed to show that the lots for which variances were sought were lots of record in 1988, when the Bay Act became effective. Because of the express language of the Bay Act and Code § 15.2-2309(2), that failure alone would have precluded variances based upon the shallowness of the lots.").

6-2 The property for which the variance is being requested was acquired in good faith

The evidence must show that "the property for which the variance is being requested was acquired in good faith." *Virginia Code § 15.2-2309(2)(¶2(i))*.

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner's knowledge that the previous owner of the property had been denied a variance does not affect "good faith" status. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. *Spence, supra.*

6-3 Any hardship was not created by the applicant for the variance

The evidence must show that "any hardship was not created by the applicant for the variance." *Virginia Code § 15.2-2309(2)(¶2(i))*. This appears to be similar to the prior standard that prohibited *self-inflicted* hardships, and the cases below were evaluated under that standard. However, it is unclear whether an applicant may be disqualified from obtaining a variance solely where the owner's contractor or a prior owner created the hardship.

The situation where a hardship has been created by the applicant would arise when an owner violates a provision of the zoning ordinance and then seeks a variance to provide relief from the unlawful act. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). Following are some examples where the court considered whether a hardship was self-inflicted:

- *To correct zoning violation; reliance on erroneous boundary markers*: Hardship was self-inflicted where the owners constructed a house in violation of side yard setback requirements, although done inadvertently in reliance upon misplaced property line markers. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (reliance on statement by homeowners' association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line, was a self-inflicted hardship).

- *To correct zoning violation*: Hardship was self-inflicted where the owner continued construction of an apartment over an existing garage in violation of the zoning ordinance after knowledge and warning of the likely consequences of her unlawful conduct. *Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959).

- *Knowing need for variance*: Hardship was not self-inflicted where the owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The standard must be satisfied regardless of whether the hardship was created intentionally or inadvertently. It is an open question as to whether the acts of a prior owner, a contractor, or some other third party will be attributed to the *applicant.*

6-4 Granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area

The evidence must show that "granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area." *Virginia Code § 15.2-2309(2)(¶2(ii)).*

The BZA must consider the effect that granting the variance may have on nearby properties. See *Board of Zoning Appeals of City of Chesapeake v. Glasser Bros. Corp.*, 242 Va. 197, 408 S.E.2d 895 (1991). For example, in *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993), granting a variance would have required three adjacent lots to provide an additional 25 feet of front yard where they abutted a pipestem lot line or driveway pavement. The court concluded that the BZA failed to consider the potentially detrimental impact the granting of the variance would have on the future development of the three lots.

The prior version of Virginia Code § 15.2-2309(2) also required consideration of whether the "character of the district" would be changed. The elimination of that broader consideration may open the door for variances that might change the character of the district by, for example, allowing a tall building or the encroachment of a building into a front yard. Perhaps the theory of the new law is that a single variance cannot change the character of a district, and a series of variances is needed to change the character of a district. The issue of a series of variances is addressed in the criterion in section 6-5.

6-5 The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance

The "condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." *Virginia Code § 15.2-2309(2)(¶2(iii)).*

An owner's showing that the special condition of the property and the resulting hardship are non-recurring is of considerable importance in determining the propriety of the variance. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (in determining that a variance from setbacks was improperly granted, the Court rejected the argument that the historic overlay district regulations were intended to apply only to old buildings and granting a setback variance for the proposed new building would render the zoning ordinance meaningless; rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of the lots in the area were even more shallow yet they complied with the zoning ordinance and the piecemeal granting of variances would nullify the zoning regulations; and, there was "no factual support" for the claim that the condition was unique since all lots in the area must comply with the base and overlay district regulations and the issue must be addressed legislatively).

Why are variances for general or recurring problems prohibited? A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. If there is a problem with the zoning ordinance, that problem needs to be addressed legislatively. *Martin, supra.* As the Virginia Supreme Court has said, variances are an "administrative infringement upon the legislative prerogatives of the local governing body." *Packer v. Hornsby*, 221 Va. 117, 123, 267 S.E.2d 140, 143 (1980). Thus, a legislative solution is always preferred over the piecemeal granting of variances. In *Hendrix v. Board of Zoning Appeals of the City of Virginia Beach*, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981), the Virginia Supreme Court said that "[t]he power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body." The Court added that using variances to resolve these problems when a legislative solution is reasonably practicable is prohibited "because the piecemeal granting of variances could 'ultimately nullify a zoning restriction throughout [a] zoning district' (internal citation omitted)."

6-6 Granting the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property

The granting of the variance may not "result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property." *Virginia Code § 15.2-2309(2)(¶2(iv)).*

This element overlaps the definition of *variance*, which provides that a *variance* does "not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning." *Virginia Code § 15.2-2201.* Use variances have been prohibited in Virginia since 1988. This element is also directly related to the scope of the regulations which may be varied, which are limited to those pertaining to the "shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure." *Virginia Code § 15.2-2201.*

6-7 The relief or remedy sought by the variance application is not available through a special exception or a zoning modification at the time of the filing of the variance application

The "relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to [Virginia Code § 15.2-2309(6)] or the process for modification of a zoning ordinance pursuant to subdivision [Virginia Code § 15.2-2286(A)(4)] at the time of the filing of the variance application." *Virginia Code § 15.2-2309(2)(¶2(v)).*

This provision is consistent with those cases explaining that a variance "allows a property owner to do what is otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982); *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance should only be a remedy of last resort.

6-8 The variance is not contrary to the purpose of the ordinance

Virginia Code § 15.2-2309(2) requires that the evidence show not only the elements discussed in sections 6-1 through 6-6, but also that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201. The definition of *variance* provides that it shall not be "contrary to the purpose of the ordinance." *Virginia Code § 15.2-2201.*

For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed.

As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

6-9 The variance application must meet the standard for a variance as defined in Virginia Code § 15.2-2201

Virginia Code § 15.2-2309(2) requires that the evidence show that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201.

These "standards" include the standard that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, as explained in section 6-1.1, an applicant seeking a variance under the *hardship* criterion must establish both a hardship and an unreasonable restriction, whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which is a high bar in and of itself).

7. Consideration of a variance application; matters the BZA may and may not decide

A BZA acts in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004).

In making the findings to support its decision on a variance, the BZA must exercise its discretion with regard to the particular facts of an application, including the precise extent of the relief sought. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). In the performance of this duty, the BZA is "clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily." *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960); *see also Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959). "Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals." *Martin v. City of Alexandria*, 286 Va. 61, 69, 743 S.E.2d 139, 143 (2013).

A statement of findings is crucial for judicial review of the BZA's decision. Under the prior law, the Virginia Supreme Court said repeatedly that, if the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980); *see also Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005). A BZA is no longer required to state *findings*; however, a BZA may grant a variance only if the evidence *shows* that all of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

Variances may not be approved for reasons other than those set forth in Virginia Code § 15.2-2309(2). *Cochran, supra; Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance. In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court's opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. An attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court's opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

In granting a variance, a BZA may impose conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2).* Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2).* Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required. *Virginia Code § 15.2-2309(2).*

8. Special situations: condominium conversions, the Americans with Disabilities Act, and the Fair Housing Act; National Flood Insurance Program

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least three special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

8-1 Condominium conversions

Virginia Code § 55-79.43(E) provides in part that localities may provide by ordinance that proposed conversion

condominiums and the use thereof which are nonconforming obtain a variance (or special use permit) prior to the property becoming a conversion condominium. The variance "shall be granted if the applicant can demonstrate to the reasonable satisfaction of the local authority that the nonconformities are not likely to be adversely affected by the proposed conversion." *Virginia Code § 55-79.43(E).*

8-2 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (*e.g.*, its zoning regulations and the criteria for granting a variance in Virginia Code § 15.2-2309(2)) so as not to discriminate against disabled persons.

8-3 National Flood Insurance Program

Localities participating in the National Flood Insurance Program are required to adopt floodplain management regulations required by federal law either as part of its zoning ordinance or otherwise. *44 CFR § 59.1 et seq.*

A locality's floodplain management regulations must include a provision that provides a procedure and standards for variances for development in the floodplain. A landowner may be eligible for a variance under the floodplain management regulations in two circumstances: (1) for new construction or substantial improvements where nearby structures were constructed below the base flood elevation, generally for parcels less than ½ acre in size; and (2) for new construction, substantial improvement, or development that is required for water-dependent facilities. *44 CFR § 60.6.* Encroachment standards and construction standards specific to the floodplain are among the standards that may be varied. *44 CFR § 60.6.* The findings required to be made by the BZA include a finding substantially similar to the "undue hardship" standard applicable to variances considered under Virginia Code § 15.2-2309(2), as well as a finding that the variance will not result in unacceptable or prohibited increases in flood heights. *44 CFR § 60.6.* The BZA is also required to consider a number of factors related to the impact of the variance, if granted. *44 CFR § 60.6.*

9. Modifications

In a 2006 bill introduced as a legislative response to *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004), the General Assembly ended up amending Virginia Code § 15.2-2286(A)(4). This enabling authority allows localities to authorize zoning administrators to review and approve *modifications* from zoning regulations. A *modification* is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements. *Virginia Code § 15.2-2286(A)(4).* Under the prior law, localities were enabled to authorize their zoning administrators to grant *variances* from any *building setback requirement. Virginia Code § 15.2-2286(A)(4).*

The findings required to grant a modification are similar to those for a variance. *Virginia Code § 15.2-2286(A)(4).* The zoning administrator's decision on a modification may be appealed to the BZA, and the BZA's decision may be appealed to circuit court.

10. Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314.*

Appendix A

HB 1849 (effective July 1, 2015)

§ 15.2-2201. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the *shape,* size, or area of a lot or parcel of land; or the size, *height,* area, bulk, or location of a building or structure when the strict application of the ordinance would ~~result in unnecessary or unreasonable hardship to the property owner~~ *unreasonably restrict the utilization of the property*, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the ~~intended spirit and~~ purpose of the ordinance~~, and would result in substantial justice being done~~. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

§ 15.2-2308. Boards of zoning appeals to be created; membership, organization, etc.

A. Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his designated judge or judges in their respective circuit, upon concurrence of such locality. Their terms of office shall be for five years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The secretary of the board shall notify the court at least thirty days in advance of the expiration of any term of office, and shall also notify the court promptly if any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may be reappointed to succeed themselves. Members of the board shall hold no other public office in the locality except that one may be a member of the local planning commission. A member whose term expires shall continue to serve until his successor is appointed and qualifies. The circuit court for the City of Chesapeake and the Circuit Court for the City of Hampton shall appoint at least one but not more than three alternates to the board of zoning appeals. At the request of the local governing body, the circuit court for any other locality may appoint not more than three alternates to the board of zoning appeals. The qualifications, terms and compensation of alternate members shall be the same as those of regular members. A regular member when he knows he will be absent from or will have to abstain from any application at a meeting shall notify the chairman twenty-four hours prior to the meeting of such fact. The chairman shall select an alternate to serve in the absent or abstaining member's place and the records of the board shall so note. Such alternate member may vote on any application in which a regular member abstains.

B. Localities may, by ordinances enacted in each jurisdiction, create a joint board of zoning appeals that shall consist of two members appointed from among the residents of each participating jurisdiction by the circuit court for each county or city, plus one member from the area at large to be appointed by the circuit court or jointly by such courts if more than one, having jurisdiction in the area. The term of office of each member shall be five years except that of the two members first appointed from each jurisdiction, the term of one shall be for two years and of the other, four years. Vacancies shall be filled for the unexpired terms. In other respects, joint boards of zoning appeals shall be governed by all other provisions of this article.

C. With the exception of its secretary and the alternates, the board shall elect from its own membership its officers who shall serve annual terms as such and may succeed themselves. The board may elect as its secretary either one of its members or a qualified individual who is not a member of the board, excluding the alternate members. A secretary who is not a member of the board shall not be entitled to vote on matters before the board. ~~For~~ *Notwithstanding any other provision of law, general or special, for* the conduct of any hearing, a quorum shall be not less than

a majority of all the members of the board *and the board shall offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggrieved under § 15.2-2314, and the staff of the local governing body.* Except for matters governed by § 15.2-2312, no action of the board shall be valid unless authorized by a majority vote of those present and voting. The board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the governing body or bodies at least once each year.

D. Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services. Members of the board may receive such compensation as may be authorized by the respective governing bodies. Any board member or alternate may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the court that appointed him, after a hearing held after at least fifteen days' notice.

E. Notwithstanding any contrary provisions of this section, in the City of Virginia Beach, members of the board shall be appointed by the governing body. The governing body of such city shall also appoint at least one but not more than three alternates to the board.

§ 15.2-2308.1. Boards of zoning appeals, ex parte communications, proceedings.

A. The non-legal staff of the governing body may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform the other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney are all invited.

B. Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under § 15.2-2314, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant or other person aggrieved under § 15.2-2314 requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to § 2.2-3704. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of § 2.2-3707.

C. For the purposes of this section, "non-legal staff of the governing body" means any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to § 15.2-1542. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality.

D. This section shall not apply to cases where an application for a special exception has been filed pursuant to subdivision 6 of § 15.2-2309.

§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. *The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall*

explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider ~~the purpose and intent of~~ any applicable ordinances, laws, and regulations in making its decision. *For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.*

2. ~~To authorize~~ *Notwithstanding any other provision of law, general or special, to grant* upon appeal or original application in specific cases ~~such~~ *a* variance as defined in § 15.2-2201 ~~from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship;~~ provided that ~~the spirit of the ordinance shall be observed and substantial justice done, as follows:~~ *the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.*

~~When a property owner can show that his~~ *Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the* property *interest for which the variance is being requested* was acquired in good faith ~~and where by reason of the exceptional~~ *and any hardship was not created by the applicant for the variance;* ~~narrowness, shallowness, size, or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.~~ *(ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.*

~~No such variance shall be authorized by the board unless it finds:~~

~~a. That the strict application of the ordinance would produce undue hardship relating to the property;~~

~~b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and~~

~~c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.~~

No variance shall be ~~authorized~~ *considered* except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

~~No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.~~

In ~~authorizing~~ *granting* a variance, the board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest; and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, *general or special,* the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously

advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

§ 15.2-2314. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition that shall be styled "In Re: date Decision of the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings *in the circuit court.* The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

~~If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.~~ The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, ~~or application for a special exception,~~ the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by ~~showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance~~ *proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision.*

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted application for a special exception, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, and is not fairly debatable.

In the case of an appeal from the board of zoning appeals to the circuit court of a decision of the board, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia.

Costs shall not be allowed against the locality, unless it shall appear to the court that it acted in bad faith or with malice. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the locality may request that the court hear the matter on the question of whether the appeal was frivolous.

Appendix B

Analysis of the Hardship Issue by Virginia Courts Prior to HB 1849

Under the law existing prior to July 1, 2015, the key element that had to be established in order for a variance to be granted was whether there was an *unreasonable restriction* or a *hardship* arising from a physical condition of the property. Of those two criteria, the *hardship* that may arise if a variance is not granted was by far the more commonly analyzed criterion.

Hardship: The Critical Analysis for Almost Every Variance Application
• *Hardship.* Almost every variance application will turn on whether, when the zoning ordinance is applied to the property, the regulations will produce a hardship relating to the property.
• *Consider reasonable uses of the property*: To determine whether the zoning regulations interfere with a reasonable use of the property, evaluate the existing uses of the land, whether any of those uses are reasonable, what other uses are allowed under the applicable zoning regulations without the need for a variance, and whether those uses, if pursued, would be reasonable. If, despite the regulations, there are existing or other possible reasonable uses, a hardship has not been established.
• *Consider whether the zoning regulations interfere with the uses on the property taken as a whole*: If you find that the regulations interfere with the reasonable use of the property, you must also determine that the regulations interfere with those uses on the property *taken as a whole*, rather than only some portion of the property. If there are other areas of the property where a reasonable use could be located without the need for a variance, an undue hardship has not been established.

1. *Cochran v. Fairfax County Board of Zoning Appeals*

The Virginia Supreme Court ruled on three consolidated appeals pertaining to variances in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004). Because the nature of the variances sought, the underlying fact patterns, and the arguments raised by the applicants, are typical of those often seen by BZAs, each case is laid out in some detail below. Likewise, the Court's informative discussion of the controlling legal principles as to whether an undue hardship exists is set out at length. The Court's decision, of course, now must be considered in light of the July 1, 2015 amendments to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is *undue* and that it *approaches confiscation*. The facts in each of the cases considered in the consolidated appeal indicate that the Court would reach the same conclusions, though its holdings and guidance would be stated differently, *because there was no hardship within the meaning of Virginia Code § 15.2-2309(2) whatsoever.*

1-1 The facts in *Cochran v. Fairfax County Board of Zoning Appeals*

In *Cochran*, the owner of a 20,000 (approximately) square foot parcel, improved with a house occupied by the owner for eight years, desired to demolish his existing house and construct a much larger house. The parcel rose 42 feet from the front property line to the rear property line. Along the northern property line, the proposed house would come within 13 feet of the side yard property line along the entire length of the house. The zoning district in which the parcel was located required 15-foot side yard setbacks. Thus, a 2-foot variance was sought.

A variance would not have been necessary if the proposed house had been moved two feet to the south (plus some additional accommodations for proposed chimneys on the northern side of the house). This change would have required that the house's proposed side-load garage on the south side of the house be replaced with a front-load garage. The owner did not want a front-load garage because it would diminish the house's "curb appeal." The relocation of the house also would have resulted in a loss of 152 square feet of living area (the house was described as having a footprint of 71 feet by 76 feet (5,396 square feet), and being two stories in height). The 152 square feet lost by complying with the setback regulations could have been recaptured either in the front or back of the house, or by adding a third story. The owner rejected these options because he wanted to save the front area for a children's play area, the back area for an outdoor courtyard, and he opined that a third story would be aesthetically undesirable.

The BZA granted the variance, finding among other things, that "the lot suffers from severe topographical conditions which the applicant has worked hard to accommodate" and that "the requests are modest." Based on these findings, the BZA concluded that the physical conditions of the parcel were such that a strict interpretation of the zoning ordinance would result in an undue hardship that "would deprive the owner of all reasonable use of the land and/or the buildings involved." The circuit court affirmed the decision of the BZA.

1-2 The facts in *MacNeal v. Town of Pulaski Board of Zoning Appeals*

In *MacNeal*, the owners of a 0.6248-acre parcel bounded on three sides by public streets desired to construct a garage in the northeast corner of the parcel. There was no existing garage on the parcel, and the owners explained that the garage's proposed location would provide the easiest access to a street. The topography of the parcel was described as "difficult." The owners desired to construct the garage to the property line. The applicable setback regulations required a 15-foot setback. Thus, a 15-foot variance was sought.

A variance would not have been necessary if the proposed garage was constructed closer to the existing house, though this would have required construction of a ramp that would increase the cost of the project and weaken or destroy a five-foot tall stone retaining wall behind the house.

After four meetings, the BZA granted a modified variance permitting the garage to be constructed five feet from the northern property line and 15 feet from the eastern boundary line. The variance also included a condition that the construction not "alter or destroy the aesthetic looks of existing vegetation bordering the northern projected boundary" of the parcel. The circuit court affirmed the decision of the BZA.

1-3 The facts in *Board of Zoning Appeals of the City of Virginia Beach v. Pennington*

In *Pennington*, the owners of a 1.25-acre parcel desired to construct a storage building on their parcel. The parcel was already improved by the owners' home and a nonconforming detached garage. The proposed storage shed would have been 288 square feet in size, and the existing detached garage was 528 square feet. The zoning district regulations limited the area of accessory structures to 500 square feet. Thus, the owners sought a variance of 28 square feet to bring the garage into conformity (which was not in issue in the case), and a variance of 288 square feet for the storage shed. The zoning district in which the parcel was located would have allowed four dwellings.

A variance for the storage shed would not have been necessary if it had been attached to the existing house. The owners' representative claimed that the shed would be nearly invisible from the street, would have no impact on neighboring properties, and that the impact of a small additional outbuilding would be minimal and in keeping with the spirit of the zoning ordinance, particularly when compared to the four dwelling units allowed by the zoning district regulations.

The BZA denied the variance that would have allowed the storage shed. At trial in the circuit court, the owners raised a new claim of hardship – that the owners' daughter had returned to live with them to care for an ailing parent, and that the storage shed was needed as a place to store her belongings. The circuit court ruled that a hardship existed, overruled the BZA, and granted the variance.

1-4 The Court's discussion of the controlling legal principles and its holdings

Concluding that the facts did not support the granting of a variance in any of the cases, the Virginia Supreme Court reversed all three circuit court judgments. The court's analysis includes a discussion of the controlling legal principles applicable to variances authorized under Virginia Code § 15.2-2309(2):

> The BZA, when considering an application for a variance, acts only in an administrative capacity. [citation omitted] Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law. [citations omitted] The General Assembly has prescribed such standards regulating the authority of

the BZA to grant variances by enacting Code § 15.2-2309(2) . . .

Cochran, 267 Va. at 765, 594 S.E.2d at 576-577.

The court concluded that under the facts of the three cases, without a variance "each of the properties retained substantial beneficial uses and substantial value." In *Cochran*, the proposed house could have been reconfigured or moved two feet to the south, or the project could have been abandoned and the existing residential use continued in effect. In *MacNeal*, the proposed garage could have been moved to another location on the parcel or the project could have been abandoned. In *Pennington*, the storage shed could have been built as an addition to the existing house or the project could have been abandoned.

1-5 The Court's guidance on how to approach a variance application

The Virginia Supreme Court provided some useful guidance on how a BZA is to approach a variance application:

> The threshold question for the BZA in considering an application for a variance . . . is whether the effect of the zoning ordinance upon the property under consideration, as it stands, interferes with "all reasonable beneficial uses of the property, taken as a whole." If the answer is in the negative, the BZA has no authority to go further.

Cochran, 267 Va. at 767, 594 S.E.2d at 578.

The Court noted that the owners in the three cases had presented compelling reasons in favor of their applications, such as: their desires, supported by careful planning, to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support, of the application by neighbors; and a serious personal need for the proposed variance. The Court held that these factors were not relevant to the issue of undue hardship, and were material to a variance application only if an undue hardship was properly found to exist. In such a case, these factors could then be considered in the discretion of the BZA to tailor "a variance that will alleviate 'hardship' while remaining 'in harmony with the intended spirit and purpose of the ordinance.'"

2. Summaries of Virginia cases where an undue hardship was not found

Following are brief summaries of cases in which an undue hardship was not found to exist. Before any of these cases are relied upon, they need to be considered in light of the Virginia Supreme Court's analysis of the undue hardship standard in the *Cochran/MacNeal/Pennington* cases decided in 2004, as well as the July 1, 2015 amendment to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is *undue* and that it *approaches confiscation*. Despite this change in the State law, it does not appear that any of the cases below turned on whether the undue hardship approached confiscation, or whether the hardship was "undue," but, instead, turned on whether there was, in fact, a hardship at all.

- *Setback*: Owners of a 36' by 44' lot sought variances to reduce required side and rear yard setbacks; in prior applications, city staff described the lot as "level," "large," "buildable," and "not unique," with "characteristics . . . similar to other lots within this section of Prince Street" and that granting the variance would be "detrimental to the adjacent property"; city staff also stated that a house in compliance with setbacks could be built; in the most recent application for side (3' variance) and rear (13'variance) yard setbacks, city staff described the application as a "good development" compatible with its historic context, unique because the historic overlay district regulations were designed to apply to old building, the lot was shallower than 2/3 of lots in area, and variances allowed for "more historically appropriate width and depth." The Virginia Supreme Court rejected the argument that deletion of the phrase "approaching confiscation" from the applicant's burden to show a "clearly demonstrable hardship" now authorized BZA's to grant variances in cases previously not authorized because the change to the law did not change the findings required for the BZA to grant a variance; the Court also

rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of lots in the area were even more shallow, yet they complied with the zoning ordinance; lastly, the Court rejected the argument that the lot was undevelopable without a variance on the theory that alternative designs could not comply with the base and historic overlay district regulations because the applicants admitted that they could submit a design that complied with the zoning regulations, it was "mere speculation" that the BAR would not approve an alternative design, and there was no factual support for the claim that the condition was unique because all lots in the area had to comply with the regulations. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (applying charter provisions virtually identical to Virginia Code § 15.2-2309(2)).

- *Setback*: Owner sought multiple variances from overlapping setbacks imposed by the county's zoning ordinance (including those implementing the Chesapeake Bay Preservation Act) on 4 out of 5 lots in a 6.594 acre purported subdivision recorded soon after the owner purchased the property in 2004, and long after the setback regulations were imposed; without the variances the 4 lots were unbuildable; no undue hardship existed because the owner could have treated the property as a single 6.594 acre parcel and constructed a single residence on the property on that part which was not subject to the overlapping setbacks. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 628 S.E.2d 324 (2006).

- *Setback*: Owner sought variance from setback to expand the existing house closer to ocean; no hardship because expansion could be constructed on other side of house without violating the setback requirement. *Packer v. Hornsby*, 221 Va. 117, 121-122, 267 S.E.2d 140, 142 (1980) ("proximity to the ocean is doubtless a 'privilege or convenience' coveted by every homeowner along the beach").

- *Setback*: Owner sought variance from setback so house could be constructed in the position desired by owner; no hardship because the house could be constructed without variance by shifting position of house. *Board of Zoning Appeals of City of Virginia Beach v. Nowak*, 227 Va. 201, 205, 315 S.E.2d 221, 223 (1984) ("to grant him a variance under these circumstances would bestow upon him a 'special privilege or convenience'").

- *Setback*: Owner sought variance from setbacks to allow a pier to be constructed on his property over wetlands, but the inability to build a pier did not leave the property with no reasonable beneficial use since there was already a single family residence on the property and no zoning regulation interfered with that use. *Gardner v. Board of Zoning Appeals and Kim*, 77 Va. Cir. 296 (2008) (noting that the BZA's concerns that, without a variance, Kim "would be denied water access and that the variance requested was minimal" and that "the lot was designed to provide water access but the ordinances effectively deprived Mr. Kim of that right," did not meet the test for an undue hardship).

- *Setback*: Owners sought variance from setback so that they could construct the house "they desired to have"; no hardship because there were other houses and configurations that would allow a reasonable use of the property. *Smith v. Spotsylvania County Board of Zoning Appeals*, 1989 WL 646478 (Va. Cir. Ct. 1989).

- *Minimum lot width*: Owner sought variance from minimum lot width requirements to allow existing lot to be subdivided into two lots, replacing existing house with new houses on each lot; lot had been illegally created in 1936. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 453, 604 S.E.2d 7, 13 (2004) (owner did not experience undue hardship given that he had enjoyed the use of his home since 1964; his "inability to subdivide his property does not constitute a hardship under the facts of this case. The effect of the zoning ordinance does not interfere 'with all reasonable beneficial uses of the property, taken as a whole'").

- *Develop to highest allowed density*: Owner's inability to develop land at its highest allowable density by requiring compliance with ordinance requirements was a limitation shared by all property owners and did not constitute an undue hardship. *Prince William County Board of Zoning Appeals v. Bond*, 225 Va. 177, 180, 300 S.E.2d 781, 783 (1983) (regulation restricting density to one dwelling unit per acre was not an undue hardship where owner desired to add second dwelling on 1.01-acre parcel; the owner's "application for a variance was, in effect, a

request for a rezoning of their property").

- *Develop to highest allowed density*: Owner sought variance from regulation that prohibited property from being developed to maximum density; inability to achieve maximum density was not an undue hardship. *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993).

- *Financial loss*: Financial loss, standing alone, cannot establish a hardship justifying the granting of a variance. *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48, 431 S.E.2d 282 (1993); *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E.2d 295 (1986). However, the value of the property is relevant to both the unreasonable restriction and the hardship approaching confiscation issues. *Natrella, supra.*

- *Financial loss*: Expenditure of more than $20,000 toward construction of a residence in the floodway was not an undue hardship, even though the owners had been erroneously informed that the site was out of the floodway and obtained zoning and building permits. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

- *Increased profitability*: There is no undue hardship where the evidence shows only that the property owner would make more money if the connected town houses could be sold within the building to separate owners. Increased profitability is insufficient alone to justify a variance. *Leigh v. Board of Zoning Appeals of the Town of Woodstock*, 1982 WL 215189 (Va. Cir. Ct. 1982).

- *Health and safety zoning regulations*: Owners sought variances from several health and safety regulations applicable to uses allowed by right; no hardship found because the right to use property in a particular way is not absolute, but conditional, and to hold otherwise would render the requirements null and void. *Board of Zoning Appeals, City of Falls Church v. O'Malley*, 229 Va. 605, 331 S.E.2d 481 (1985).

- *Commercial parking on residentially zoned property*: Owner sought a variance to allow commercial parking lot on residentially zoned land to serve business on another lot; no hardship justifying grant of variance because the lot was level and adequately suitable for the construction of improvements permitted under the zoning classification and the only hardship was related to the business and the property upon which the owner conducted its business, not the property for which the variance was sought. *C. & C. Inc. v. Semple*, 207 Va. 438, 150 S.E.2d 536 (1966) (Note: the owner was seeking a use variance, not allowed in Virginia since 1988).

- *Additional signage*: Owners sought a variance that would have allowed them to display two signs, rather than one; the only hardship was that two signs would better identify the property. *McCall v. Board of Zoning Appeals of the City of Richmond*, 1987 WL 488782 (Va. Cir. Ct. 1987).

- *Structural height restriction*: Owner sought a variance that would allow farm equipment dealership sign to be 20 feet in height, where zoning regulations permitted signs approximately no taller than 10 feet, and claimed that a sign 10 feet in height would be partially obscured by farm equipment from the highway in one direction, and completely obscured from the highway in the other direction; no undue hardship because the farm equipment dealership already existed on the property and other general commercial uses could also be located there. *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

- *Erroneously approved site plan and building permit*: Owner sought a variance from an 8-foot setback where the approved site plan showed a 3-foot setback in violation of the zoning ordinance; no hardship justifying the granting of a variance because the only error was made by the city in the granting of the building permit, and the permit was void. *Dixon v. Zoning Appeals Board of Virginia Beach*, 50 Va. Cir. 424 (1999).

- *Location of accessory structure*: Owner sought a variance from a regulation that required accessory structures to be located in the rear yard of a single family dwelling; location of a new single family dwelling resulted in a pre-existing barn being located in front sideyard, and the locality refused to issue certificate of occupancy for the dwelling; no undue hardship because the owner could dismantle the barn and eliminate the need for the

variance. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005).

- *Preexisting variance limiting parcel's use.* A preexisting variance on a parcel that limited the parcel's use to the sale and repair of batteries, standing alone, does not amount to an undue hardship. *CL 11-93 & CL 11-41*, opinion letter dated November 28, 2011.

3. Summaries of Virginia cases where an undue hardship was found

Following are brief summaries of cases in which an undue hardship was found to exist under the standards that applied prior to July 1, 2015.

- *Expansion of sludge drying beds*: Utility company site needing a variance to expand sludge drying beds was a hardship approaching confiscation because without expansion, plant would violate water quality standards. *Tidewater Utilities Corp. v. City of Norfolk*, 208 Va. 705, 160 S.E.2d 799 (1968).

- *Lot size and width*: In a district where lots were required to contain at least 75,000 square feet and have a minimum width of 200 feet to be considered a "buildable lot," and the lot in question contained 45,733 square feet and was 199.45 feet wide, undue hardship existed because the lot was unbuildable under existing zoning regulations and the variance would alleviate a clearly demonstrable hardship approaching confiscation. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 2001 Va. Cir. LEXIS 381 (2001).

- *Setbacks*: Undue hardship existed so as to justify a variance from 30-foot setback requirement where the property was located at the corner of two residential streets and was exceptionally narrow and exceptionally shallow, and had no 90 degree corners. Other facts supporting the undue hardship included: (1) the owners sought to construct a 34-foot-wide house (a typical house being built in the immediate vicinity was 40 feet wide); (2) a house any narrower than the 34-foot-wide house proposed would have been too narrow to accommodate interior rooms; (3) a house any smaller or narrower than the proposed 34-foot-wide house would not be economically viable in the relevant real estate market; (4) the proposed house could not be shifted back on the property because it would infringe on the side yard setback of 10 feet, necessitating another variance; and (5) the house could not be rotated on the property because rotation would result in the other front corner of the house infringing on the front yard setback, which would require another variance. *Brown v. Fairfax County Board of Zoning Appeals*, 2001 Va. Cir. LEXIS 49, 2001 WL 543520 (2001).

- *Building height*: Undue hardship existed so as to justify a height variance where parcel sloped on edges, making construction that complied with city's tree preservation and protection regulations difficult or impossible; the terrain and the potential loss of additional large trees constituted the undue hardship. *McGhee v. Board of Zoning Appeals of the City of Roanoke*, 57 Va. Cir. 47 (2001).

- *Lot width*: Undue hardship was found so as to justify the granting of a variance to reduce the lot width requirement to divide property into three lots sharing a driveway where the property was an odd shape; to develop it appropriately without a variance required that an expensive road be constructed; and the construction of the road would require removal of mature trees, damage a vineyard, and encroach upon an historical house, three features which enhanced the pastoral character of the area. *McCoy v. Fairfax County Board of Zoning Appeals*, 48 Va. Cir. 227 (1999).

The Virginia Supreme Court case that found an undue hardship – *Tidewater Utilities* – is an atypical variance case and most likely is limited to the unique situation it presented.

EXHIBIT H

BOARD OF ZONING APPEALS – VARIANCE REQUIREMENTS

Specific Requirements	Va. Code Section	
The burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria set out in § 15.2-2309, and specifically § 15.2-2309(2).	§ 15.2-2309	
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, __ a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure __ when the strict application of the ordinance would: __ unreasonably restrict the utilization of the property, __ **and** such need for a variance would not be shared generally by other properties, __ **and** provided such variance is not contrary to the purpose of the zoning ordinance. "Variance" shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	
Notwithstanding any other provision of law, general or special, a variance shall be granted __ if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property	§ 15.2-2309(2)	

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BOARD OF ZONING APPEALS – VARIANCE REQUIREMENTS, CONTINUED

___ or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, **and**		
___ (i) **and** the property interest for which the variance is being requested was acquired in good faith ___ **and** any hardship was not created by the applicant for the variance;	§ 15.2-2309(2)	
___ (ii) **and** the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area;	§ 15.2-2309(2)	
___ (iii) **and** the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;	§ 15.2-2309(2)	
___ (iv) **and** the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property;	§ 15.2-2309(2)	

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EXHIBIT I

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

JOHN W. GLOVER and
THE CITY OF STAUNTON, VIRGINIA,

Petitioners,

v.

Case Nos. CL08000025-00
CL08000026-00
CL08000051-00

THE BOARD OF ZONING APPEALS OF THE
CITY OF STAUNTON, VIRGINIA, et al.,

Respondents.

FINAL ORDER

With the agreement of counsel and the parties acting pro se, these certiorari proceedings have been conducted as consolidated for purposes of trial and rulings.In recognition of this agreement, and with the concurrence of the Court, it is HEREBY ORDERED that the proceedings are consolidated to that extent.

On October 21, 2008, the Court conducted a pre-trial conference and a hearing on motions matured for consideration, in anticipation of the previously scheduled December 4, 2008 trial pursuant to Virginia Code § 15.2-2314. During the conference, the Staunton Board of Zoning Appeals withdrew its September 29, 2008 Motion for Leave to File Answer. Also, the Court then concluded and, in confirmation, does HEREBY ORDER that the September 12, 2008 motion of the City of Staunton to reconsider and vacate or modify the July 24, 2008 Orders of the prior judge designate is DENIED; however, the services of William E. Shmidheiser as court-appointed counsel for the Staunton Board of Zoning Appeals are HEREBY SUSPENDED effective October 21, 2008, given the appearance of John A. Conrad as counsel.

On December 4, 2008, with all parties present, and represented by counsel or acting pro se, the Court conducted an appeal trial of the three Petitions filed by the City of Staunton, et al.and the Answers of the Respondents, if any, in these three consolidated cases pursuant to Virginia Code Section 15.2-2314.

For good cause appearing, and after considering objections of the Petitioners and the argument of counsel, it is hereby ORDERED that the Motion for Leave to File Answer of the Staunton Board of Zoning Appeals is granted and the Answer of the Staunton Board of Zoning Appeals is duly filed, to which the Petitioners objected on the same grounds identified in their October 17, 2008 objection and on the grounds that the motion had been withdrawn and otherwise now was untimely, with the Staunton Board of Zoning Appeals had remaining in default.

Whereupon, the Court received opening arguments, admitted into evidence all evidence submitted by the BZA, overruling the objection of the Petitioners on grounds that additional evidence was not necessary for the proper disposition of the matter, and then the BZA and all other Respondents rested; the Court heard all closing arguments of counsel for the Petitioners and the BZA, and pro se Respondents, and concluded the trial, with leave for the parties to submit additional briefs and/or memoranda of points and authorities, as well as the minutes of the Staunton City Council, all of which were submitted by the parties and considered by the Court.

Whereupon, in consideration of the record of the Staunton Board of Zoning Appeals, all evidence submitted by the parties, the written briefs and oral argument of all counsel and all parties, and for the reasons stated in the Court's January 14, 2009 letter opinion, it is HEREBY ORDERED and ADJUDGED that the Staunton Board of Zoning

Appeals' motion to dismiss all three Petitions for lack of standing is DENIED; that the decisions of the Staunton Board of Zoning Appeals to grant each of the three variances are REVERSED; and that the three variance applications are hereby denied.

It is further ORDERED that the transcript of the October 21, 2008 hearing before the Court is hereby made a part of the record in all of these proceedings.

The Clerk is directed to forward an attested copy of the Final Order to counsel of record and all parties acting pro se.

ENTERED this 17th day of June, 2009.

Judge

REQUESTED BUT OBJECTED TO AS NOTED OTHERWISE:

Douglas L. Guynn
Attorney for Petitioners

SEEN AND OBJECTED TO FOR THE REASONS STATED IN THE RECORD:

John A. Conrad,
Board of Zoning Appeals Attorney

J. Michael Warren

A COPY
TESTE: J. Michael Markel CLERK
Circuit Court, Staunton, Va.

Lisa Solod Warren

Christopher P. Lowery

Brandy Pierce Lowery

Frank Belloni

Debra Chilton-Belloni

SEEN:

William E. Shmidheiser, Esquire

No Appearance
After Notice
Endorsement waived
pursuant to Rule 1:13
but see letters
dated April 29, 2009
and May 15, 2009
M.S.H.
6-17-09

EXHIBIT J

OBENSHAIN
LAW GROUP

Mark D. Obenshain
Attorney at Law

Phone: 540.208.0727
Direct: 540.208.0728
420 Neff Avenue, Suite 130
Harrisonburg, Virginia 22801
mdo@obenshainlaw.com
obenshainlaw.com

June 11, 2014

Via e-mail and mail

Sharon E. Angle
Director of Planning/Zoning Administrator
City of Staunton
P. O. Box 58
Staunton, VA 24402

Re: Debra Chilton-Belloni
1403 North Augusta Street, Staunton, VA

Dear Ms. Angle:

Please find attached Ms. Chilton-Belloni's form appealing your May 30, 2014 determination to the Board of Zoning Appeals, attachments and her check in the amount of $200. Please let me know the schedule established for the public hearing and for consideration of this appeal and application for a variance.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/
HB262986.DOCX
Enclosures

cc: Victor M. Santos, Esquire (by e-mail and mail)
Mrs. Debra Chilton-Belloni (by e-mail)

APPEAL TO THE BOARD OF ZOING APPEALS
CITY OF STAUNTON

Applicant: Debra Chilton-Belloni Date: 6/5/2014

Mailing Address: 161 Seclusion Manor Phone: 540-872-4354
Mineral, VA 23117

I (we) respectfully request that the Board of Zoning Appeals review the decision made on May 30, 2014 by the Zoning Administrator.

Address of Property: 1403 N. Augusta St., Staunton, VA 24401

Legal Description (Block No., Lot No., Section): 1400 block of N. Augusta St., Lots 1 and 23, Chilton Hall and Cottage - (Lot 4, BLK B) Map No. 310

Applicable Provision of Zoning Code: 18.120.010(3)

The following action is requested:

☐ An interpretation of the zoning map/Zoning Code.

■ An appeal of an administrative decision.

Description of Problem: I am seeking a variance from the above referenced ordinance with respect to size, height, location or features of a structure -- a wall -- built on the property. My deceased husband and I sought and received approval from the City planning office before building the wall. The application of the above cited ordinance in the manner sought by the City will subject me to an undue hardship warranting a variance. See attached letter dated May 9, 2014 submitted in support.

Has the applicant previously filed an appeal in connection with this property? yes, prior to law change

List and explain any existing special use permit or variance previously granted on this property:
Not Applicable

What is the applicant's interest in the property?

■ Owner

☐ Contract purchaser (attach copy of pending contract or option agreement)

☐ Owner's agent

☐ Other (explain)

Explanation of purpose to which property will be put: Residential

Attach supporting material such as a site plan, tax map, topographic map, drainage map, utility easement map, building elevation map, etc.

Signature of Applicant

Fee Paid: $200

OBENSHAIN
LAW GROUP

Mark D. Obenshain
Attorney at Law

Phone: 540.208.0727
Direct: 540.208.0728
420 Neff Avenue, Suite 130
Harrisonburg, Virginia 22801
mdo@obenshainlaw.com
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Very truly yours,

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Mrs. Debra Chilton-Belloni (by e-mail)

DCB000392

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CITY OF STAUNTON

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☐ Other (explain)

DCB000394

Explanation of purpose to which property will be put: Residential

Attach supporting material such as a site plan, tax map, topographic map, drainage map, utility easement map, building elevation map, etc.

Signature of Applicant

Fee Paid: $200

DCB000395

0107

BELLONI BZA APPEAL
EXHIBIT 1

LENHART
ATTORNEYS AT LAW | PETTIT

Mark D. Obenshain
Attorney at Law

Direct: (540) 437-3133
mdo@lplaw.com

Phone: (540) 437-3100
Fax: (540) 437-3101
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

May 9, 2014

Via e-mail and mail

Sharon E. Angle
Director of Planning/Zoning Administrator
City of Staunton
P. O. Box 58
Staunton, VA 24402

Re: Debra Chilton-Belloni
1403 North Augusta Street, Staunton, VA

Dear Ms. Angle:

As you know, I am counsel for Debra Chilton-Belloni. Ms. Belloni has received your letters admonishing her to demolish or modify the wall constructed in front of the above-referenced premises. You have cited Section 18.120.010(3) of the Staunton City Code in asserting that the wall violates the height restrictions contained therein.

This letter is written to you pursuant to Virginia Code § 15.2-2286, Chapter 18.200, and Section 18.195.010 of the Staunton City Code in order to ask you to grant Mrs. Belloni a modification from the zoning ordinance cited above with respect to the size, height, location or features of a structure – in this instance, a wall – on her property.

In support of this request, Mrs. Belloni submits that failure to grant a modification will result in practical difficulty as well as unnecessary and undue hardship upon her. The City has extensive knowledge of what your predecessor repeatedly referred to as the "misunderstanding" that led to the construction of the wall. Mrs. Belloni and her now deceased husband built the contested wall at an expense of over $25,000 after asking City zoning officials to visit the site, review their plans, and tell them whether their proposed wall could be legally built under the City's zoning ordinances. In 2006, Earl Thompson, a member of the City zoning office, did visit the site to review it and the Bellonis' plans. In testimony provided under oath in 2011 in the Staunton City General District Court (a copy of the transcript is attached, see pages 24-29), he testified that (1) he understood what the Bellonis wanted to build, (2) he told them that they could legally build the wall, (3) he intended for them to rely upon him, and (4) the wall that was ultimately constructed was consistent with the plans he had approved.

On November 21, 2007, your predecessor, John Glover, acknowledged in a letter to the Bellonis the role of the "misunderstanding" in the construction of the wall, but in response to their request for relief from the City's height restrictions, he cited the Virginia Supreme Court case of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). In that case, the Supreme Court of Virginia relied upon the language of Virginia Code § 15.2-2309(2) in concluding that a variance could be granted only to "avoid an unconstitutional result." At that time, the Code of Virginia specifically defined the type of "undue hardship" that could serve a predicate for a modification or variance as one "approaching confiscation." Mr. Glover told the Bellonis that the language of the statute and the *Cochran* case tied his hands and that it would make an appeal difficult.

Mr. Glover was prescient in part. The Board of Zoning Appeals (BZA) had no difficulty finding that the Bellonis had suffered an undue hardship, but certain of its members acknowledged that it might not be a sufficient hardship to mount the hurdle imposed by the *Cochran* decision and its ruling that the hardship must be one "approaching confiscation." Indeed, when the City appealed the case to Staunton City Circuit Court, Judge Irvine relied upon *Cochran* in reversing the BZA and rejecting the Bellonis' application for a variance. In rejecting the Bellonis' position, the Court held as follows:

> A review of the record shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals,* 267 VA. 756 (2004). Although property owners argued then and now, that the effect of the zoning ordinance if applied to their property interferes with *"all reasonable beneficial uses of the property, taken as a whole,* the Court finds that the BZA did not reach such a conclusion based on the evidence before it, nor is there evidence in the record of the BZA to support such a conclusion. Furthermore, the additional evidence that has been submitted to this Court does not support such a conclusion. In fact, the BZA acknowledged that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the law.

Glover v. Board of Zoning Appeals, Staunton Cir. Ct., Case No. CL08-51 (Belloni) (January 14, 2009) (Emphasis in original).

In fact, the property owners asserted and the BZA agreed that the Bellonis had suffered an undue hardship, however, it was not one that the Court could say that it was one "approaching confiscation" as required by Virginia Code § 15.2-2309(2).

As I am confident you are aware, effective July 1, 2009, the language of Virginia Code § 15.2-2309 was amended eliminating the limitation relied upon by the Supreme Court in *Cochran* and by the Circuit Court of the City of Staunton in *Glover v. BZA* when it issued its opinion on January 14, 2009. The change to the statute goes straight to the heart of this case and it renders the *Cochran* case irrelevant to the analysis, effectively overturning that decision. Now the law permits the granting of a modification or variance in cases that "will alleviate a clearly demonstrable hardship." It eliminates the two words that had followed that language and upon which the Supreme Court relied in *Cochran* – "approaching confiscation." This substantially

lowers the threshold for granting a variance and this case presents compelling facts for applying that lower threshold.

It should be noted that notwithstanding the 2009 amendments to state law, the City has not amended Section 18.200.040(3) of its Code. That section of the City Code now violates state law and is invalid to the extent that it retains the "*Cochran*" standard for granting a variance.

In this case, the Bellonis already convinced the BZA on one occasion that in the absence of a modification or variance, she will suffer a demonstrable and unnecessary hardship. There is ample evidence already in your file of the substantial sum spent by the Bellonis to build the wall, work that began in reliance upon guidance provided by City Zoning official Earl Thompson. Moreover, Mrs. Belloni will have to incur additional expense in order to modify or tear down the wall. (Estimates are attached).

Furthermore, Mrs. Belloni has already been subjected to a criminal prosecution initiated by your office and prosecuted by the City Commonwealth's Attorney for the alleged violation of this ordinance. That 2011 prosecution was dismissed for the City's dilatory pursuit of the Bellonis and upon a holding by the General District Court of the City of Staunton that the prosecution was barred by the statute of limitations. This criminal prosecution caused the Bellonis to incur thousands of additional dollars in expense.

Following the City's failed 2011 prosecution, Dr. and Mrs. Belloni heard nothing from the City for two years leading them to reasonably conclude that the City had abandoned the issue. Instead, one week following the death of her husband, Mrs. Belloni received a letter from the City, threatening another prosecution should she choose to repair damage recently caused to the wall by an inattentive truck driver who collided with the wall while texting. In response to that letter, Mrs. Belloni was afraid to repair the wall despite the availability of insurance proceeds for fear of further prosecution.

Once again, in March of this year, Mrs. Belloni received another letter threatening some unspecified action if the wall was not demolished or modified by May 14. Since that time, I have communicated with your office and with Mr. Victor Santos, an attorney retained by the City in connection this matter, in an attempt to open a dialogue in hopes of finding a compromise and avoiding further proceedings. Those overtures have been rejected and accordingly, I am now writing this letter on behalf of Mrs. Belloni in order to formally request a modification or variance.

I request that you find in writing the following:

(1) The strict application of the ordinance would produce undue hardship to Mrs. Belloni. The hardship in this instance is that demolition would render wasted the substantial expenditure already spent by Dr. and Mrs. Belloni to build the wall in reliance upon the guidance provided by Mr. Thompson. That hardship would be compounded by the additional cost of removal or modification.

(2) The hardship is not shared generally by other properties in the same zoning district and the same vicinity. In support of such a finding, I submit that there are no other property owners who have built structures in reliance upon a "misunderstanding" of the nature acknowledged by Mr. Glover and testified to by Mr. Thompson. The Bellonis are the only landowners to build a structure after seeking and receiving permission from a City official and this issue is not one shared generally by other properties in the district or vicinity. Moreover, neither the presence nor the height of a wall is a condition generally shared by other properties in the same vicinity.

(3) The authorization of the modification will not be of substantial detriment to adjacent property and the character of the zoning district will not be changed by granting the modification. In support of that finding, I submit that the wall has been in existence since 2007. It is an attractive wall built at great expense and with care by skilled craftsmen in a manner that compliments and does not detract from the character of the area. In support of that finding, the file you have contains petitions signed by more than 80 residents of the area. Moreover, this is evident from any visual inspection of the property.

I hope that you will let me know if you need additional information in order to begin the process of notifying adjoining property owners of the request for this modification and giving them an opportunity to respond. If I can be of any assistance or provide additional documentation from Mrs. Belloni, please let me know and I will gladly do so.

Mrs. Belloni loves Staunton and her home there. Although the home is broken into apartments at present, Mrs. Belloni keeps an apartment where she resides when she is in Staunton. She hopes to move to the home and take up permanent residence there. This wall was carefully planned by Mrs. Belloni and her late husband with loving care in order to make this beautiful historic house – located on a busy road – a home for them where they could peaceable enjoy the house and yard without excessive road noise. Unfortunately, Dr. Belloni died before this dream could become a reality, but Mrs. Belloni retains this dream for herself and for future generations.

Thank you for your consideration of this request.

Respectfully yours,

Mark D. Obenshain

MDO/jlh
HB262986.DOCX
Enclosures

cc: Victor M. Santos, Esquire (by e-mail and mail)
Mrs. Debra Chilton-Belloni (by e-mail)

BELLONI BZA APPEAL
EXHIBIT 2

STAUNTON™
VIRGINIA

May 30, 2014

Mr. Mark D. Obenshain, Esq.
Lenhart and Pettit
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

Dear Mr. Obenshain:

Based upon my review, it appears that the Staunton Zoning Administrator has not had and does not have the authority to grant a modification to provisions of the Staunton City Code. Even if it were assumed some authority existed otherwise, the matter of hardship already has been fully adjudicated, with the Staunton Circuit Court having ruled several years ago against the property owners' position and in favor of the City—and reversing the board of zoning appeals because the board of zoning appeals had acted contrary to law.

Even assuming that some limited aspects of the Staunton City Code merit some updating, as is often the ongoing challenge with all localities given the volume of recurring changes made by the General Assembly annually, we endeavor to read the City Code in light of any applicable changed provisions of the Virginia Code. The City Code provisions, I respectfully suggest, are not unlawful but simply have to be read accordingly in light of any applicable provisions of the Virginia Code. I express no view on your assertions about the effect of any subsequent changes to Section 15.2-2309, although I am not aware that any changes would purport to have retroactive effect or any effect as to what has been a continuing unlawful situation despite our patient efforts to work with the property owners.

In reaching this view about the lack of authority to make a modification, I have put aside any inquiry or consideration of what the property owner have asserted regarding the underlying circumstances, which already were considered by the circuit court. As you know, the City respectfully has continued to disagree with the property owner's assertions and characterizations. But, also, please remember that the board of zoning appeals had actually agreed with the Zoning Administrator's interpretation and application of the provisions of the City Code, and that determination by the board of zoning appeals apparently was not challenged by the property owners on appeal to the circuit court and, as well, not beyond the circuit court.

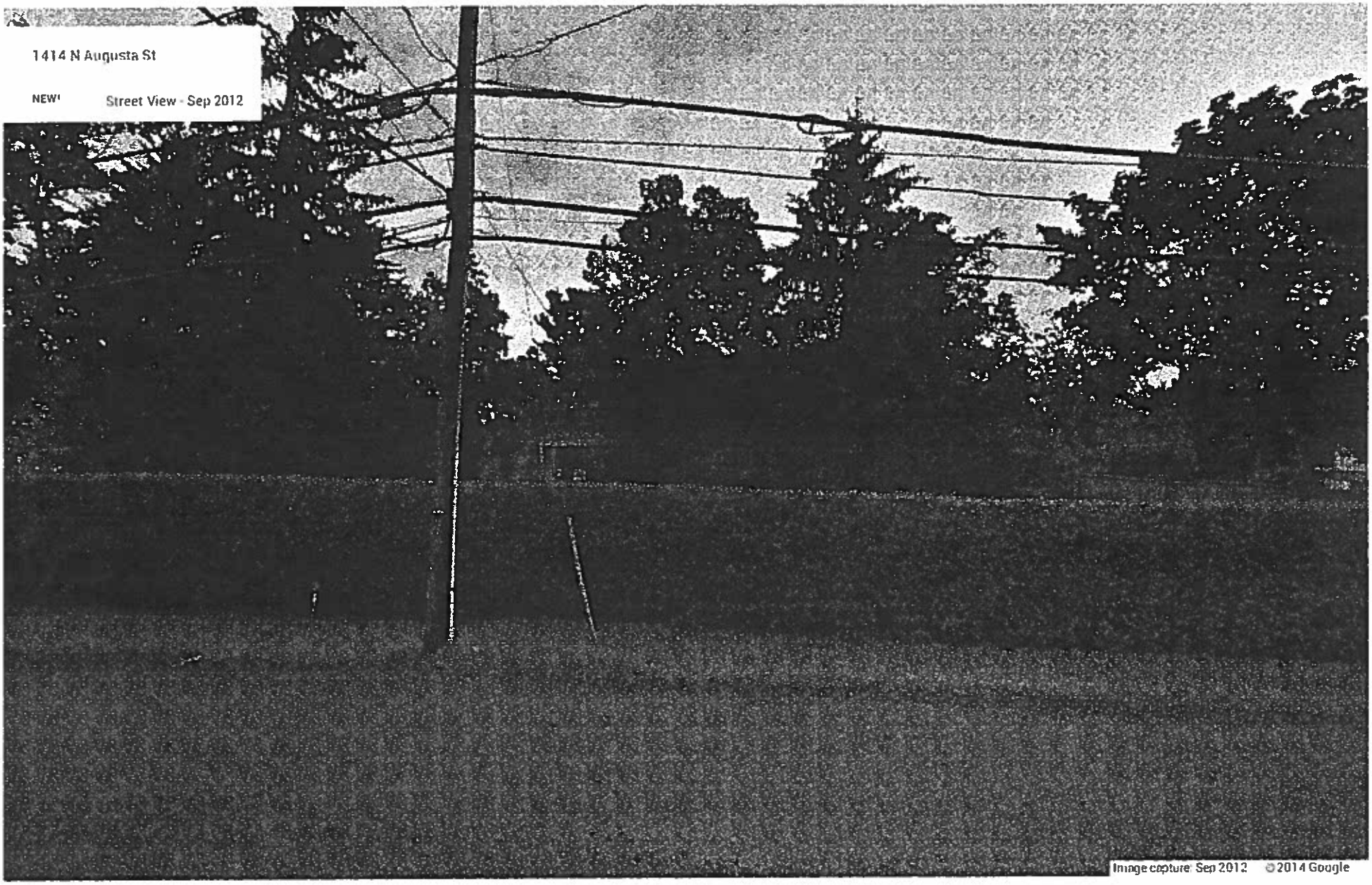
Sincerely,

Sharon E. Angle
Director of Planning/Zoning Administrator

c: Victor Santos, Esq.

116 W. BEVERLEY STREET
P.O. BOX 58
STAUNTON, VA 24402

BELLONI BZA APPEAL
EXHIBIT 3


1414 N Augusta St
NEW
Street View - Sep 2012
Image capture: Sep 2012 © 2014 Google

BELLONI BZA APPEAL
EXHIBIT 4

CITY OF STAUNTON
VIRGINIA

STAUNTON CITY COUNCIL
P.O. BOX 58
STAUNTON, VIRGINIA 24402-0058
(540) 332-3810

August 15, 2008

Dr. and Mrs. Frank Belloni
161 Seclusion Manor
Mineral, VA 23117

Dear Dr. and Mrs. Belloni:

Per your request of August 14, 2008, enclosed is a copy of the transcript of the BZA meeting of February 20, 2008.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Deborah A. Lane

Deborah A. Lane, MMC
Clerk of Council

TRANSCRIPT OF THE
BOARD OF ZONING APPEALS
MEETING/HEARING OF
WEDNESDAY, FEBRUARY 20, 2008.

DEBORAH LANE: Test one, two. Test one, two. Minutes of Staunton Board of Zoning Appeals, February 20, 2008.

OLIVIA WELSH: The Board of Zoning Appeals for the City of Staunton will come to order and, uh, we'll have a moment of prayer before we ever, uh, look at these minutes – because I think we have some problems with the past minutes. Just a moment please. Amen. Uh, everybody has a copy of the minutes – I haven't – I didn't get a packet until today, so I don't – and I think it's because I may have been gone. Uh, you all have some problems with the minutes – I know you, Mr. Vice Chairman, had told me that you wanted to get some things.

PAUL VAMES: Well, Madam Chairman, I went over my concerns with Debbie and some of it was grammatical – some of them was just stated in here the way it was quoted – so, of course we can't change those. I do have one question for Mr. Robertson. There's a term here that he had on his response, let me find it. On page 5, about three-fourths the way down, it says "he stated that he is not – it's not right to prosecute people when they don't know the law." Was it prosecute or persecute?

OLIVA WELSH: Or was it both?

RICHARD ROBERTSON: I would like to say both, yes, Madam Chairman, but uh it would have to be prosecute.

PAUL VAMES: It was? Okay.

RICHARD ROBERTSON: The point I was trying to make was, I think we all know and understand, and we understand the reason for it, even though it may not sound, uh, perfectly sound, but its that violating the law, you know, ignorance of the law is no excuse for violating the law. That was the point we were trying to make. Thank you.

PAUL VAMES: The other items I have I've addressed with Debbie and

OLIVIA WELSH: Mr. Smiley, did you have anything that you saw in the minutes:

NORMAN SMILEY: No ma'am.

OLIVIA WELSH: Alright, uh, good afternoon ladies and gentlemen. We'd like to welcome to the Board of Zoning Appeals for the City of Staunton. Uh, before we start this hearing, I need to tell you that Mr. Robertson has what's considered to be a conflict

of interest. He rents a garage, two garages, off of the people that are here asking us to overrule the City officials. And he has been told it would be in his best interest if he disqualified himself. Uh, I wish we would have known this in your all's packet that you gave us, anytime you have a matter like this, and I would say this to all Board members, if you think you've got a conflict of interest, we need to notify, you know, uh, me and the City of Staunton so that we are a neutral – stay as neutral as we can on something like this. And, uh, Mr. Robertson will abstain from any questioning, is that correct? Or, he will not be able to make any comments for the record on this. Mr. Robertson is appointed the same as each one of us by the Circuit Court Judge, Judge Humes Franklin, and uh, he does not serve at our pleasure, any Board members pleasure, he serves at the Judge's pleasure. So, Mr. Robertson apparently has made that decision that he wanted to disqualify himself. Its not that I asked him to do that.

DEBORAH LANE: Mrs. Welsh, uh, I need a motion for the minutes as amended.

OLIVIA WELSH: Oh, I'm sorry. Okay, can I have a motion for

WILLARD KEELING: Move the approval of the minutes.

OLIVIA WELSH: Second?

RICHARD ROBERTSON: Second.

OLIVIA WELSH: All in favor say aye.

NORMAN SMILEY, RICHARD ROBERTSON, PAUL VAMES, WILLARD KEELING; OLIVIA WELSH (in unison). Aye.

OLIVIA WELSH: The motion carries 5-0.

DEBORAH LANE: Thank you.

OLIVIA WELSH: Okay, I'm sorry.

DEBORAH LANE: That's alright.

OLIVIA WELSH: Uh, we're here today, uh, uh, in regards to a wall that has been built that, uh, does not meet the City Code in the City of Staunton, and uh, I believe Mr. Chap Goodwin is here to represent the people that own this historic home. So, I'm gonna ask everybody in here, anybody can speak, but I'm gonna want you to come to podium, state your name and address for the record. You cannot speak from the audience. Mr. Goodwin.

DOUGLAS GUYNN: Madam Chairman, just as a courtesy to the Board and uh Mr. Goodwin, do you want the City to exclude any of its witnesses during this proceeding?

OLIVIA WELSH: No, it doesn't bother - unless it bothers him – it doesn't bother us.

DOUGLAS GUYNN: Okay.

OLIVIA WELSH: Or me – does it bother anybody that witnesses are in here?

PAUL VAMES: No.

OLIVIA WELSH: No? Mr.

CHAP GOODWIN: Good afternoon.

OLIVIA WELSH: Good afternoon Mr. Goodwin.

CHAP GOODWIN: I appreciate the snow that you all brought in honor of the occasion.

OLIVIA WELSH: Since you've been in Florida, right?

CHAP GOODWIN: It's warmer there.

OLIVIA WELSH: And I've been in South America, so it was warm there.

CHAP GOODWIN: We're here today to ask for a variance to City Code for the, uh, construction of a wall located at the Belloni's home, Chilton Hall, on Augusta Street. Uh, Dr. Belloni and his wife are here. They came to Staunton, uh, have seen this home a number of times, found Staunton to be a very charming and welcoming community and decided to make their home here. They purchased, uh, a historically significant home on Augusta Street and, uh,

OLIVIA WELSH: Mr. uh, may I interrupt you for just a minute?

CHAP GOODWIN: Sure.

OLIVIA WELSH: This, this is, you're talking about the variance. What about whether John made the right decision or not.

PAUL VAMES: Item A.

CHAP GOODWIN: The – both items will be addressed at the same time. If you all want to do it differently, I'm fine. Do you want to address them separately?

PAUL VAMES: We have to.

CHAP GOODWIN: Do you want to address them separately?

OLIVIA WELSH: Mr. City Attorney, do we need to do it differently, or can we just do it all at one time?

DOUGLAS GUYNN: It's the pleasure of the Board, Madam Chairman. That's the position of the City. Whether it's more helpful to take it together or one at a time, they are potentially distinctive items involving distinctively different inquiries by the Board of Zoning Appeals, but if it would expedite things, and the Board wants to do them together, the City has no objection. We realize you are very busy.

WILLARD KEELING: Its gonna take two votes, right? So maybe if we do them separately would be less confusion.

OLIVIA WELSH: What do you all want to do. Its gonna slow this thing down, but that's okay, I mean

CHAP GOODWIN: I would suggest that the, uh, our presentation will be the same for both, so we could either duplicate it, or we can, uh, I have no problem with taking two separate votes.

OLIVIA WELSH: Do we have to take two separate votes Mr. Guynn?

DOUGLAS GUYNN: The City's position is that there are two separate matters, and uh, require or need to have two separate votes by the Board of Zoning Appeals, uh, either the applicant or the City might decide to appeal one but not the other, and your votes might be different in one than in the other, uh, I'm sorry, I don't mean to complicate it, but I think they are distinctive.

OLIVIA WELSH: We'll do them separately Mr.

CHAP GOODWIN: Do you want to deal with the uh

OLIVIA WELSH: Number A.

CHAP GOODWIN: Alright, the reviewal, the review of the

OLIVIA WELSH: Mr. Glover?

CHAP GOODWIN: Mr. Glover's decision.

OLIVIA WELSH: Um.

CHAP GOODWIN: I think that is a slight simpler issue and I think that the, uh, facts are the same, uh, the issue would be that we believe that that, uh, wall is grandfathered. Uh, there's been a hedge there, probably since the turn of the century when the house was built. Uh, the wall is in at or about the same location as the, uh, uh, hedge. The position of, of, of uh the Belloni's would be that they contacted the City, got

authorization to install that wall, were told they did not need a building permit, and to flat go at it as far as building the wall.

OLIVIA WELSH: Who told them that Mr. Goodwin?

CHAP GOODWIN: That would be, uh, Earl Thompson.

OLIVIA WELSH: Earl Thompson, okay.

CHAP GOODWIN: Uh, the uh, issue of the, uh, grandfathered clause is that because that was an existing obstruction, if you will, at the street, uh, to replace it with a wall does not violate the City Code because the obstruction was already grandfathered.

OLIVIA WELSH: Uh huh.

CHAP GOODWIN: The house was built around uh 1900. We haven't been able to figure out exactly the date of it, but they're working on that. Uh, they were not told ahead of time they could not build the wall or that it violated anything. They were told after the wall was constructed. Now, uh, I will acknowledge that the point in time when they were notified, the brick columns were not complete. Uh, they were completed after they were notified, but the wall itself was there. Uh, the bricks were on site, the mortar was on site, the contractor was, uh, in route, and this whole process had been going on for about, uh, uh 6 weeks, so. That's, I mean very simply on the first issue, that's our uh, uh position that the uh wall is grandfathered.

OLIVIA WELSH: Uh, Mr. Thompson's position with the City is inspector? Am I correct?

CHAP GOODWIN: Yes, yes.

OLIVIA WELSH: Okay.

CHAP GOODWIN: And there, in the factual situation, there are several items that the Belloni's contest – they did, uh send a letter to each one of you all – I think they hand delivered it to each of you. They explained their issues. Uh, they did not receive from Tim or anybody else any instruction that they were in violation, uh, of the statute, that they could not build a wall there. And I do believe that it was Tim who had mentioned to them at a later date that the wall was probably grandfathered though that was also the position, I believe, that Earl Thompson had given them. But, in any event, the uh, the position as to the wrong decision is that the uh, wall is grandfathered. Now, I do have, for the Board's view, photographs of the uh, house that show the uh, hedge, show the wall, show the historical home, and I would like to pass that around for you all to look at.

OLIVIA WELSH: That'll be fine. I also should say that the Board, most of them, have been out there. I know that I've been there two or three times, myself. I didn't go on the field trip today. Some of you went on the field trip, didn't you?

NORMAN SMILEY: No, but I went there last night.

OLIVIA WELSH: Yeah.

CHAP GOODWIN: There's one other item that the Belloni's felt, and I indicated that they had come to Staunton, felt very at home here, felt very welcomed here, and felt very comfortable with the City and its uh, uh, administration and staff. Its posted right outside on the wall here, its posted upstairs on the well, its posted in the Zoning Department, and it's the uh, letter of welcome to people who come to City Hall – it's called the Customer Service Commitment. This is the City of Staunton's commitment to providing prompt responsive, courteous customer service. We will respond promptly, we will listen carefully. We'll not make you wait longer than necessary. We'll provide you with consistently reliable service and information. We will respond and not give you the run around when you call. We'll listen to any complaint, do what we can do make things right. We'll do what we can to meet your special needs. We'll be friendly and professional in all our dealings with you. And that was something that was very important to each, to the Belloni's when they came to Staunton, and they felt that way and still feel that way. And they appreciate your, uh, attention to this and your cooperation in looking at it. And I brought one of these for each one of

OLIVIA WELSH: And I hope they will still, I know on behalf of the Zoning Board, I can say I hope they still feel welcome in this City. Uh, because you certainly are welcome. Uh, Staunton has a history of, of, of being a very fine historic old town and the people in this City are usually very, very nice.

CHAP GOODWIN: I don't know if Dr. Belloni wanted to address the issue of the, uh, grandfathered wall or do you want to wait and discuss the issue with the variance?

DOUGLAS GUYNN: Madam Chairman, on behalf of the City, could I get a copy of what has been delivered, apparently, to the Board of Zoning Appeals members last week. I have not received it – did you send that to my office Mr. Goodwin?

CHAP GOODWIN: I did not send it at all – the Belloni's sent it – and I got one this morning.

DOUGLAS GUYNN: No one provided it to me, I'm being handed it for the first time today.

OLIVIA WELSH: Mr. Guynn, do you want us to give you a little time to look this over? I'll let you have my copy.

DOUGLAS GUYNN: I have, I have a copy now, but I'd like to

OLIVIA WELSH: I don't know whether you've got it all Mr. Guynn.

DOUGLAS GUYNN: Is there something more than just two pages?

OLIVIA WELSH: Well, you know, I mean you know, I need to give, I need to let you, Mr. Roberts, can I have – can he have your copy since you can't? And then give it back to you?

RICHARD ROBERTSON: Yeah, (inaudible).

OLIVIA WELSH: Do you have any notes on it? If you do, I'll be glad to let him have mine.

RICHARD ROBERTSON: Nooooo.

DOUGLAS GUYNN: All I'm asking for is the same opportunity to have what the BZA members have received.

OLIVIA WELSH: You are sure – John, do you want to come here and get this? Is your whole copy there Paul?

PAUL VAMES: Yes it is.

OLIVIA WELSH: Let, and we're gonna give Mr. Guynn a chance to look at this, uh, so he'll know what's going on. This was delivered to me day before yesterday.

CHAP GOODWIN: Mr. Guynn, just for your, uh, information. I received my copy uh yesterday, uh, I did not, in fact, receive a copy of a notice of this hearing, nor did my clients. It apparently went to a different address. We found out about the hearing last week. I was on vacation and got a copy from the City. They, uh, made us a copy, which I picked up, had somebody in my office pick up on Friday, and I received on Tuesday when I came back into the office because I was gone for two weeks.

JOHN GLOVER: Apparently there was some issue with the mail. We mailed all the packets at once. In fact, I think that the Chairman, the Chairperson did not receive her packet either, so

OLIVIA WELSH: I just got one today.

JOHN GLOVER: Yeah, I don't know what happened to them, but they were all mailed at the same time.

CHAP GOODWIN: There was apparently a change in the date of the meeting, and uh, when that occurred, I was not aware that it was rescheduled, so I did not get a

notice, and when I contacted you on uh Thursday or Friday, that was the first I knew that the hearing was going to be held.

DOUGLAS GUYNN: Madam Chairman, I've quickly reviewed what's just been handed to me.

OLIVIA WELSH: Do you need more time?

DOUGLAS GUYNN: No, I don't want to, uh, hold up these proceedings. On behalf of the City, I respectfully object to the introduction of evidence or consideration in any way by the Board of Zoning Appeals of what appears to be a petition. It is not material and its not relevant to a proper inquiry either under the appeal or under the request for a variance, so we respectfully object to any consideration of that petition. That's simply a matter of popular opinion, and it is not relevant under the case law or the statutory law.

OLIVIA WELSH: Mr. Guynn, I'm, I, I mean, you know, it, it may not be evidence, but these people, the people, I'm sure these are people that surround that neighborhood because as you all know, that could be zoned, I mean that's zoned for something besides housing right now, and you could put a bunch of apartments out there, or you could put a half way house or anything the way its zoned now – and I think that was given, that petition was given, and I'm not sure of this, but I think it was given because the people in that neighborhood got excited. Now, we don't, I mean the petitions, you know, we understand what you're saying, but I think they just wanted us to know that there were people out there that were not opposing the Bellini's wall. Is it Bellini or Belloni? Belloni.

CHAP GOODWIN: Belloni.

OLIVIA WELSH: I think that that's why that was given to us, uh, I believe it was wasn't it Mr.?

CHAP GOODWIN: That's accurate, and we prepared a tax map that shows in orange where the neighbors who signed that petition uh live. The only two neighbors that we're aware of that did not sign it don't oppose it, but they work for the City of Staunton and chose not to sign a petition in this instance. Uh, there are 81 signatures on that petition, and it was my intention as part of the variance to read those individuals. I understand that Mr. Guynn feels like its not important.

DOUGLAS GUYNN: Its not a matter that its not important, Madam Chairman, its under the controlling law, its not material and its not probative of any material fact – meaning that its not relevant, and the City respectfully objects to it – even if you had 2,000 names, the City's position would be the same.

PAUL VAMES: Mr. Guynn, if someone from the audience chooses to speak to this and is not directly related to the item, but they have an interest in it, are they allowed to speak?

DOUGLAS GUYNN: It depends on what they have to offer.

PAUL VAMES: Well, if its related to what we're discussing here, aren't they given that opportunity?

DOUGLAS GUYNN: Well, when you, when you use the term related, it depends on whether or not its related to a material issue in the case, and whether or not it tends to prove that something is more or less than likely on a material issue under the controlling law as to both the application, the interpretation of the zoning administrator, and under a request for a variance.

CHAP GOODWIN: I would also submit that in the 30 years that I've been doing this, when letters come in from individuals who are not able to be at the meeting, they, those letters are read into the record and the uh, the counsel and or the Board of Zoning Appeals, those items are made available to them, and I would submit that these are individuals who offered an opinion on this, who could have come and spoken, um, and that they should be, uh, recognized.

OLIVIA WELSH: Mr. Guynn, you know, this puts the Zoning Board – I, I've always allowed people to speak and

DOUGLAS GUYNN: Well, I'm not, I realize the Board may allow them to speak, but I want the record to be – that the City has preserved its objection.

OLIVIA WELSH: Oh, that's okay because I just think, uh, to be a part of government, that the people that pay the taxes should be allowed to speak, but I understand and I take your point, and Debbie, you need to make a note that the City is objecting, but I'm gonna allow the names to be read and the people to speak if the Board agrees with that.

CHAP GOODWIN: There was one letter in the packet that was submitted from one of the neighbors. We have one more letter that arrived after the fact, and I suspect, subject to the same objection, I would like to submit that letter to the Board as well.

OLIVIA WELSH: Do you have a copy that you could give Mr. Guynn too.

CHAP GOODWIN: I do.

OLIVIA WELSH: Please, let him look at it.

DEBORAH LANE: Chap, do you have another one? Chap?

OLIVIA WELSH: Now, do what now?

DOUGLAS GUYNN: Well, really good thing, the handwriting is a lot better than mine. Just the same objection, Madam Chairman. But the hand writing

OLIVIA WELSH: And make sure Mrs. Sutton that you make note of that – to protect his point. Is that right Mr. Guynn? Is that what they say in a court of law – protect my

DOUGLAS GUYNN: That's close enough, yes ma'am.

OLIVIA WELSH: Okay. Who is that? What's that name?

PAUL VAMES: I'm not sure. Go ahead and read it.

OLIVIA WELSH: Okay, go ahead and read that Chap.

CHAP GOODWIN: Okay. You all took my last copy.

OLIVIA WELSH: Here, you can have mine.

DOUGLAS GUYNN: Chap, (inaudible).

OLIVIA WELSH: You can't speak Barton, no you can't speak from the audience. You're gonna have to get up here and state your name for the record.

CHAP GOODWIN: "To the Board of Zoning Appeals, February 18, 2008. While at Chilton Hall, uh 1403 N. Augusta Street was constructed after permission was granted, uh, it says by the Board of Zoning, why is it now in violation of code? Aesthetically appears to be in good taste. We are in support of the wall to remain."

OLIVIA WELSH: And what's, what's the name on that?

CHAP GOODWIN: Uh, I was going to hope that Dr. Belloni could tell us that because I couldn't quite read it.

OLIVIA WELSH: Well, I'm not gonna let him speak until he gets up to the podium, states his name and address.

CHAP GOODWIN: The name is John Giancarlo Gisali (spelling?)

OLIVIA WELSH: Oh, okay, then, you didn't do bad.

CHAP GOODWIN: I apologize, I couldn't – could not read it.

OLIVIA WELSH: Alright. Now, now this is for your (Item) a – right?

CHAP GOODWIN: Right.

OLIVIA WELSH: Okay. Now, do you have anything else you want to say?

CHAP GOODWIN: Did you want to speak?

OLIVIA WELSH: Yes, Mr. – Dr. Belloni, if you would get up and state your name and address for the record please.

FRANK BELLONI: My name is Frank Belloni and I live at 1403 North Augusta Street in Staunton – otherwise known as Chilton Hall. I, I've asked for permission to speak because I, I want to respond to the objection that the City Attorney has made to the fact that these petitions are not relevant, and I, and I'm gonna, I'm gonna argue here just very briefly referring very specifically to the code. And, I'm referring to uh Part B of the code that says uh the, the uh the construction of the wall unquestionably contributes significant to our enjoyment of the use of our property because I know that, that the zoning administrator's argue that one objection to, uh, to the, the wall, and the reason that they that in is that the people, the public has a right to the enjoyment of Chilton Hall – to be able to view the property, and, and that the wall obstructs their view of the property. So, its suggesting that if one person can complain about the fact that the wall obstructs their ability to enjoy the presence of this property, historical property, surely the fact that you have uh, uh, surrounding neighbors who say that the way does not, in any way, inhibit their enjoyment of the wall as stated by the code, then I think that it, it is relevant – I mean, if we had 30 or 60 or 160 or 500 as the Attorney suggested, complaining about the wall because it obstructed their view of the house, I think that would be considered relevant and that would certainly be, uh, uh, an argument that, that the zoning administrator would make that you're obstructing the ability of people to see, to view this wall and they have a right to, to uh, enjoy this property. Thank you very much.

OLIVIA WELSH: Thank you Dr. Belloni. Uh, is there anyone else here that would like to speak in regards to Item a? Is there anyone that, uh, would like to say anything opposing this in regards to?

JOHN GLOVER: Yes, Madam Chairman., I would uh, ask that, uh, Tim Hartless to come up and, and present the evidence that we have and the exhibits and explain some information in your packets.

OLIVIA WELSH: Okay, Mr. Hartless, please. Your name and address for the record – and your position with the City.

TIM HARTLESS: Uh, I'm Tim Hartless, I'm the zoning inspector for the City of Staunton, and I live at 826 Lammermoor Drive. Uh, my first contact with the Belloni's, Dr. Belloni, uh, he contacted our office in the late summer of 2006. It was either late August or early September of 2006, uh, at our office by phone. Uh, I was in a meeting at that time, uh, so one of our secretary's uh took the message – a handwritten message and handed it to me after the meeting was over. Uh, the meeting ended late in the afternoon,

so I called Dr. Belloni back the following morning. Uh, he indicated at that time that he was interested in constructing, uh, a sound barrier, uh, I suggested that we meet there at his home so I could get a better idea of what he was proposing. Uh, I told him that I would be out that afternoon doing inspections, and I, uh, would be happy to stop by and talk with him, and he indicated that he would be home that afternoon, uh, so I did do that. Uh, arrived at his home that afternoon, uh, knocked on the door, he stepped out on the porch, it was a very warm afternoon, uh, we walked around the property. He indicated the area where he would like to build this sound barrier, uh, it was along N. Augusta Street, and then down along Ridgeview Road. Uh, I responded that, uh, we would consider this barrier to be a wall. He indicated that he would build it more than likely from cinder blocks, but from some kind of masonry material. Uh, I told him the City Code would prohibit a wall taller than 3 ½' in a front yard and I explained that since he did live on the corner of N. Augusta Street and Ridgeview Road, that we would consider uh, his property, to have two front yards – because he fronted on two separate City streets. Uh, at that time his, his response was that a 3 ½' tall wall would not function very well as a sound barrier. Uh, and we left the conversation at that, uh, went back to my office. Over the next week, he did contact me two more times by telephone, uh, requesting some information about uh, the possibility of filing a request for a variance or an appeal. Uh, I explained the process, uh, he asked for my opinion upon whether an appeal might be granted and I explained to him that he would have to prove that he had a hardship, uh not of his own creating, and it would not be a shared hardship – it was unique to his specific property. Uh, at that time he determined that he would not file a request for a variance or an appeal, and that was the end of my, of my communication with him at that time.

OLIVIA WELSH: Is that your microphone? It's making a racket.

TIM HARTLESS: Uh, about six months later while I was out of town at a conference, uh, apparently he did contact our office again, uh, and I think Mr. Thompson is here, and he'll address that later on. Uh, my next communication with Dr. Belloni was in November, 2007. Uh, we received a complaint with regard to a uh, to the height and location of a wall at 1403 N. Augusta St.

OLIVIA WELSH: How many complaints did you get Mr. Hartless? More than one? Cause my packet says complaints.

JOHN GLOVER: We, we, you know, based on the last meeting, we consider any inquiry a complaint. So we received complaints and inquiries from several individuals.

OLIVIA WELSH: You, you received complaints about this wall from several individuals?

JOHN GLOVER: We had several inquiries, which we treat as a complaint, and we would go investigate to see if there is indeed a violation.

OLIVIA WELSH: Were they in the City of Staunton?

JOHN GLOVER: Yes ma'am.

OLIVIA WELSH: Were they over there in that area?

JOHN GLOVER: I don't know, I didn't, I didn't get their addresses – I'm not sure.

OLIVIA WELSH: Go ahead Mr. Hartless.

TIM HARTLESS: We did receive complaints in November of 2007. Uh, we completed a notice of violation and Mr. Thompson and I hand delivered that notice of violation on November 21st. It's the same day that the letter is address, or is uh dated. It was November 21st, uh, we knocked on the door and the Belloni's invited us in, and we stood there in their, in their entryway and uh, handed them the notice. They asked us what the problem was. Uh, we explained again about the 3 ½' height limitation in a front yard, and uh, they, they, Dr. Belloni asked why he was not made aware of this, this 3 ½' limitation. And at that time, uh, we did tell him that I had been there on site, I had talked to him, both in person and by telephone. Uh, he should have been aware of the 3 ½' uh limitation. Um, there was some discussion between him and Mr. Thompson about apparently some miscommunication when they, when they spoke, Earl will talk about that later. And we left at that time. That was the end of my communication with the Belloni's.

JOHN GLOVER: Tim, Tim, could you, could you talk, talk, speak to the uh condition or the completion of the wall when you, when you delivered the notice? I think.

TIM HARTLESS: At the time that we delivered the notice, the front portion of the wall, the actual sections of the wall, were near completion. There were one or maybe two courses, uh, short of completion. At that time, none of the, the brick posts had been constructed. And on the side of the property, on the Ridgeview Road side of the property, uh a footer had been poured and there was one, maybe two courses of block laid. I noticed because when I walked up to the front door, I stepped over the cinder block section of wall and it wasn't more than 6" from the height of the ground.

OLIVIA WELSH: Mr. Hartless, uh, Mr. Smiley wants to ask you a question.

NORMAN SMILEY: Help me, help me with the timing here. You're saying that you received a message to call the Belloni's in either August or September, 06?

TIM HARTLESS: That's correct.

NORMAN SMILEY: And the following day, you made contact, contact?

TIM HARTLESS: That's correct.

NORMAN SMILEY: On, you did that by the phone and then that afternoon you met with Dr. Belloni?

TIM HARTLESS: Yes sir. Uh, that was in the summer of 2006 – August, early September.

NORMAN SMILEY: And your notice of violation was delivered in November?

TIM HARTLESS: November, 2007.

NORMAN SMILEY: The, the reason I'm confused, our packet says that was in September.

TIM HARTLESS: The notice of violation is dated November 21st, I believe.

JOHN GLOVER: No, its September 20th – it was in the packet.

NORMAN SMILEY: So, my question is, Mr. Hartless, from August or September 06, you were never again in contact until you delivered the violation in September?

TIM HARTLESS: That's correct, when we received the complaint, we delivered the notice of violation. Uh, from 2006 when I spoke with him in August or September to that point, I had no more communication with him, other than the two phone calls shortly after our meeting in person.

NORMAN SMILEY: So, our communication was solely with Dr. Belloni?

TIM HARTLESS: Yes sir, that's correct.

NORMAN SMILEY: Alright.

OLIVIA WELSH: Anybody else?

JOHN GLOVER: Yeah, I uh – okay, I'm sorry.

OLIVIA WELSH: Oh, go ahead, go ahead.

JOHN GLOVER: I just want Tim to finish. I want you to walk them through the items contained in the packet if you would before we move on to uh, Mr. Thompson and Ms. Burke to comment on their interactions.

TIM HARTLESS: Sure. Uh, in your packet there are some exhibits, um, I've labeled them. The first one we'll look at is, uh, labeled Map 1. Its right behind the photographs. This is a map showing the location of the property, 1403 N. Augusta Street. Its located on the corner of N. Augusta and Ridgeview Rd. I have indicated three of the

four property corners and labeled them Pin 1, Pin 2 and Pin 3. Uh, this coincides with the way I've labeled the pins in the photographs that we'll review. If you'll look at photograph #1, I've, I've labeled all the photographs in the lower right hand corner, and we're looking at photo 1. This is a, a view of the property along N. Augusta St. I'm standing at the corner of Ridgeview Rd. and N. Augusta looking north. Uh, I've indicated in #2 at the bottom of the photograph, Pin #1 is located underneath of the hedge. I've indicated it with an arrow, its under the very edge of that hedge at the far corner of the property. Um, I've also indicated the distance that the wall sets from the property line, uh, on the Ridgeview Rd./N. Augusta St. side, uh, it is approximately 9' front the property line. At the far end where Pin 1 is located, its about 7' from the property line.

OLIVIA WELSH: You know, Mr. Hartless, the hedge almost covers the wall. I can't understand why that wall is such a big problem.

TIM HARTLESS: At that location, the hedge, it appears that the wall is not as tall, but in reality, the hedge is actually much higher at that end of the property than it is down here at the Ridgeview Rd. side of the property. If you'll look at photograph #2, this is the same view from the opposite direction. I'm standing at the other end of the property looking south down N. Augusta St.

OLIVIA WELSH: That's on 2?

TIM HARTLESS: Photograph #2.

OLIVIA WELSH: Okay. Mr. Guynn, do you have these?

DOUGLAS GUYNN: Yes ma'am. Okay, thank you.

TIM HARTLESS: The pin is located underneath the hedge. There's a, a ribbon there on the hedge that marks where the pin placement is. Uh, and it's basically the same view – its at this end of the property its located approximately 7' from the property line at the far end its located approximately 9' from the property line. If you'll look at

OLIVIA WELSH: When I was on the transportation board, we used walls for sound and I notice where this is right out on the street, and I know, at least 5 years ago, there was probably, uh, 1,000 to 1,300 cars a day on that road. I don't know how many is on there now. I know I always wondered why the City didn't put a "no thru" sign for trucks that come down that street roaring down that street. Because they could do that – VDOT would do that for them. Uh, because it makes a racket, uh.

PAUL VAMES: Mr. Hartless, let me ask you a question here. Mr. Glover. What is the uh, if it was something there besides a wall – let's say that the wall was in code 3 ½' – how far would it need to be off the property line?

JOHN GLOVER: It could be right on the, on the edge of the property line, uh, you know, right up to the property line if it was within the proposed, you know, the allowed height. Uh, except, for obviously in the corner, there are special restrictions in that corner of that triangle that makes up the corner – I'm sure you're familiar with that – and there it's a lot, its more restrictive in that corner area than it would be generally across the front yards.

PAUL VAMES: So, the 7 or 9' really is not an issue? It just helps us locate the wall, right?

TIM HARTLESS: That's correct.

PAUL VAMES: Okay, thank you.

WILLARD KEELING: May I ask a question?

OLIVIA WELSH: Sure, Mr. uh Keeling.

WILLARD KEELING: I reckon its an appropriate time while we're looking at photograph #1, I think Mr. Goodwin, when he mentioned the, uh, pre-existing hedge being, uh, uh, a cause for the wall to be grandfathered, uh, could someone speak to that? I don't know whether Mr. Hartless or Mr. Glover would do that, but, uh, is there a, uh, code, or anyway that, you know, the hedge would grandfather a wall?

JOHN GLOVER: I can, I can speak to that, Mr. Robertson, um, Mr. Keeling, um. Um, I was going to at the end of the briefing from Mr. Hartless, I was going to speak to that. Uh, the application before us appeals basically Section 18.120 of the city zoning code, which refers to walls and front yards and fences and such. Uh, the only arguments or information I've heard challenging that interpretation are to the non-conformity of the wall. The City code actually has a specific section that speaks to that – its Section 18.190.020, uh, and I can read that to you. "A non-conforming building or structure shall not be added to or enlarged in any manner unless said building or structure, including additions and enlargements, is made to conform to all the, all of the regulations of the district in which it is located." Now, it goes on and on about some specifics, but that's the general that applies in this case. There are other specific issues that apply to parking and, and other types of things. Uh, so, if their challenge is that that's a non-conforming, uh, that the shrub, that the hedge is non-conforming, I have two issues with that. Its obvious this wall's much larger, and it, its much larger than the shrub that existed, which would be an enlargement or adding to the non-conformity. Plus, the, there's the issue of materially impeding vision. Uh, obviously the wall, a masonry wall is going to impede vision much more than a hedge would. Uh, especially, you know, the hedge in some places is not in real good shape. Others it's better, you know. But, but, you know, it's a lot more solid than a fence. Uh, you can see from the exhibits also that we gave out that the wall does, you know, rise above the hedge in many places, and in some places, there was no hedge. Uh, there's one, there's one of your pictures, and on a field trip, it was pointed out to you that there used to be a, a driveway entrance at one point that was, uh,

done away with, uh, the wall was put in that place, and, and uh trees were actually planted in that area also, and that's pretty obvious from the exhibits. Uh,

OLIVIA WELSH: Well, this picture on page 6, that whole front there, Mr. Glover, that hedge is there – and it practically covers that whole one side.

JOHN GLOVER: If you look at all, all of the pictures, Madam Chairman, you'll see that in general the, there, I don't deny that there may be spots where they, where that's, the hedge is close to the same height, but its hard to argue that a hedge is more transparent than a, I mean a wall is more, as transparent as a hedge. I mean it's a solid masonry wall.

OLIVIA WELSH: I agree in the winter time, when there's no leaves on there.

WILLARD KEELING: I reckon my biggest question was about the uh grandfathering of a pre-existing, uh, structural, or hedge, or whatever it was. Thank you.

OLIVIA WELSH: Did you get your answer?

JOHN GLOVER: Does that answer your question? I hope so.

OLIVIA WELSH: Anybody else have any questions before he finishes – you got some more you got to present, right? Go ahead Mr. Hartless.

TIM HARTLESS: Okay, uh, if you'll look at photograph #3, that is a view of the property from – it goes from the intersection of Ridgeview Rd and N. Augusta. This time we're looking down, uh, along Ridgeview Rd. Uh, you can just see the edge of the, of the street there – I've marked it in red. Uh, you, we're looking into towards the location of pin3. Pin 3 is – I didn't mark it on this photograph because there's several trees and part of a hedge in the way. Uh, but this wall along Ridgeview Rd., the wall is approximately 6' from the property line. Uh, the next photograph is, is the same, same side of the property – the Ridgeview Rd. side looking from the opposite direction. We're now looking towards N. Augusta St. from pin 3 towards pin #2. The next photograph, this photograph is, is a picture of me standing in front of the wall. Uh, I took this photograph to give you a, an impression of the size of the wall. Uh, its approximately 7' tall in this, in this location.

JOHN GLOVER: How tall are you Mr. Hartless?

TIM HARTLESS: I'm 6'4" tall – with my hat on I'm about 6'5", and as you see, the wall is, is at least 6" taller than I am.

OLIVIA WELSH: (Inaudible.)

TIM HARTLESS: And then, the final photograph is a, of a view of the property from the other side of N. Augusta St. I'm standing in front of, uh, Kings Daughters

Nursing Home when I took this photograph, and uh, its just to give you an idea of what the wall looks like as your traveling north of N. Augusta St.

JOHN GLOVER: Is that all you have Mr. Hartless?

TIM HARTLESS: That's all I've prepared.

JOHN GLOVER: Okay.

OLIVIA WELSH: Thank you Mr. Hartless – go ahead.

JOHN GLOVER: I'd also like to have Ms. Sherry Burke, who works in our office to come up and speak for a minute just to reinforce Mr. Hartless' testimony about, you know, him meeting with Dr. Belloni.

CHAP GOODWIN: (Inaudible.)

OLIVIA WELSH: Mr. Hartless, you come back there and tell them when you took those photographs.

TIM HARTLESS: These photographs were taken uh about a month ago in preparation for creating this packet for this meeting.

OLIVIA WELSH: Thank you. That would have been December – no, January, right?

TIM HARTLESS: That's correct, they were taken, uh,

OLIVIA WELSH: January 08.

TIM HARTLESS: At the end of January, 08.

OLIVIA WELSH: End of January 08 Mr. – alright Ms. Burke. State your name and address and your position with the City.

SHERRY BURKE: Sherry Burke, I live at 205 Foxhill Place and I'm the department secretary.

OLIVIA WELSH: Alright, thank you.

JOHN GLOVER: Just speak to, you know, your familiarization with Mr. Hartless, you know, his, his inspector, his inspection, or visit to the property.

SHERRY BURKE: Okay, it was, I remember it was a warm day, uh, Dr. Belloni had called and wanted to have the zoning administrator come out and tell him what he could. He wanted to build a sound barrier wall. Tim was in a meeting with uh two other

department people, so I took the message. Did take it on a piece of scrap paper – did not take it on a, a pad that would hold the note for me. Uh, when I gave it to him, called him the next day. When Tim went out, he came back, and I asked him, what, what does he want to do. He said, he wants to build a sound barrier wall. I said, well, you know, what'd ya tell him? He said, 3 ½', but he didn't, he recommended it would not work because of the high level of traffic that would come across that road.

OLIVIA WELSH: That was Dr. Belloni? Right?

SHERRY BURKE: Tim went out

OLIVIA WELSH: 3 ½' that 3 ½' would not work.

SHERRY BURKE: No, Tim told him. Mr. Hartless told him that 3 ½' would not deter any of the traffic because it was such a high volume.

OLIVIA WELSH: Yes, okay. Alright. Go ahead.

SHERRY BURKE: Okay, and I did have a few contacts with uh Dr. Belloni because uh, when he would call in, after 3 or 4 calls I remember talking to him – I would call him Mr. Belloni and he said to me, he said – call me what you will. So, I mean had quite a bit of contact with him. He was Mr. Belloni to me. Also, I noticed he was calling from and 804 number which was in the Charlottesville area.

OLIVIA WELSH: Well, I, I believe they have a farm in Louisa.

JOHN GLOVER: Yeah, right. Thank you Ms. Burke. And then, finally, I wanted Mr. Thompson to come up and speak about, you know, his, his meeting with Dr. Belloni on site which

WILLARD KEELING: Could I ask one

OLIVIA WELSH: Sure, go ahead.

WILLARD KEELING: I think Mr. Thompson is probably going to say something a little different, but, as far as the testimony of Mr. Hartless, uh, I wondered if, uh, Mr. Goodwin and Mr. Belloni would speak to the fact that in their packet that they delivered to us, they state that to the best of their knowledge that they had never met, uh, Mr. Hartless nor had he ever been on the property. Could you speak to that?

OLIVIA WELSH: Uh, I, before we, Mr. Thompson, let me let them come up there and speak to that.

WILLARD KEELING: Yeah.

CHAP GOODWIN: Dr. Belloni would like to speak.

OLIVIA WELSH: Okay, Dr. Belloni. And this is uh, he's already given his name and address for the record.

FRANK BELLONI: My name is Frank Belloni. I have a very different, uh, memory of the history that Tim Hartless just provided. To the best of my recollection, and I'm perfectly willing to swear on a Bible, the first time I recall meeting Tim Hartless was on September 27, 2007. Prior to that time, I may have spoken to him on the phone because I don't know the personnel of the City of Staunton, and I might have talked to him. I might have talked to several other people, but until this time, if I had met the person, I wouldn't be able to put the two together. The history, as I remember it, if you'll permit me, is that, uh, in the fall of 2006, we did contact uh, the City because we were interested in building a wall just as, as has been explained to you. We were told by, by the secretary that, that were there, we explained what, what we wanted done and she said we'll have to do a site analysis and I said very well. And eventually, 2 or 3 days, or a week, I do not recall, we had a visit, not by Tim Hartless, but by Earl Thompson. Its not very different – it would be quite difficult to mix up the two of them – they're quite different kinds of persons. Earl Thompson came out, and, and we spent about half an hour together – he looked over the property – he walked down Augusta, he was in the garden in front of Chilton Hall. He walked down on Ridgeview Rd., uh, he asked us where we planned to build a wall. We explained to him that we planned to build it inside the hedge line on, on Augusta and on Ridgeview. We also told him we planned to close that one drive because it was very, uh, dangerous even to try to enter, and he, and his advice to us, if you close it, be sure you landscape it, and I said of course that we would do that. And so he, he said, if I recall correctly that this was a grand(fathered) situation – that the hedge already existed, and that hedge by the wall on N. Augusta is 150' long and its only in a very small section where it does not, where it is not higher than the wall. Not the reverse. Uh, so he went down Ridgeview and, and in the last analysis he decided he saw no problem with it, and we asked him if we needed a building permit, which we thought we might since we're not familiar with it, with the code here in Staunton and he said no, we didn't, and he said have, basically, have at it – which we took to mean as an approval. We were extraordinarily pleased, uh, and in fact there's a witness here in the audience – we immediately called her and we said, you know, we've got good news. The City's come out, they've done the site analysis, they've given us permission to build the wall. That's the way I remember it. Then, I, uh, uh, the next time we encountered Tim Hartless, or the only time we actually physically, I remember encountering him was when he came, not in November, but in September. He came on September 27th, he brought a notice of violation.

OLIVIA WELSH: What year was that Dr. Belloni?

FRANK BELLONI: 2007.

OLIVIA WELSH: Okay.

FRANK BELLONI: He brought a notice of violation that was dated September 20th. He came together that time with Tim Hartless and we were naturally struck by

these two people, and when he came, uh, he brought all the material we would liked to have seen before. He brought an aerial photograph of Chilton Hall, he brought a diagram, he brought something that should a corner of 25' – he brought regulations, and my response was to Mr. Thompson "Why, why are you bringing me these things now? Why didn't you bring me any one of these things when you came and approved uh, uh the wall a year ago, because anyone of those things would have stopped us in our tracks." We're not complete idiots, we certainly never have expected that the City uh, would do anything other than do what they're doing now – if we built the wall in the face of their clear notes to us and instruction to us that, that, what, what was permissible. That's the end of the story. And, and its, furthermore, I, I think someone raised the question about what you got in the thing – we never met with Mr. Thompson or with Mr. Hartless in the spring of 2007. We did meet with Hartless and uh, uh Thompson in September of 2007 – and then we met again with John Glover. The first time we met him in, ah, uh, shortly thereafter, uh, uh he came to us and, and because, it was, it was because Tim Hartless, who stayed on when they came, uh, uh, Earl Thompson really couldn't deal with us at all. He walked away. Tim Hartless stayed and he explained the whole situation again with us and he suggested that, he recommended that we could do a variance – that's what he explained the possibility of a variance, and the possibility of an appeals, and he recommended we contact John Glover.

OLIVIA WELSH: Why did Mr. Thompson walk away, Dr. Belloni?

FRANK BELLONI: Its, I believe that, that Earl Thompson, uh, was extraordinarily stressed, that he could not, he, he felt very conflicted because we had an extraordinarily cordial meeting when he came in 2006. We thought he made a very reasonable, rational decision. I think that if he had thought it wasn't grandfathered in, he would have said I don't think so, or he could have said, you know, we'll have to think about this – we'll come down to the office, or whatever; or you'll have to file a variance. You know, any of that information, we would have accepted because we found him very accepting and we thought he was very reasonable. When he came the second time, he phoned first, in fact, to apologize, uh, for the fact he was having to do this, and we think that, that, uh, Mr. Thompson was really caught in a very awkward situation between a rock and a hard place. He, I think he, he felt that he, he'd, that we had done something on the basis of his having approved it, and now, of course, he was having to come to us and say no, you can't do this – and that's difficult for anybody to do. And we think, we think, that, that Mr. Thompson did the right thing in the first place. We don't know why he's changed his mind.

JOHN GLOVER: Madam Chairman?

OLIVIA WELSH: Yes.

JOHN GLOVER: If I may speak, I, I don't want to pretend to, uh, know what was going on inside Mr. Thompson's head during all this. But department policy is that if someone feels, any of my staff, feels that a situation is getting heated, that they are to walk away and leave because no benefit will come from a shouting match, you know,

and, and in our line of work, this tends to happen occasionally, so Mr. Thompson was just following department policy.

OLIVIA WELSH: Sure.

FRANK BELLONI: Fair enough, but Mr. Hartless didn't evidently feel any stress and he stayed.

OLIVIA WELSH: Go ahead Mr. Keeling.

WILLARD KEELING: Well, just for clarification, you, you're saying that to the best of your memory you do not remember meeting or, or remembering Mr. Hartless being on the site prior to September, 2007.

FRANK BELLONI: That's correct. I, I do not ever remember having met him. Its possible that we might have glimpsed him when we up to the uh, uh Planning and, uh whatever it is.

WILLARD KEELING: But not on your property?

OLIVIA WELSH: But not on your property?

FRANK BELLONI: I, I cannot, I cannot, I, I swear I could not imagine having Tim Hartless come to my property and having a conversation with him, and our forgetting him. I don't think so. There is, I'm not by myself, I have a wife who was there as well. And, and there's also witness here in the office that, that if it were called upon, I would tell you that after the meeting with Mr. Hartless, we immediately phoned her. She was one of the only people we knew in the City of Staunton and we were extraordinarily pleased to tell her the good news.

OLIVIA WELSH: Let me ask you Mr. Glover. When did Mr. Hartless come to work for the City? He hasn't been here

JOHN GLOVER: He's been with us 2 ½ years Madam Chair.

OLIVIA WELSH: And that would have been when?

JOHN GLOVER: Uh, Tim, do you know when you started – I can't remember.

FRANK BELLONI: And, if I may

JOHN GLOVER: About 2 ½ years.

FRANK BELLONI: finally conclude, uh, John Glover did come out at, at our request and we had a nice conversation. He walked down the back yard and the front yard, and he noticed that we didn't have a private yard, and, and he said, uh, he was

going to see what he could do. We, uh, we in fact suggested that whoever it was that made the complaint that he might get back if there was anything we could do, to, to modify that, that, the unhappiness in this person, we would be willing to do it. He said give me a couple of day, okay? Two or three days. Well, in fact, he didn't' come back – this was perhaps the 28th or 29th of September – he came back to us in November, and when he came back in November, he said there was nothing he could do, or well, well, what he came back with really was, uh, uh, uh the new notice of appeal – uh, notice of violation.

JOHN GLOVER: No. I did meet with Dr. Belloni. I was trying to find a resolution to

OLIVIA WELSH: Well, you always try to be helpful

JOHN GLOVER: I was just trying to

OLIVIA WELSH: citizens in the community, and

JOHN GLOVER: Yes ma'am.

OLIVIA WELSH: and you should.

JOHN GLOVER: Yes ma'am.

OLIVIA WELSH: Mr. Smiley wants to ask you a question.

FRANK BELLONI: In fact, I must say in closing that John Glover, of course, was very helpful, and, and, uh, and

OLIVIA WELSH: And he should be.

FRANK BELLONI: I have every confidence, uh, uh, in fact, we, we don't, none of these people, at, uh, were unpleasant. They all, they all were pleasant with us and we hope we've been pleasant with them. It is certainly true, as John Glover said, that I, I was not happy when, when Earl Thompson came back with this notice and I said to him, and that, that, he probably did the right thing in walking away. You know, why have you come to us with this, this information now. We can read and we can see, you bring us an aerial photograph and you bring us a diagram, and you bring us regulations – we can read them. I'm not, I, I, I've never questioned the interpretation of the zoning administrator. The, I, I don't know why he said this was what they're answering to. I'm sure he can interpret the regulations far better than anybody else in the room, but of course, he, he's also citing rules and regulations that I doubt that anybody in this room know about – the backup, you know, what is considered to be grandfathered and all that – unless its explained to you folk before at other meetings. Now, excuse me, and there was

OLIVIA WELSH: Mr. Smiley wants to ask you.

NORMAN SMILEY: Dr. Belloni, Mr. Hartless notwithstanding, my understanding from what you're saying is that you met with Mr. Thompson on the site. He looked at your plans, he gave you in your estimation a verbal approval.

FRANK BELLONI: Excuse me, we didn't have plans.

NORMAN SMILEY: Okay, but in your estimation he gave you a verbal approval to proceed with the wall?

FRANK BELLONI: Yes.

NORMAN SMILEY: You built the wall?

FRANK BELLONI: Yes.

NORMAN SMILEY: You thought everything was fine until September when you received notice of violation? Is that correct?

FRANK BELLONI: Yes, exactly correct.

NORMAN SMILEY: Thank you.

OLIVIA WELSH: Alrighty. Did you have anything – anybody else have anything? Okay.

FRANK BELLONI: By the way

CHAP GOODWIN: (Inaudible.)

FRANK BELLONI: Uh, just a matter of correct information. 804 is Richmond – we live in Louisa which has – is 540, just like Staunton, and in Charlottesville, its 434 and in Staunton its 540 – so we couldn't have been – I don't know how it would be that we'd be making calls from 804 to anybody in Staunton. Just doesn't seem very - - and what was the second question sir?

CHAP GOODWIN: (Inaudible.)

FRANK BELLONI: Oh, oh, and also, it goes without saying, you know, I think its perfectly proper for Tim Hartless to take photographs of the hedges and stand in a place where, uh, where, that, uh, the wall appears to be highest. But I would have liked it if he would have also stood right next to the edge on, on N. Augusta St., and see how, how much taller than Mr. Hartless the hedge is there – because all N. Augusta is 150' of hedge. Not only that, the only place where there wasn't – there were two places – the driveways on either end of this 150' hedge. There's a driveway on the north end and its wrapped (inaudible). that goes to the Statler Brothers, and its on Augusta and it wraps

down the property line, and on the other end there is another hedge. It's the one on, on, uh, Ridgeview – certainly its – it is incomparable to the one on N. Augusta. We don't know what the reason is, but the trees or whatever. But we put ?????? and we assume it will grow like the hedge on N. Augusta. And, and you know, that, that goes without say.

OLIVIA WELSH: It'll take a little time, but it'll grow.

FRANK BELLONI: And, and, and we would never build a bloody wall if we thought, if we thought there was an uh ordinance against it and we have every good reason to, to, to, to think that we would not, certainly not want to cross the department of, of, of zoning and inspections or planning and inspections – we have very – we would have been foolhardy to cross them. Thank you.

OLIVIA WELSH: And I believe you Dr. Belloni.

FRANK BELLONI: Thank you very much, and excuse me if it got heated.

OLIVIA WELSH: That's alright.

FRANK BELLONI: Thank you.

WILLARD KEELING: Madam Chairman, before we started, and I'll go back to what Mr. Goodwin said about the testimony might relate to both of these issues. Uh, as I understand it, we're, we're still discussing Item a which is the, uh, Mr. Glover's interpretation of the code, and the only thing that I recall being said when this started was that, uh, the issue of the pre-existing hedge, uh, was the reason that the wall should be allowed. Uh, I've heard a lot of testimony here, but I haven't heard a whole lot that speaks to, to this issue a, and for time's sake, I'd like to see us try to get back on track and deal with this one and then

OLIVIA WELSH: Its hard to stay on track, I, I

WILLARD KEELING: and let this testimony eventually deal with b, which would be the variance.

OLIVIA WELSH: Well.

JOHN GLOVER: Madam Chairman?

WILLARD KEELING: Are the, are the other issues that are gonna come up speaking to the interpretation of the building inspector, is what I'm

OLIVIA WELSH: What did you say John?

JOHN GLOVER: We're going to get that in, I just wanted to get through all of the, the evidence and exhibits that we have and then I'll speak about – if I could just bring Mr. Thompson up for just a minute.

OLIVIA WELSH: Mr. Thompson, you take your time, we're gonna let you speak if we're here until 10 o'clock tonight. We're gonna listen to both sides.

JOHN GLOVER: And then I'll, then I'll close it all up, if, if

OLIVIA WELSH: Well, we want to hear both sides.

JOHN GLOVER: Right.

OLIVIA WELSH: Your name and address Mr. Thompson. I've known you for a lot of years.

EARL THOMPSON: Yes ma'am. You sure have. Uh, I'm Earl Thompson, I am the deputy building official for the City of Staunton, and I live at 176 Fairmont Drive in Staunton. Uh, I cannot tell you the time frame uh when I met with, uh, Dr. and Mrs. Belloni. Uh, do know it was a time that Tim was out of the office, uh, at a conference or something. We're thinking the early spring of 2007, but I have nothing to confirm that. I did receive a call from Dr. Belloni and scheduled a time to meet with him at his home. Uh, we met in the front yard, and, and looked at what they had in mind, uh, they told me they wanted to build a wall to help block the noise from N. Augusta St. My initial response was the zoning code would not permit that, but as we discussed the existing hedge and the fact that it was not assisting with blocking the noise, I did, uh, tell them that I felt the existing hedge along N. Augusta St. might be considered to be an existing condition which was a non-conforming. And, if they were to construct a wall behind the hedge which did not exceed the height of the hedge, there may not be a problem. We did also discuss the closing of the one driveway, and extending the wall along Ridgeview Rd. And I did tell them I felt it was best to try to get the landscaping in first and, uh, you know, let that fill out, and uh my intention was to try and assist them with a solution to the problem that they had.

OLIVIA WELSH: As you should've.

EARL THOMPSON: That's, that's what

WILLARD KEELING: What was the state of the wall when you, at the time you went out there?

EARL THOMPSON: They hadn't – there was no

WILLARD KEELING: There was no wall?

EARL THOMPSON: There was no wall. They hadn't started on the project when I met them.

OLIVIA WELSH: Mr.? Okay.

RICHARD ROBERTSON: I think

JOHN GLOVER: Thank you Mr. Thompson.

OLIVIA WELSH: Thank you Mr. Thompson. I have no questions.

JOHN GLOVER: Madam Chairman. I just wanted to follow up with, with, with that, I believe Mr. Keeling, you know, the application is before you in item a is an appeal of the decision of the zoning administrator. The appeal applicable section referenced in their application is 18.120. Again, I've heard no evidence here, any real objection to the interpretation of Section 18.120, so I would, I would, I would say that the application is defective and that its, you know, there has been, you know, that there, I don't, they haven't stated any evidence to appeal that. My other question, statement, would be that, uh, you know, its unfortunate that there was a, some miscommunication, if there was. I, I'll never, you know, I wasn't at either of these meetings so I can't testify what took place. I do know that I do trust my staff, they've been with me a long time, and I have no reason not to trust them. Uh, but, all that as, all that in my mind is irrelevant. The issue at hand is "is the code correct?" Is the wall allowed, or is it prohibited? Uh, its unfortunate there's a miscommunication, but that, that, you know, the code still is what the code is, and it, it prohibits these walls in this front yard. Uh, and, and I, this interpretation of the code that we've had, I've been the zoning administrator now since the year 2000. Before that, I was here for gosh, a while, with my predecessor, Willard Botkin, uh, and I never had any challenge to our interpretation of this, this, these sections of the zoning code.

"Is the Code Correct?"

OLIVIA WELSH: We never had this *Cochran* law (laughter). Uh, I'm gonna close the public – did you have something you want to say? Go ahead.

CHAP GOODWIN: Won't get another chance.

OLIVIA WELSH: Gonna give you another crack at this apple.

CHAP GOODWIN: Uh, the appeal on this was in the decision that was made, not on the interpretation. If you'll look at the block that's checked, it's the decision that was made. And the decision that he believes was wrong is that he was advised that they thought it might be grandfathered, and he felt like it was grandfathered. Uh, you have a hedge there which, even in a January, an end of January picture in the, you know, the lowest point of the season, the wall and the height are similar in height at that point. Its higher at some points and lower at others. I think if you take the middle of the growing season in the summer and there's a uh, I think that everyone would agree that the hedge is going to be taller in the summer than it is in the winter. I would also point out that that

wall is about 4 or 5' thick, and the, uh, the degree of, uh, peer-ability to see through it, I forgotten the word that Mr. Glover used, but the, your ability to see through that 4' thick hedge that's 6 ½' or 7' tall is not significantly different than the view you get looking through a masonry wall. And I would submit that in good faith they built a wall, um, uh, relying on the fact that it was, uh, legal to do so, that it was grandfathered to do so, and that when that hedge is there, the wall will not be visible. The hedge is, uh, thick enough and sufficiently dense that its not that you're going to be able to see through the hedge and not see through to the wall, you're not going to be able to see the wall through the hedge.

OLIVIA WELSH: But, but, the wall is very attractive and the wall also is also conducive with that house. That wall is not a detriment to anything around it. Or that's my view in looking at it. Of course, beauty is in the eyes of the beholder.

CHAP GOODWIN: That's the other, the other issues we have I think deal with the, uh, historical significance, the practical significance, fundamental fairness, and all those things. I think what we're dealing about here is that wall grandfathered? I think they built the wall based on the fact that they were told it was, and they believed that it was, they believe it is now.

DOUGLAS GUYNN: Madam Chair?

OLIVIA WELSH: Okay.

JOHN GLOVER: To, to have non-conforming status, and the term we generally use is legally non-conforming, which means that the wall would have to been constructed legally, uh, the wall was not there previous to this, so it cannot be non-conforming. The hedge may be, but the wall was constructed recently, so it has no protection as a non-conforming structure, in my opinion.

WILLARD KEELING: Mr., uh, may I make one comment?

OLIVIA WELSH: Go ahead.

WILLARD KEELING: One thing that bothers me, when we keep talking about this hedge, we're forgetting the fact that this is a corner lot and Ridgeview is considered to be front yard, and no one has spoken to that hedge there.

CHAP GOODWIN: Well, I think that the issue is that the hedges, that house was built about 1900, uh, before 1900, perhaps slightly after 1900, it was built about 1900, and there's been a hedge there from the previous owners disclosure. There's been a hedge there since George Goodlow was a little boy, which is, he's older than I am, and 50 years ago, I was a big boy.

OLIVIA WELSH: Well, are we ready to – go ahead Paul.

PAUL VAMES: Now, Mr. Goodwin, its, there's still a little misunderstanding here because I'm reading item a as it appears in the agenda and it says that "to the zoning administer – uh, an appeal of Dr. Frank Belloni and Mrs. Deborah Chilton Belloni of 1413 N. Augusta, Staunton, Va. to the zoning administrator's interpretation of the city code." You said its really not interpretation. You said they checked another block that says what?

JOHN GLOVER: Its in the application that's part of your – yeah.

CHAP GOODWIN: (Inaudible.)

PAUL VAMES: Well, I think we're acting on (item) a, though.

JOHN GLOVER: But, if you look above

OLIVIA WELSH: Mr. City Attorney, do you want to see this piece?

JOHN GLOVER: If you look above on the application, you'll see the applicable section of the zoning code and that's Section 18.120.

CHAP GOODWIN: That's this one right here, 18-

JOHN GLOVER: So, its an appeal of an administrative decision, applicable, or, of the related to the provision of the zoning code Section 18.120. That's the code section they put on their application.

PAUL VAMES: Mr. Guynn, are we going to be voting on the fact that Mr. Glover's interpretation of the code, which he just read out to us, was correct or incorrect? Is that in this item a?

DOUGLAS GUYNN: Item a is just on Mr. Glover's interpretation – his position is that its, its not a question of whether or not, uh, the BZA agrees with Mr. Glover's interpretation, but whether it is a long-standing interpretation. From the evidence so far, and I've heard Dr. Belloni say he really didn't issue with the interpretation. Its really, its really item b that seems to be the nub of things, uh Mr. Vames, and that's why I suggested at the beginning that you may have one vote on item a and could have an entirely different vote on item b, with all due respect. Does that make sense?

PAUL VAMES: It does, it certainly does. Thank you.

WILLARD KEELING: My, my opinion is that if we could to a point to resolve a, I think the testimony is evident enough that we can resolve the issue with (item) b. But, but a, uh, I haven't heard enough to make me think we, we uh, should, shouldn't vote to uphold the city on a, but on b, we need to deal with b when we get to that.

OLIVIA WELSH: (Inaudible.)

PAUL VAMES: Yeah, right, I think that's

OLIVIA WELSH: Well, we're going to close this public hearing and the Board's gonna talk about this minute, and I'm gonna entertain a motion, and, and I, you all, I think, have hit the nail on the head on this – this, this is, this is on whether Mr. Glover's interpretation of the Zoning Code was correct.

WILLARD KEELING: (Inaudible.)

PAUL VAMES: Okay. Well, I'll make the motion that, uh, we interpret, or we, our opinion is that, uh, Mr. Glover's interpretation was correct and I quote from Mr., Dr. Belloni, "I have no problem with the interpretation of the Zoning Administrator, Mr. Glover." That in no way means we're not going to consider the second item, which is the variance request. But I'll make the motion that we do, uh, as stated in item a, verify the fact that, uh, the interpretation of the Zoning Administrator was correct.

WILLARD KEELING: And I would second that.

OLIVIA WELSH: All in favor say aye.

NORMAN SMILEY, RICHARD ROBERTSON, PAUL VAMES, WILLARD KEELING AND OLIVIA WELSH (in unison). Aye.

OLIVIA WELSH: The mo - you're disqualified, so the motion carries 4-0 with 1 disqualification.

RICHARD ROBERTSON: One less disqualification.

OLIVIA WELSH: One less. I knew you're chomping at the bit to vote on that. Alright, now, the next issue is item b. Now, would you

WILLARD KEELING: I, I would hope that we don't have to go through all this testimony again and we will consider everything that's been said when we think about item b.

JOHN GLOVER: And I would, the City would agree to that if you'll just ask Ms. Sutton to enter that into, you know, the record as part of these, you know, proceedings for this item, with the submission that it was exhibits that were handed to us and that were in your packet.

OLIVIA WELSH: Alrighty. That'll be fine, but I'm gonna give the City Attorney and the attorney that's representing uh Dr. and Mrs. Belloni to uh, if they've got anything more to say about this, and to give the general public an opportunity to speak.

WILLARD KEELING: We, we'll have to have what, another hearing?

OLIVIA WELSH: No, we're gonna get this through this evening.

WILLARD KEELING: No, I mean are we gonna, gonna have a public hearing on b?

OLIVIA WELSH: Yeah, on b. But, I haven't, there's, there's public out here, and I think they ought to have an opportunity to speak if they want to speak.

WILLARD KEELING: Right.

OLIVIA WELSH: And if they want to oppose it, that's fine, and if they want to speak for it, that's fine. But that's our job, is to set here and listen to the people. So, is there anyone here that, Chap, do you want to speak again? Now, Debbie, this is b and same name, same address.

CHAP GOODWIN: And I would ask that the testimony that came in on the first hearing also be included in this one. I was, I couldn't quite figure out how we were going to separate it, and it didn't work out that we could separate it very well.

DOUGLAS GUYNN: No objection by the City, with the same objection preserved, though, in terms, that was made earlier, as far as the petition.

OLIVIA WELSH: As far as point, as a? Right?

DOUGLAS GUYNN: Right, no objection in terms of incorporating the previous evidence into item b, with the City preserving its, its objection as to the petition with all the names. Thanks.

OLIVIA WELSH: Okay. You got that Ms. Sutton? Alrighty.

CHAP GOODWIN: First of all, obviously the facts are the same. We still have a wall, uh, we've requested a variance for that. Uh, I'm gonna argue that that wall, irrespective of the motion we've just had, I still would like to argue that the wall is grandfathered. He was told that, and that argument, uh, I believe is germane to this issue as well. It comes in, uh, to the fact that property rights, it comes in to the fact of fundamental fairness and historical significance, and I think those are the four issues that the Board needs to consider on this house. This is not a normal house in the City of Staunton. There are probably four or five houses in the City of Staunton that are of significant, or historical significance, and this is clearly one of them. Uh, it is a stately house, it is a, uh, magnificent house if you, if you will. Uh, there's been a hedge around it since the 1900's and they felt like a wall would enhance their property rights and their enjoyment of the property. Traffic, uh structure out there, to them, the number of cars that pass there everyday is a significant, uh, interference with their ability to use the property. I'm gonna, and I think each of you, have in your package, but I'll just submit one for you all, a traffic study, uh (inaudible).

OLIVIA WELSH: Give Mr. Guynn a copy of that please, Chap.

CHAP GOODWIN: It (inaudible) there are approximately 10,000 vehicles that pass that house every day. That's a significant amount of traffic.

OLIVIA WELSH: Its an increase (inaudible).

CHAP GOODWIN: Its also important to note that there are two construction projects going on across the way, which significantly impacts the, uh, uh, neighbor's, or the Belloni's use of the property. The noise, the congestion, the dirt and traffic that comes through there is significant to them. They have limited to one access into their property, uh, which is on the far end, uh, they closed one of the gates. Now, the property rights, I think they have a right to enjoy their property. I would submit to the Board that, uh, one of the reasons, one of the ways they can enjoy their property is having quiet enjoyment of the property, uh, and not have the, uh, be inundated by this noise, the dust, the dirt, and the wall is a significant uh protection for them. Uh, I would argue that the wall is, uh, in compliance with the appearance of the house, and enhances the appearance of the house. It is a, uh, uh, a common thing to have around, uh, houses that have, uh, significance historically, they were old type things that are there, and they are historically significant. And this is in keeping with that, uh, historical significance. Uh, I would argue that fundamental fairness is a real issue here. I think Earl Thompson has been very, very forthcoming in talking about what he recalls about the meeting. Dr. Belloni has no recollection of a meeting with Tim and, and he's indicated, Tim's 6'5" with white hair and he's somebody that you remember when you see him. I remember him from the first time I met him. Uh, he does remember having the meeting with uh Earl Thompson. He remembers that that meeting was early on in 2006 when they started his process. Earl Thompson doesn't deny that – he doesn't recall, though he thought it might have been in the spring. Uh, his recollection of the meeting varies to Dr. Belloni's recollection, and I would submit that, uh, Dr. Belloni contacted the City, got his decision, went forward with his wall, and only after the wall was virtually complete, did he get a notice that he was to terminate. Now, I'll point out, and I think this is where the, uh, petition from the neighbors is, uh, very important. There are, uh, 81 people who signed the petition, which is their direction to the, uh, Board of Zoning Appeals, or their correspondence with the Board of Zoning Appeals as to what their opinions are. You've gotten two letters that support that. I'm looking for my, uh, copy of the petition. There are 81 signatories to that, most of whom are neighbors, and the rest of whom are interested enough to agree to sign a, uh, petition. That petition states that "the undersigned hereby respectfully request that the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Rd. The wall, which is landscaped to blend in with the existing hedge serves to block traffic noise, and thereby renders the garden of Chilton Hall livable for its owners."

OLIVIA WELSH: Let me ask you a question. Is that house air conditioned downstairs?

CHAP GOODWIN: I don't know that. Is it air condition? It is not.

OLIVIA WELSH: So, in other words, when you have your windows all up, you've got a lot of dust and a lot of noise, unless it is central air. Because if you have central air, you can keep your windows down and you don't have the traffic noise.

CHAP GOODWIN: I lived on the corner of Opie and Donaghe Street out by the park and I did not have air conditioning when we moved to Staunton, because we were told you didn't need air conditioning in Staunton. But, uh, the noise level of Donaghe Street can't possibly compare to Augusta Street. You know, it was unbearable there, particularly on the 4th of July – it was very pleasant to find, uh, Judge Wood parked in your front yard, or Judge Bumgardner parked in your front yard when they were headed over to the park. But, you know, you have significant traffic there.

OLIVIA WELSH: Why, I, I just wondered, because that house is an old house and I didn't think, it probably would have to be torn apart to put air conditioning in it. You know, to get in the walls.

CHAP GOODWIN: Uh, I'd like to read you the names of the people who signed this, us, Judy

OLIVIA WELSH: You know, Mr., do you really want to read those or do you just want to make it a copy of the record?

CHAP GOODWIN: There is a copy, it was put into your packages, and I'll be happy to, uh, submit a copy of the petition and the, uh, the typed list of the people who have signed to the uh

OLIVIA WELSH: Do ya'll want to hear the names?

WILLARD KEELING: We, we have a copy.

PAUL VAMES: We have a copy, its not necessary.

OLIVIA WELSH: But you can make it a part of your, the record, if you give Debbie a – is that okay?

CHAP GOODWIN: That's fine.

OLIVIA WELSH: And, any Mr. Guynn.

DOUGLAS GUYNN: Con, continuing objection – its not material and its not probative of any material, uh, issue under the controlling law.

OLIVIA WELSH: Okay, but its okay if we let her go ahead and give a copy.

DOUGLAS GUYNN: We just have a continuing objection, yes ma'am. They shouldn't be considered a

OLIVIA WELSH: But you go ahead, go ahead and give her a copy.

CHAP GOODWIN: There was also one letter that was submitted in the packages to you all which was not, uh, submitted directly to the Board – I'll put that with this.

OLIVIA WELSH: Okay, and, and I'm gonna let any of these people out here speak that wants to speak, Chap.

CHAP GOODWIN: And I suspect that there are several people who would like to speak. Are there any people, who while they don't want to speak, would like to stand up and show their support for this?

OLIVIA WELSH: Well, let, let, let me do this – let me see, is there anybody that would like to come up here and speak for this? Well, then I'd like for you to come up here, state your name and address. Dr. Bell, I know you, but I'd like you to state your name and address for the record.

DR. MARDRE BELL: I'm Dr. Mardere Bell, I live at 38 Ridgeview Rd., which is about 3 houses down from when Dr. Belloni lives. Uh, I wanted, what I wanted to speak to is to correct an inaccuracy I heard in some of the proceedings about the hedge and the, the wall. Uh, I come down Ridgeview to Augusta at that corner every day and the hedge sticks out about 3 to 4" out beyond the wall. When I came over I just looked at it again to be sure of my facts, and it's the hedge that seems to obstruct the view on Ridgeview, excuse me, I mean Augusta – not the wall, the wall is fine. I'm one of the signatories of the petition, which of course, has been thrown out, but I did sign that I have no objection to the walls being there at all. In fact, I think it'll make good neighbors, and I think people do have a right to their own property, so that's all I have to say.

OLIVIA WELSH: Who else would like to speak for it? Ma'am, if you would state your name and address for the record, we'd appreciate it.

MORA COLEMAN: Good afternoon, my name is Mora Coleman. I live at 10 Crescent Drive. From 2001 until 2007, I lived at 1417 N. Augusta Street, which is 2 houses down from where Dr. Belloni lives today. To answer your question about the air conditioning, we lived in the other house on the street that looks like Chilton Hall, and some people would get us confused, uh. We did not have air conditioning when we moved there. It was terrible because we could not open the windows, the dirt and the noise, not to mention the heat, uh, we were able to put the air conditioning in, in the attic to heat the second floor, still not the first floor. So, with the 10,000 cars a day, its just incredible. Uh, I was one of the signatories – I'm in full support of it. I live there as I said for 6 years. We had a hedge, you might notice that hedge in front of that house, uh, it still was not a barrier. And that about, my husband is 6'2" and it was about a little bit taller than he was. So, that's all I have to say.

OLIVIA WELSH: Thank you Ms., thank you Ms. Cole. Anybody else that would like to speak? Please come forward sir. State your name and address for the record.

TOM ALDRIDGE: Tom Aldridge, and we live at 1320 N. Augusta St. A little circle thing going here. Uh, I, I just want to clarify something because ya'll seem to be putting a lot of emphasis on this, uh, denied petition. Uh, we didn't have any problem with the wall – you know, I, I think somebody said, its their property, and, yeah, we'd like for them to do what they're able to do with the wall. Uh, I would clarify that the reason we signed the petition, because I mean I just didn't have a dog in that fight, but the reason we signed the petition was that, as, as they explained, as the Dr. explained a minute ago, that, that he said he was given permission, did it, and then the City reneged. Uh, I really don't care about the wall, there, there issues back and forth about that. I did not complain about the wall. But, our, and I, I don't know if I'm speaking for other people or not, but I know I'm speaking for my wife and myself – if he were given permission and then they recanted, that's a problem. And, and we, especially felt bad being newcomers to the area, so I just wanted to make that clear, uh, regarding the petition.

OLIVIA WELSH: Thank you so much Mr. Aldridge. Anybody else want to speak for this? Are you speaking for it Mr. Bishop? Or opposing it?

CHARLES BISHOP: Neither, I'm speaking to the code.

OLIVIA WELSH: Okay, alrighty.

CHARLES BISHOP: A little bit what my friend Tom Aldridge said. I'm Charles N. Bishop, Jr., 38 Woodlee Rd. Uh, I think one of the central issues here hasn't been touched on – perhaps its been touched on by Mr. Guynn, but, ya'll have a difficult job up there and that's the reason people, uh, its tough to find people to serve on Boards like this. I would like to, to make a couple points. Uh, tasteful, pretty, that's got nothing to do with this as I see it. What we have here is a code and this testimony about who was where and all that, I can't speak to any of that, you all have the difficult job of, of unraveling that and resolving that. But, I can tell you this, there's, there's nobody in, in, and I've been in Staunton a lot longer than some, some of you have, and all this stuff about we want people to be welcome, yes we do; there's no question about that. But, we also want people to know that their efforts through Historic Staunton and, and Newtown, and all the things we've done have some protection in our code that also, if somebody, now anybody that's been in Staunton for years and been in any sort of real estate activity, would question, good lord, that wall. I mean, you know you couldn't build that wall – anybody would know you couldn't build that wall, and, and here again, I don't know, that knows this kinda. Here's what I think the danger is – that if this is a precedent that somebody interprets as kicking the door open that we don't have code anymore, then we've got a real problem. We've, we've got a

OLIVIA WELSH: Mr. Bishop,

CHARLES BISHOP: I'm, I'm not here to argue with you Mrs. Welsh. I'm not here to answer questions, I'm here to state just how I feel about this. I'm not for or against the Belloni's – I don't even know em. Uh, and uh, uh, there are a lot of things would like to do with their property. Now, you all have to sort these, these issues out, but I, I'm just bringing up a couple of issues that I think are more relative than a lot of the things that have been discussed here. Thank you very much.

OLIVIA WELSH: Well, I want to say for this audience that the Zoning Board does not set precedent. You can do something here and a house here, and you don't have to do if they ask for something, you don't have to do the same thing over here. So this Zoning Code, and that was made very clear to me by Duke Bumgardner years ago when he put me on this Board. This Zoning Board does not set precedent. Now, that's what I want to say.

CHARLES BISHOP: Again, again you all have a very difficult job and thank you for the opportunity for input.

OLIVIA WELSH: And thank you Mr. Bishop. Now, is there any, anybody else that would like to speak about this? Opposing, for or whatever.

JOHN GLOVER: Whenever your ready Madam, I'll go ahead and give my

OLIVIA WELSH: Well, I'm gonna close this public hearing and bring this back to the Board. I also want to take an opportunity to thank everybody – this is the most I've seen for a long time. Haven't had too much controversial. I want to thank you all, uh, as citizens of Staunton for coming in here to voice your opinions and to see what's going on in your community. Now

JOHN GLOVER: Madam Chairman, before you close the public hearing, could I give some testimony for the City?

OLIVIA WELSH: Sure, you sure can.

JOHN GLOVER: Um, I would just like to state, you know, that I find that the City Code's prohibition against walls over 3 ½' in the front yard, as in the code sections that are part of your packets and the exhibits, uh, are clear, uh, you've upheld those previously in item a, and in my opinion, the, the, the wall should be either removed or lowered in height as to comply with the City regulations. Uh, I point out that many homes in this area share this hardship – this is not unique, uh, in, in fact, some of our testimony even eluded to the fact that other homes may or may not have air conditioning, and are, or face the same traffic that, that, that the Belloni's face. Uh, its, just like its unfortunate situation that we have, you know, this, but I feel that I'm duty bound, uh, to uphold the law within the controlling framework that I have. Uh, whatever took place between my staff, whom I've already said I trust, you know, I trust their, their opinions and their decisions, uh, and I've no reason not to trust my staff. Uh, its, its really, my duty is to uphold the law whatever did take place there. Uh, and I refer you to a case,

Wolfe vs. Fairfax Board of Zoning Appeals, uh, as it relates to estoppels in a similar case as this one. Also, I'd like to point out that without this variance, I don't feel that the property owner is denied all reasonable use of the land, taken as a whole, within the controlling framework of *Cochran vs. Fairfax County Board of Zoning Appeals*. Thank you Madam Chairman.

OLIVIA WELSH: Uh, well, I'm a strong believer in people's property rights, and, but I'm also a strong believer that if you're going to do something that is going to be detrimental to the people around you, that things like this shouldn't be granted. But I also want to say to the City that what, if those, if they will sell that house, and it will probably be sold for apartments or some kind of a rehabilitation center, uh, uh a business or some kind, which can go in there

JOHN GLOVER: I believe its already apartments – am I incorrect? Aren't there some apartments in the building now?

FRANK BELLONI: May I speak?

OLIVIA WELSH: Sure may.

FRANK BELLONI: There are (inaudible).

OLIVIA WELSH: And I just am not sure what would happen to that neighborhood and those houses, it, because you know and I know, you can't discriminate – what moves in, you could have riff raff or, you know, and I, I mean I just have a hard time with this. I, I think the walls attractive, I'm aware of the *Cochran* law, love Mr. Guynn dearly, he's been a friend for 30 years and I know he's very much opposed to this, but I, I myself, I cannot force these people to tear that wall down. I do think the City should make sure that when they talk to people, cause as you all may know, we've had a problem like this out off of New Hope Road with some fences, and this is the second – back to back. And, uh, I think, and I know the City is probably understaffed and don't have enough people to, because they don't do anything unless somebody complains. People go out and do things and unless somebody complains, even though it's a violation of the code, but you couldn't have enough people in the City to staff it, I mean, you know. And you will admit to that won't you Mr. Glover? That you all can't, unless somebody complains, you don't

JOHN GLOVER: It is a challenge to police every, entire City.

OLIVIA WELSH: Every detail that goes on. And especially with annexation. Uh, but I, I want to know what the pleasure of the Board is. The public hearing is closed.

PAUL VAMES: Just let me

WILLARD KEELING: Can I just make just one quick comment, and, I agree with everything you said. The one thing, and, and, and I reckon this would be a

recommendation on my part, I think I've already mentioned this to Mr. Glover, but, depending on which side you take or what you believe here, one thing that would have been very helpful for me, if there had been better record keeping by the City, and I don't mean extensive record keeping, but at least a notation of what date, what time, who I talked to, and I believe in other issues that I've dealt with – I haven't been on this Board that long, but we've dealt with this same type of thing – he said, I said, and we don't remember the exact date, but it was sometime along there – so I would strongly recommend the City considering some type of record keeping so that when they make a statement that, that you can go back and say I was there on such and such a day and I spoke with such and such a person at such and such a time.

JOHN GLOVER: Thank you Mr. Keeling, and we did, you know, we use Microsoft Outlook for all our calendar appointments, e-mails and such, I'm sure you're quite familiar with it and we were under the understanding that they kept all our old appointments. Well, when this case came up, obviously we went back to the Outlook calendar to see, and anything older than 6 months was gone. We talked to our IT Department, uh, not sure what the issue, what the problem, or if there is a problem. Mine shows all my appointments previous to 6 months – there's some several years back, but we are working on it and it's a good suggestion about having a backup of keeping it on the paper in case that system were to fail in the future.

WILLARD KEELING: I've taught computers for 40+ years and I know it can be resolved.

JOHN GLOVER: Okay, thank you.

OLIVIA WELSH: Uh, go ahead Mr. Vames.

PAUL VAMES: I just wanted to mention that uh we're not, you know, its, its, the City Attorney has a job to do, and he interprets the laws of the State of Virginia, and he does a good job with that. And, that's his job, so he's doing what he needs to be doing. The Zoning Administrator interprets the regulations in the Code, that are in this book, and he's doing a good job. He's doing it very well. Uh, with, with that said, the overriding thing that, that we keep getting thrown in our face is this *Cochran* ruling, which was in 2004. And our contention is that it pretty much ties our hands. We almost cannot do anything unless we violate that ruling, which puts us in the conflict with the City Attorney, and, and he's doing his job, and we're trying to protect the rights of the citizens. If every time someone went to Mr. Glover with an appeal, the answer was there is no appeal, why would you have a Board of Zoning Appeals? What does mean? Well, you can go to them, but they're not allowed really to approve anything because its against the law if they do. Well, you know, Mr. Guynn can say, well you know, that may be true, but there is an exception. Well, I went back for 20+ years I've been on this Board – I can't think of a case that would meet the current requirements as interpreted by them. I don't know of a case that would meet that. But I'll read this to you – "The threshold question for a Board of Zoning Appeals in considering an application for a variance, as well as for court reviewing the decision, is readily affect of the zoning ordinance upon the

VAMES

property under consideration as it stands, interferes will all reasonable, beneficial uses of the property, taken as a whole." That's what we're imposed with. Now, there is one word in there that I really pull out, and I say a very important word, and that word is "reasonable". Interferes will all reasonable, beneficial uses of the property. Mr. Guynn's interpretation of reasonable is going to be one thing, our interpretation is going to be another, Mr. Goodwin, your interpretation will be something else, but I think the most important interpretation is the property owner. If he, himself feels that his right to use his property properly is being withheld from him, well then that's very important. Well, you could well, if that's the case, then everything ought to be approved by the Zoning Board and just go throw the law out the window. But that's not the case, there's always a line that you draw and that line that you draw is – once you cross it and once you interfere with the health, safety, welfare of yourself and your neighborhood, and if any of those 81 names would have been against this wall, we would have certainly reconsidered that – just as seriously. But in this case, there's 81 names and everyone says its fine – and we've checked the safety and welfare. I spent Saturday afternoon over there for awhile, driving around the block, coming out of every intersection, turning every way, I didn't see a safety problem. And if they say they can't enjoy their property properly because the traffic and the noise and the dirt, then I respect that, and I think we need to be sure we protect the property rights of our citizens, because that is a cornerstone of our democracy. We can't turn our back on it, and its happening everywhere. And I know that, uh, Mr. Guynn, I certainly respect – if I was in your job, I'd be doing the same thing you did – you're doing the right thing. And Mr. Glover, the same thing – you are doing your jobs. But if we are only a red stamp every time the Zoning Board, or the Zoning Administrator makes a decision, we just endorse that and say I'm sorry. Say that's correct, then what's the use in having it? We, we are a Zoning Board of Appeals and not a Zoning Board of Approval, and, and we are for an appeal. If you say, well you can't appeal anything, what's the use of having a Zoning Board, the state legislature needs to say disband all Zoning Boards because you can't get a zoning variance approved. That's why we're here. We're here to listen and to take into consideration the rights of the individual person that has recourse only through us, and it protects their rights as a property owner. Thank you.

OLIVIA WELSH: I'm gonna let you speak – just a minutes. Uh, if the people, the citizens of a, of this State, can't go to somebody to get relief, I think that is unconstitutional. Because when you go to a Zoning Board of Appeals, you go in to get relief from what the government agency has told you, you cannot do. And, uh, I have a problem with it, and I hope every one of you all – I had a call from a legislator yesterday afternoon wanting to know what this *Cochran* law was. And I said to him, I said you know, you were down there when it was done, why don't you, why don't you tell me what it is? Well, he said, I just thought I'd ask, I know its gonna come out in the paper. I said well maybe you better figure out what you've done. And I hope everyone of you all will contact your legislators and tell them how dumb this law is. Uh, Mr. Smiley.

NORMAN SMILEY: Uh, Madam Chairman, I think that the, the testimony today and uh the dates and who said what, when and who met where, and all that, uh, that notwithstanding, I think its important that everybody understand that, that, this Board, uh

understands and appreciates the Code and the law. Uh, with that said, it, it bothers me that we have, in this particular case, citizens of the City calling the City to get permission to build a wall, and a City official goes out there and gives them approval to build the wall. Uh, they went through a lot of time and expense to build it – the walls built and then suddenly they receive a notice from the City saying well, we've, basically we can't do this. To me that's the crux of the discussion today. Uh, an agent for the City gave them approval. Several months later, the City comes back and says no, and uh, to me, that, that's really what it boils down to.

OLIVIA WELSH: And I don't think this wall is detrimental to anything. In fact, I think it enhances, and I wouldn't want that noise in my ear all night long if I didn't have air conditioning, and I wouldn't want that dust coming in my windows all the time. So, with that, is there anybody else that wants to say anything else? I'll listen for a motion.

PAUL VAMES: I'll make the motion that we grant the variance that the wall be allowed to stay as it is.

OLIVIA WELSH: Any second?

NORMAN SMILEY: Second.

OLIVIA WELSH: All in favor?

NORMAN SMILEY, PAUL VAMES, WILLARD KEELING AND OLIVIA WELSH (in unison). Aye

OLIVIA WELSH: The motion carries 4-0 with 1 exclusion. You've been excluded. Okay, thank you all for coming, uh, remember, anybody here they have 30 days, the City, to appeal this, and I, uh, so, it may, I don't know what they will do and what they won't do, but we did the best we could. Now, we're going to have a

RICHARD ROBERTSON: May I say one thing?

OLIVIA WELSH: Yeah, go ahead Dick.

RICHARD ROBERTSON: I, I just want to say for the benefit of, of those of you who are left, that I'm not known as the shrinking violet, but in this case, I had to demur uh, for reasons which I think we made evident. I, uh, it would have been not the right thing for me to do since we do business together. But, I'll say one thing to you. Whether this was the right thing to do or not, is our City going to be better because of what's been done with this wall, or is it not. I think the answer is very evident, even though it may run afoul of the *Cochran* law. God bless the *Cochran* law.

BELLONI BZA APPEAL
EXHIBIT 5

V I R G I N I A:

IN THE GENERAL DISTRICT COURT OF THE CITY OF STAUNTON

CITY OF STAUNTON,	)
	)
v.	)
	)
FRANK AND DEBRA BELLONI,	)
DEFENDANTS.	)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. GREGORY MOONEY

Staunton, Virginia

Wednesday, October 12, 2011

10:45 a.m.

Pages 1 - 37

Reported by: Kay Trigilio, RPR

A P P E A R A N C E S

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WITNESS ON BEHALF OF THE COMMONWEALTH

	Direct	Cross	Redir	Recross
TIM HARTLESS	4	14	23	
EARL FRANKLIN THOMPSON	24	26	30	30

E X H I B I T S

(Returned to counsel)

ON BEHALF OF THE COMMONWEALTH

NO.	DESCRIPTION	PAGE
1	Photograph	10
2	Photograph	12
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ON BEHALF OF THE DEFENDANTS

NO.	DESCRIPTION	PAGE
1	Staunton City Customer Service Commitment	18
2	Photograph	20

P R O C E E D I N G S

MR. GAINES: Each of the defendants is charged with erecting a wall in the front yard during the period 2011. Pleas of not guilty.

THE COURT: All right. Go ahead. Whenever you're ready.

MR. GAINES: Your Honor, the Commonwealth would call Tim Hartless with City Zoning.

THE COURT: All right.

TIM HARTLESS,
called as a witness by and on behalf of the Commonwealth, after having been duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please, in the witness chair.

DIRECT EXAMINATION

BY MR. GAINES:

Q. Mr. Hartless, would you please state your name and occupation?

A. My name is Tim Hartless. I'm the zoning technician for the City of Staunton.

Q. And how long have you been employed in that position, sir?

A. Since September of 2005.

Q. Calling your attention to the late summer of 2006, do you recall having any conversation with Mr. Belloni -- Belloni -- excuse me, Belloni, I believe?

MRS. BELLONI: That's correct.

Q. Frank Belloni.

A. Mr. Belloni called our office and talked to our secretary --

MR. OBENSHAIN: Your Honor, I'd object to hearsay. I think the witness was asked about whether he had any conversation, not --

MR. GAINES: That's correct, Your Honor.

THE COURT: Get to that.

BY MR. GAINES:

Q. I understand, given the background, did you actually go meet with him?

A. I did. I did talk to Mr. Belloni.

Q. Where did that take place?

A. It took place at their home on Augusta Street.

Q. Is that in the City of Staunton?

A. Yes, it is in the City of Staunton.

Q. Is it commonly referred to as Chilton Hall?
A. That is what they call it, yes.
Q. Is it at the intersection of Ridgeview and North Augusta Street?
A. That's correct.
Q. Now, what was -- what did Mr. Belloni, Dr. Belloni, want to see you about?
A. They were interested in building what they referred to as a sound barrier along North Augusta Street and Ridgeview to try to block some of the traffic noise.
MR. OBENSHAIN: I don't mean to interrupt. I'm assuming that the question is relating to what Mr. -- Dr. Belloni specifically told him, not what he learned from somebody else. I don't want to unduly --
THE COURT: Right. I understand.
MR. OBENSHAIN: -- impede, but to the extent he's offering something he came to through hearsay, I would object.
THE COURT: Your answer is going to be based on your conversation with Dr. Belloni?
THE WITNESS: That's correct.
THE COURT: If I mispronounced that at the outset, I apologize.
DR. BELLONI: That's quite all right.

THE COURT: All right. Go ahead.

A. Dr. Belloni indicated that they were interested in building a sound barrier to block some of the traffic noise along North Augusta Street.

BY MR. GAINES:

Q. And did you go into the yard and in that area and look at it?

A. Yes.

Q. And when did you do that?

A. We met there at his house, in his front yard. He showed me the area where he wanted to build the wall. It was a cinderblock wall, basically, is what they were interested in building as a sound barrier. We looked at the area where they wanted to erect this wall. We discussed the code requirements, our zoning requirements for maximum height and for setback placement of the wall.

Q. What did you advise him about the height?

A. I advised him that there was no setback requirement for a wall, but our zoning code does limit the height of walls to three-and-a-half feet. At that time the code limited it to three-and-a-half feet if the wall was such that it materially impeded vision.

Q. You're talking about a solid wall?

A. Right. And I told him at that time this

was a cinderblock wall, solid wall, it would impede vision, so it would be limited to three-and-a-half feet.

Q. Was there any more to the discussion?

A. No. That was the extent of our discussion. At that point I left and went back to the office.

Q. Now, subsequently, in March of 2007, did it come to your attention that there -- that there had been another inquiry about building a wall? Just yes or no.

A. Yes.

Q. And did you do anything with reference to that second inquiry?

A. At that point the wall was not under construction.

Q. So you didn't go back out there or anything like that?

A. No. No.

Q. Okay. At some point were you or your office advised that a wall was under construction?

A. We did receive a complaint that there was a wall being constructed.

Q. And was that in mid September of 2007?

A. Yes, that's correct.

Q. What did you do -- what did you do in

response to that complaint?

A. At that point we drove out, identified there was a wall being constructed, drafted a Notice of Violation and hand-delivered it on September the 20th.

Q. And why did you draft a Notice of Violation and deliver it on those dates in September of that year?

A. It was obvious, from what we saw, the wall -- the intent of the wall was to exceed our maximum height restrictions.

Q. Mr. Hartless, I show you a couple of photographs or copies of photographs, and do you recognize what's depicted in those photographs?

A. Yeah, this is the beginning stages of the construction.

Q. Do those photographs accurately depict, from the angles from which they were taken, the state of the construction of the wall when you were there on September 20th, I believe you said?

A. That's correct.

Q. And which -- there appears to be a hedge there. Is that a significant reference point for you?

A. The hedge would be along North Augusta Street. That's where the hedge is located.

MR. GAINES: Your Honor, we'd move to introduce this as Commonwealth Exhibit 1.

MR. OBENSHAIN: Can I just inquire very briefly?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. OBENSHAIN:

Q. All right. Did you take that picture?

A. No.

Q. Do you know who took it?

A. No, I'm not for sure.

Q. Did you see that wall in that state?

A. Yes.

Q. You saw that on that day?

A. I saw that wall when it was in that stage of construction.

Q. Okay.

THE COURT: Admitted. Commonwealth's 1.

(Commonwealth Exhibit No. 1 was admitted into evidence.)

BY MR. GAINES:

Q. Were you present when the Notice of

Violation was delivered to either Mr. or Mrs. Belloni?

A. I was.

Q. To whom was it delivered?

A. They were both there in the room when it was handed to Dr. Belloni.

Q. Is this technically a criminal matter? Are Debra Belloni and Frank Belloni in the courtroom today?

A. Yes, they are.

Q. Would you identify them, please, for the Court?

A. Right there.

Q. After delivering the Notice of Violation, did you ever return to the property on North Augusta Street?

A. Mr. Glover -- Mr. Glover returned. I do not recall if I was with him or not at that time.

Q. Have you been by there since?

A. I have been by there many times since.

Q. Mr. Hartless, I show you a photograph of a road in the foreground and a nice brick home in the right background and a wall in between. Do you recognize what's depicted in that photograph?

A. I do recognize what's depicted in the photograph.

Q. What is that?
A. That would be a wall in front of 1403 North Augusta Street.
Q. And is that -- does it accurately depict how it appeared -- is that the wall when it's finished?
A. Yes.
Q. Does it still appear that way today?
A. It still appears this way today.
Q. I understand the vegetation changes from season to season?
A. Yes, but that wall still exists in that state today.
MR. GAINES: Your Honor, we would introduce this as Commonwealth 2.
MR. OBENSHAIN: No objection.
THE COURT: All right. Commonwealth 2.

(Commonwealth Exhibit No. 2 was admitted into evidence.)

BY MR. GAINES:
Q. I show you another photograph. It appears to be you standing in front of a wall. Do you recognize what's depicted in this photograph?

A. I do.
Q. What is that?
A. That would be me standing in front of this wall. This would be the Ridgeview Road side of the wall.
Q. There's some writing that was put on there. Is that the height of the wall barriers at different points from six to seven feet?
A. That's correct.
Q. Is that based on your measurements?
A. That's based on our measurements, yes.
Q. Does it accurately depict the appearance of the wall as it was on the day that was taken?
A. Yes.
Q. Is the wall in a similar state?
A. Yes, it's in a similar state.

MR. GAINES: I move that into evidence.

MR. OBENSHAIN: No objection.

THE COURT: Commonwealth 3.

(Commonwealth Exhibit No. 3 was admitted into evidence.)

MR. GAINES: Your witness.

MR. OBENSHAIN: I do have a couple of

questions.

CROSS-EXAMINATION

BY MR. OBENSHAIN:

Q. Mr. Hartless, the Commonwealth's attorney said this is technically a criminal prosecution. You filed this; did you not?

A. Yes, I did.

Q. You filed it as a criminal prosecution?

A. Yes.

Q. You filed this seeking a misdemeanor conviction against Ms. Chilton and/or the Bellonis?

A. That's correct.

Q. And you -- when you went out there to deliver the Notice of Violation, that was in September of 2007?

A. That's correct.

Q. You first became aware, as I understand it, that the Bellonis had some intention of building a wall -- you or your office -- back in -- sometime in 2006?

A. That's correct.

Q. And they started construction sometime in the summer of 2007; right?

A. I'm assuming.

Q. Or early fall?
A. Sometime in that area. I believe we saw it in September. It was already -- construction had started at that point. That's correct.
Q. And so it was completed in the fall of 2007; wasn't it?
A. I believe so. I believe it was a few months after.
Q. By September 20, 2007, the date that you delivered the Notice, the wall was already in a condition that you considered to be in violation of the city's ordinance; is that right?
A. A portion of it.
Q. Okay. So you already had reason to believe that they were in violation of the city zoning ordinance, September of 2007?
A. When we delivered the Notice, yes, sir.
Q. Okay. And when you went to deliver the notice, you went with another zoning officer; is that right?
A. I did.
Q. You took Earl Thompson with you?
A. That's correct.
Q. And you became aware, before delivering that Notice, that Earl Thompson had talked to the

Bellonis?

A. That's correct.

Q. You became aware, before delivering the Notice, that the -- that Mr. Thompson had told the Bellonis that they could construct the wall as planned without violating the city zoning ordinance; is that right?

A. That's not exactly accurate. Mr. Thompson had stated that, in his opinion, the hedge existed and that the wall could be approved as long as it did not exceed the height of the hedge.

Q. And you were aware that Mr. Thompson actually met with Dr. Belloni and told him that the wall could be constructed legally because of the hedge; is that correct?

A. I was aware of that.

Q. And you're aware that Mr. Thompson, as an authorized officer of the Zoning Department, intended for the Bellonis to rely upon his instruction; right?

A. That's correct.

Q. And you're aware that there is no application that people had to file in order to build a wall at that time; is that right?

A. That's correct.

Q. There was no permit that had to be obtained

in order to build a wall at that time; is that right?
A. That's correct.
Q. All that you had was an ordinance that says that it can't be higher than three-and-a-half feet in certain circumstances if it will materially -- materially -- impede vision across such yard. This wall didn't impede vision of traffic at the Augusta Avenue intersection because of the hedge; right?
A. The wall, in its final state, was taller than the hedge.
Q. Well, there's no vehicle that could have seen over that hedge, anyway, was there? That was a hedge that was six, seven feet tall, right there at the corner of Augusta Avenue and the corner where it was built; right?
A. That's correct.
Q. And even before the wall was built, it was the hedge that materially impeded vision at that corner before the wall was there; right?
A. That's correct.
Q. And the wall had no impact at that corner on vision of traffic approaching at that intersection; did it?
A. Not on Augusta Street, no, sir.
Q. Okay. So it's a matter of interpretation

as to whether it materially impeded vision?

A. Yeah, the zoning administration's interpretation.

Q. So your interpretation was that it did materially impede vision?

A. Across the yard, yes, that's correct.

Q. And you're aware that another officer in your office had told the Bellonis that it was his interpretation that it did not violate or would not violate the zoning ordinance; is that right?

A. Yes, that's correct. He was under the opinion that it would not, as long as it didn't exceed the height of the hedge.

Q. I'm going to hand you a document I'm going to mark as Defense Exhibit Number 1.

MR. GAINES: No objection, Your Honor.

THE COURT: All right. Defendant's 1.

(Defendants' Exhibit No. 1 was received into evidence.)

BY MR. OBENSHAIN:

Q. Do you recognize that? This is the Staunton City Customer Service Commitment that Staunton -- the commitment that Staunton has made to

its residents and businesses; is that right?

A. That's correct.

Q. And one of the commitments that it makes is that we will provide you with consistently reliable service and information. We will give you straight, accurate information on our -- on all our operations in order to keep you informed at all times; right?

A. That's correct.

Q. Okay. At best -- at best, even under the version of events that you've testified to, your office gave inconsistent information to the Bellonis; right?

A. It depends on -- you know, taking into account that I had been out there before.

Q. Okay.

A. And gave them very clear information on my visit.

Q. Which was inconsistent?

A. Which Earl had a slightly different interpretation of, that's correct.

Q. Okay, fair enough. Did you -- do you believe that meets the customer service commitment that Staunton made to the Bellonis?

MR. GAINES: Your Honor, I would object to the relevance.

THE COURT: I think it's somewhat argumentative.

MR. OBENSHAIN: That's fine.

BY MR. OBENSHAIN:

Q. Let me show you Exhibit Number 2, if I may.

MR. GAINES: Your Honor, I don't object to the foundation. This is -- I've been by that property many times myself. This accurately depicts the front -- from across the street in the summertime, what the hedge looks like in the summertime.

BY MR. OBENSHAIN:

Q. Okay.

THE COURT: Defendant's 2 and 3?

MR. OBENSHAIN: I'm sorry, that's Mr. Gaines' copy. It's the same thing.

THE COURT: All right.

(Defendants' Exhibit No. 2 was admitted into evidence.)

BY MR. OBENSHAIN:

Q. With respect to your visit, you've testified about that before; haven't you?

A. Yes.

Q. You testified at a BZA hearing?

A. That's correct.

Q. You were asked about documentation of a visit that you made during the late summer of 2006, and my understanding is you told them that you had no documentation of that visit?

A. That's correct. I don't have any documentation.

Q. You looked in your calendar; you have no calendar note?

A. We don't have any calendar notes from that time.

Q. You kept no case notes of any visit with the Bellonis?

A. No. It was just a simple --

Q. Go ahead.

A. We ordinarily would not keep a record of jobsite inspections, which is what we would call it, but that's correct. I do not have any documentation.

Q. All right. So BZA proceedings, they concluded, and then there was a circuit court litigation; is that right?

A. Right, the city appealed the BZA's decision.

Q. I don't know whether Commonwealth will agree to the timeline, but my understanding is the

final Order in that Circuit Court proceeding was entered June 17, 2009. Does that sound about right?

A. That sounds about right.

MR. GAINES: That sounds about right. I don't know the specific date, but I think that's pretty close.

MR. OBENSHAIN: Okay.

BY MR. OBENSHAIN:

Q. So you filed this Criminal Complaint, as I understand it, July 21 of this year?

A. That's correct.

Q. So you filed this Complaint four years after you became aware that the Bellonis were building a wall that, in your view, violated the city zoning ordinances; right?

A. That's correct.

Q. And two years following the entry of a final Order in the Circuit Court proceedings following the BZA appeal?

A. That's correct.

MR. OBENSHAIN: Those are all the questions I have for this witness.

THE COURT: Redirect?

MR. GAINES: Yes, Your Honor. If I may have Defense Exhibit 1?

THE COURT: Defense 1.

REDIRECT EXAMINATION

BY MR. GAINES:

Q. During the time period after the -- after mid September of 2007 and you delivered the Notice of Violation, did you or your office make other efforts to try to resolve this matter without bringing charges?

A. Certainly. We did not want to file charges. We gave a tremendous amount of time and communicated with the Bellonis in writing several times in that -- during that time period, trying to resolve this without having to proceed with further prosecution.

Q. Was that, in part, consistent with the city's commitment to try to be friendly and professional?

A. Sure.

Q. And did Dr. Belloni respond to these -- he wrote back?

A. Yes, he did.

Q. And so it wasn't -- it wasn't just dead air for four years?

A. Not at all. We thought we were making

progress and thought that we could resolve this without any further action.

MR. GAINES: I don't have any other questions, Your Honor.

THE COURT: All right. Thank you.

MR. GAINES: Commonwealth would call Earl Thompson.

EARL THOMPSON,

called as a witness by and on behalf of the Commonwealth, after having been duly sworn, was examined and testified as follows:

THE COURT: Thank you. Have a seat right there, please.

DIRECT EXAMINATION

BY MR. GAINES:

Q. Mr. Thompson, good to see you again. State your name and your occupation.

A. Earl Franklin Thompson. I'm currently a project manager for Countryside Services.

Q. Now, you used to work for the City of Staunton as one of the zoning officials; is that right?

A. Yes, sir.
Q. And, in fact, calling your attention to March of 2007, you were a zoning technician; is that right?
A. Well, actually, Tim would have taken that over. I would fill in for him when he was out of the office.
Q. Was he out of the office the first week of March of 2007?
A. I would assume so, if that's the time frame that I met with --
Q. When you met with Frank Belloni?
A. Yes, sir.
Q. And you did meet with Frank Belloni; didn't you?
A. Yes, I did. I met with the Bellonis on their property at some point in time. Again, I have no calendar or documentation as to the exact date of that visit.
Q. Was it before they started building the wall?
A. It was before they started, yes, sir.
Q. There's been some reference to the fact that you told them, to some degree, that a wall would be okay. What, exactly, did you tell them?

A. I told them that, in my opinion, the existing hedge provided an existing nonconforming condition, which, in the code, if you have an existing nonconforming condition, you don't have to eliminate that as a code requirement. And that if they were to build a wall behind the hedge, no taller than the hedge, that that wouldn't increase their nonconformity, and I felt it would be okay to do that.

Q. Did you discuss with them specifically building a wall along Ridgeview as well?

A. I think they had intended to do that from our discussion. And, again, my intent was that they could build a wall no taller than the hedge where the hedge was existing.

Q. That's what you conveyed to them?

A. Yes.

Q. Was it just Frank Belloni and not Debra?

A. I believe they were both present.

Q. All right. All right.

MR. GAINES: Please answer counsel's questions.

CROSS-EXAMINATION

BY MR. OBENSHAIN:

Q. Mr. Thompson, you went out, actually, to

the site; right?

A. Yes, sir.

Q. Do you remember whether that was in the fall of 2006 or, as Mr. Daniels suggested, the beginning of 2007?

A. I don't really recall. I do recall discussing the event at my church, which occurs in September, with them at that time.

Q. Bake sale at your church?

A. Yes, sir.

Q. Told them -- did you tell them to go buy something at your church sale?

A. Oh, yeah. I told them they couldn't pass up those apple pies.

Q. When is that bake sale?

A. It's always in September.

Q. Does that lead you to believe that conversation took place in September of 2006?

A. More than likely, yes, sir.

Q. Not March of 2007?

A. Yes, sir.

Q. Okay. And based upon what the Bellonis told you, my understanding is you told them that they could build their wall?

A. Yes, sir.

Q. You were an authorized official of the zoning office; were you not?

A. Yes. At that time, yes, sir.

Q. And you were -- that fell within the scope of your responsibilities as an employee of the zoning office --

A. Yes, sir.

Q. -- is that right? And the Bellonis didn't, to the best of your knowledge, mislead you about what their intentions were with respect to building the wall; did they?

A. No, they did not.

Q. And when you told them that you thought that they could build their wall, did you intend for them to rely on that?

A. Yes, sir.

Q. And understand that they were going to go to significant personal expense as a result of what you told them?

A. Yes, sir.

Q. And that was your expectation and your intention for them?

A. Yes, sir.

Q. For them to proceed with the construction of that fence -- or the wall? And, as a matter of

fact, did you tell them something to the effect of "have at it"?

A. I may have.

Q. Does that sound like you?

MR. GAINES: It sounds like him. I'll stipulate that.

BY MR. OBENSHAIN:

Q. In September of 2007 did it come to your attention that your office was about to serve the Bellonis with a Notice of the zoning violation?

A. Yes, sir.

Q. And what did you do in response to learning that?

A. I met with John Glover, who is the zoning administrator -- he has the final say on zoning matters, as far as the city -- and made him aware that I had met with them, indicated that I told them they could do what they had planned to do.

Q. And they served the Notice anyway?

A. Yes, sir. He felt like I had exceeded the bounds of my duties and it was a violation.

Q. Did you exceed your authority in giving advice or --

A. I don't feel like I did.

MR. OBENSHAIN: Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. GAINES:

Q. Again, with reference to the specific advice, you testified that it was -- that if they built the wall that would not be any higher than the hedge where the hedge was --

A. Yes, sir.

Q. -- they would be all right?

A. Yes, sir.

MR. GAINES: Okay.

MR. OBENSHAIN: Can I -- if you'll indulge me?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. OBENSHAIN:

Q. The wall, as it's constructed -- you've been by and seen the wall?

A. Yes, sir.

Q. Is that wall consistent with what they told you when you went out there?

A. Pretty much so, yes. It's probably a little taller than I envisioned in some locations, but

yes, sir.

Q. Is it taller just in terms of the practical reality of seeing it, or did they -- they didn't mislead you about what they were going to build; did they?

A. No.

Q. What is there is what they told you was going to be there when you met with them?

A. Pretty much, yeah.

Q. And it's just seeing it maybe is the cold hard reality of what they had described?

A. Well, on the side street there was -- the hedge wasn't as tall on the side street as the wall.

Q. Well, they told you that they were going to build the wall on the side street?

A. Yes, sir.

Q. All right. They told you that it was going to be uniform height?

A. I don't know that we discussed the exact height.

Q. Okay. So the front is exactly as they described it; is that right?

A. Yes, sir.

Q. The side, you may not have discussed that with them?

A. We probably didn't discuss the height other than my intent that they not exceed the height of the existing hedge.

Q. All right. And that was, you believe, in 2006?

A. Yes, sir.

Q. And the wall was complete by sometime in September, fall of 2007?

A. Yes, sir.

MR. OBENSHAIN: All right. Thank you.

MR. GAINES: That doesn't give rise to any further questions, Your Honor.

THE COURT: Okay. Thank you. Have a seat, please.

MR. GAINES: Commonwealth rests its case in chief, Your Honor.

THE COURT: All right.

MR. OBENSHAIN: Your Honor, if we may, we move to dismiss on the statute of limitations grounds.

THE COURT: What is the statute of limitations?

MR. OBENSHAIN: It is one year.

THE COURT: All right. Okay.

MR. OBENSHAIN: What I would suggest to the Court is that statute of limitations, pursuant to

19.2-8, is that the limitations expire one year after there was cause therefore. In this instance the clear testimony of Mr. Hartless is he knew in September of 2007, four years ago, that there was cause for asserting a zoning violation. That he attempted to work cooperatively with the Bellonis is admirable; however, it doesn't permit them to pursue a misdemeanor action four years after cause therefore arose.

I would note that the city's ordinance and the Complaint suggests that there's a separate violation on each day. However, the Court of Appeals of Virginia has rejected the notion that a -- that the city's ordinance can give rise to a separate misdemeanor violation on every day. And specifically with respect to this statute, it said that the misdemeanor occurs when the cause therefore arose, and, accordingly, I would move to dismiss this as being inconsistent with the statute of limitations.

THE COURT: All right. Mr. Gaines, go ahead.

MR. GAINES: Your Honor, the city's position is that it is a continuing violation. I believe counsel is correct; I believe that the ordinance, as was drafted, did actually say that every

day is a violation, and that's one reason why the time frame alleged in the warrant is as it is. So the Commonwealth's position is if we had charged for separate day for each day, then counsel would be correct, that the charges from, you know, mid September of 2007 would be time-barred by an assertion of the -- of the statute of limitations. But since the wall is still there, that it is a continuing violation, and so this charge is not time-barred.

THE COURT: All right.

MR. OBENSHAIN: Your Honor, in conclusion, what we would say is the cause therefore arose when the city became aware that the wall was being built, in its view, in violation of the zoning ordinance. In Lawless versus County of Chesterfield, the Court views expressly held with respect to this very statute in a strikingly similar ordinance that the code offered a legislative intent to preclude the treatment of each day's violation as a separate misdemeanor, does not authorize a locality to adopt a zoning ordinance that makes each day's violation a separate misdemeanor. It is not a continuing offense, and the city cannot sit on its rights.

And in this case the Bellonis went to considerable expense, are going to be put to

considerable expense, presumably, if the city has its way, and the city has sat on its rights and cannot proceed.

THE COURT: All right. I'm dying to find out what the Board of Zoning Appeals and the Circuit Court said, but that's not in the evidence right now.

I'm a former chairman of the Planning Commission in Alleghany County and vice chairman of the Board of Zoning Appeals, so I have some interest, some residual interest in these matters.

But I think that there is a narrow ground -- I take the argument that there can't be a continuing violation, but I'm not going to rule on that. It seems to me that the language chosen in the Summons doesn't allege a continuing violation. I'm not familiar with the entire zoning ordinance, but it seems to me that it could arguably allege a violation in erecting and maintaining a structure, but it clearly has more limited language. It alleges that the defendants unlawfully erected a wall, and it seems to me that the process of erection was completed well over a year ago. And for that reason I'm going to grant the motion on the basis of the statute of limitations and dismiss the charges.

MR. OBENSHAIN: Thank you, Your Honor.

THE COURT: Conditioned on your telling me what the Board of Zoning Appeals --

MR. GAINES: Off the record. As soon as the Court closes these proceedings.

THE COURT: I'm writing as we speak.

(Exhibits returned to counsel.)

(Proceedings were concluded at 11:53 a.m.)

CERTIFICATE OF COURT REPORTER

I, Kay Trigilio, RPR, do hereby certify that I recorded verbatim the proceedings in the General District Court of the City of Staunton in the captioned cause, heard by The Honorable J. Gregory Mooney, Judge of said court, on October 12, 2011.

I further certify that the foregoing pages, numbering 1 through 36 inclusive, constitute a true, accurate, and complete transcript of said proceedings.

Given under my hand this 8th day of October, 2013.

_____

Kay Trigilio, RPR

BELLONI BZA APPEAL
EXHIBIT 6

CRIMINAL COMPLAINT
Commonwealth of Virginia

RULES 3A:3 AND 7C:3

Print ALL information clearly:

☒ General District Court
☐ Juvenile and Domestic Relations District Court

City of Staunton
CITY OR COUNTY

Under penalty of perjury, I, the undersigned Complainant swear or affirm that I have reason to believe that the Accused committed a criminal offense, on or about

September 20, 2007 until present, in the ☒ City ☐ County ☐ Town
DATE OFFENSE OCCURRED

of Staunton, Virginia

I base my belief on the following facts:

SCC 18.120.010 (2)(b) limits the height of ~~fences~~ walls in any required front yard to 3 and ½ feet if the wall materially impedes vision across the yard

The statements above are true and accurate to the best of my knowledge and belief.

In making this complaint, I have read and fully understand the following:

- By swearing to these facts, I agree to appear in court and testify if a warrant or summons is issued.
- The charge in this warrant cannot be dismissed except by the court, even at my request.

Hartless, Timothy Allen
NAME OF COMPLAINANT (LAST, FIRST, MIDDLE)
(PRINT CLEARLY)

Timothy A Hartless
SIGNATURE OF COMPLAINANT

Subscribed and sworn to before me this day.

7-20-11 10:35AM
DATE AND TIME

☐ CLERK ☒ MAGISTRATE ☐ JUDGE

DC-311 10/97 PC (114-3-010 06/03)

0198

CRIMINAL COMPLAINT

ACCUSED: Name, Description, Address/Location

Bellani, Frank
LAST NAME, FIRST NAME, MIDDLE NAME

161 Seclusion Manor
Mineral, VA 23117

COMPLETE DATA BELOW IF KNOWN

RACE	SEX	BORN MO.	BORN DAY	BORN YR.	HT. FT.	HT. IN.	WGT.	EYES	HAIR
W	M				5	7			

SSN

T. A. Hartless
City Hall
116 W Beverley St
Staunton, VA
24401

BELLONI BZA APPEAL
EXHIBIT 7

STAUNTON
VIRGINIA

September 9, 2013

Dr. Belloni and Ms. Chilton-Belloni
1403 North Augusta Street
Staunton, VA 24401

Dear Dr. and Mrs. Belloni:

Re: 1403 North Augusta Street

One of our staff members noticed that the continuing illegal wall around your property, at the above referenced address, recently shows some missing pieces. So that you do not have any misunderstanding, even as the City has continued to be extraordinarily patient in affording you more than reasonable time to bring the wall into compliance, we provide you with this notice letter.

City staff previously have communicated with you about the illegal wall. Please be advised that any action to do any work on the wall, other than to bring the entire wall into compliance will be considered yet another violation. You also should disclose and make any contractor or other person aware of the City's position, including but not limited to any prospective purchaser or sales agent or firm.

Sincerely,

Sharon E. Angle

Sharon E. Angle
Director of Planning/Zoning Administrator

Cc: Douglas Guynn, City Attorney
Timothy Hartless, Zoning Technician

DEPARTMENT OF PLANNING & INSPECTIONS
116 W. BEVERLEY STREET | P.O. BOX 58 | STAUNTON, VA 24402
540.332.3862 (OFFICE) 540.332.3807 (FAX)

STAUNTON™

March 18, 2014

SENT VIA CERTIFIED & FIRST CLASS MAIL

Ms. Debra Chilton-Belloni
161 Seclusion Manor
Mineral, VA 23117

Re: Zoning Compliance—1403 North Augusta Street, Staunton, VA

Dear Ms. Belloni:

We only recently learned of Dr. Belloni's passing last summer. We extend our condolences. Although there was disagreement and the Circuit Court ruled in favor of the City, Dr. Belloni was clearly a gentleman and a scholar and he was vigorous in asserting a position.

As you know, the matter of zoning violation unfortunately remains unresolved even after the City's successful litigation in Circuit Court several years ago which invalidated the Board of Zoning Appeals' mistaken grant of a variance— and after all of the City's letters since then to Dr. Belloni and you as the owners of the property. Again, if anything, the City has been overly patient.

As the person who succeeded Mr. Glover as Zoning Administrator, I believe it necessary to move forward with expecting compliance with the zoning requirements as they pertain to your property at 1403 North Augusta Street. Accordingly, the City serves formal notice that the violations must be corrected by **May 14, 2014**, which affords you almost another two months to accomplish the needed changes for full compliance. If you choose not to do so, then the City will explore all of its options to take enforcement action, including the filing of necessary papers.

You remain in violation of City zoning requirements, and I respectfully urge you to take action now to achieve compliance before the deadline. In fairness to all citizens, the City should expect zoning compliance whether property is on the north end or the south end or elsewhere in the City. There has already been more than enough time to comply with respect to your property since the City prevailed in the Circuit Court.

This letter is being sent to you by both certified and first class mail so that we assure your receipt. A copy also has been posted on the front door of 1403 North Augusta Street.

Sincerely yours,

Sharon E. Angle

Sharon E. Angle
Director of Planning/Zoning Administrator

DEPARTMENT OF PLANNING & INSPECTIONS
116 W. BEVERLEY STREET | P.O. BOX 58 | STAUNTON, VA 24402
540.332.3862 (OFFICE) 540.332.3807 (FAX)

LENHART
ATTORNEYS AT LAW | PETTIT

Mark D. Obenshain
Attorney at Law

Direct: (540) 437-3133
mdo@lplaw.com

Phone: (540) 437-3100
Fax: (540) 437-3101
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

March 27, 2014

Via Fax and Mail

Sharon E. Angle
Director of Planning/Zoning Administrator
City of Staunton
P. O. Box 58
Staunton, VA 24402

Re: 1403 North Augusta Street, Staunton, VA

Dear Ms. Angle:

I represent Debra Chilton-Belloni and she sent me a copy of your March 18, 2014 letter. In your letter, you once again raise on behalf of the City the issue of the wall around the subject property. While I understand the City's frustration, I take issue with your characterization of the City as patiently waiting for Mrs. Belloni to remove or modify the wall.

In 2011, the City filed suit seeking to enforce the alleged zoning violation. That action was litigated and ultimately dismissed on a finding by the Court that it was time barred by the statute of limitations. The City elected not to appeal that determination.

Dr. and Mrs. Belloni considered the matter closed until one week after her husband's death, Mrs. Belloni received your letter of September 9, 2013. I did not receive a copy of that letter until last week. That letter created a significant Catch-22 for Mrs. Belloni in that the missing pieces of the wall referred to in your letter of September 9, 2013 were the result of damage inflicted when the wall was struck by a truck. The driver of the truck was texting, drove off of the road and hit the wall. The truck driver bears financial responsibility for the crash, but as a result of the letter you sent on September 9 threatening to treat any repairs as a new violation of the City's zoning ordinance, Mrs. Belloni has refrained from making those repairs. As a result, no new violation can be asserted and the statute of limitations still precludes further enforcement action.

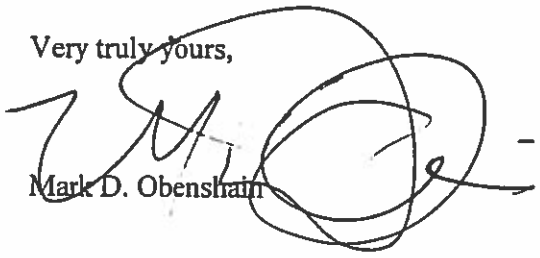
The damage to the wall is unsightly and Mrs. Belloni would like to repair it, however, she is afraid to do because of the threat contained in your September 9, 2013 letter, which came one week after her husband's death.

The efforts and energy being dedicated to this longstanding dispute, both on the part of the City and Mrs. Belloni are perhaps misplaced. I would hope that instead of continuing to fight, we could instead work to reach some kind of compromise agreement. At this point, it is impossible for either the City or Mrs. Belloni to be satisfied. Mrs. Belloni has expended considerable resources in this matter and it is apparent that the City continues to fret over it as well. I don't think that the City should persist in asking Mrs. Belloni to tear down the wall. I also don't think that it is productive to require that damage go unrepaired. If there are reasonable modifications to the wall that the City is willing to finance, I suspect that could form the basis for compromise.

Please let me know if the City has any interest in meeting to discuss some way to resolve this apparent impasse.

With best regards,

Very truly yours,



Mark D. Obenshain

MDO/jlh
HB257304.DOCX

cc: Mrs. Debra Chilton-Belloni

STAUNTON
VIRGINIA

April 7, 2014

Mr. Mark D. Obenchain, Esq.
Lenhart and Pettit
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

Dear Mr. Obenshain:

The City already has compromised remarkably, affording and waiting an extended time for civil compliance with zoning provisions of the Staunton City Code. The date mentioned in my previous letter still affords your client reasonable opportunity to achieve compliance, although it appears from your letter that your client intends to refuse to do so even after yet all this time.

Please be sure that you and your client promptly disclose to any prospective purchaser or agent the City's position that there is a continuing zoning violation, despite the notable patience demonstrated by the City. We also ask that the City's previous correspondence to the Bellonis be disclosed to any such interested person so there is full information about the circumstances of the property and the City's repeated communications to seek voluntary compliance.

For any future legal communications with the City at this time, you may contact Mr. Victor Santos. I believe you know how to reach him. I emphasize, however, that the prior date mentioned in my previous letter remains the same so that there is no misunderstanding.

Sincerely,

Sharon E. Angle

Sharon E. Angle
Director of Planning/Zoning Administrator

cc: Victor M. Santos, Esq.

DEPARTMENT OF PLANNING & INSPECTIONS
116 W. BEVERLEY STREET | P.O. BOX 58 | STAUNTON, VA 24402
540.332.3862 (OFFICE) 540.332.3807 (FAX)

STAUNTON
VIRGINIA

April 16, 2014

Mr. Mark D. Obenchain, Esq.
Lenhart and Pettit
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

Dear Mr. Obenchain:

I understand that following my April 7, 2014 letter to you that you contacted Mr. Santos. I realize that neither you nor the property owner has lived in Staunton and likely don't really know about our collective city efforts over the years to promote and preserve the special character and other related zoning interests in various ways related to streetscapes. So, perhaps Mr. Santos can within a constructive legal framework help you appreciate why the City has continued to have an interest in working—even too patiently, perhaps, over an extended time— to achieve civil zoning compliance with respect to the illegal walls on Augusta Street. We still would prefer the property owner work with us, but it appears from the extended history that your property owner has no intention at this point in doing so.

Neither Mr. Glover, my predecessor, nor I as Zoning Administrator authorized the walls and, in fact, in addition to what Mr. Hartless advised the property owner originally, the walls were continued to be built, even after Mr. Glover personally visited the site as Zoning Administrator and confirmed their illegality for the property owners. As you know, not even the Zoning Administrator has authority to issue zoning opinions contrary to the provisions of the Staunton City Code. And even if someone purported to do so, the City is not bound by such an action or prevented from expecting compliance with the law that applies to everyone else, as written. It's unfortunate that the property owners ignored Mr. Glover when he visited the property. It's also regrettable that so much time has passed without compliance, but as a small city we strive to keep communications open, even to a fault, and maintain hope that a property owner will ultimately decide to work with us. The other two property owners involved at the time took that approach, cooperating with us after the circuit court ruled in favor of the City and against them and your property owners as to the variances, and concluded the Staunton Board of Zoning Appeals had acted contrary to law in all three cases in purporting to make exceptions to our zoning conditions on the location and height of the walls or fences.

Mr. Santos forwarded this week your note to him "requesting copies of the following records: 1) Complaints concerning the wall on the subject property; 2) Responses or notes relating to responses made by City officials to complainants referenced in No. 1; 3) Any records related to alleged zoning violations in connection with the subject property dated or generated after October 12, 2011." Your request covers almost three years, and we're glad to respond to it. Particularly in these continuing tight budget times especially for a small city, we have a limited number of staff in our department, and one of them is out this week at training. For these reasons and other demands on our staff, it is not practical for us to respond in 5 work days even to fully ascertain what kind of time and estimated expense may be involved in the search, identification, retrieval, and copying of any records that fall within your broad request. We also will need to evaluate to what extent your request implicates exclusions under the Virginia Freedom of Information Act, such as to investigation of official zoning enforcement complaints.

Sincerely,

Sharon E. Angle

Sharon E. Angle
Director of Planning/Zoning Administrator

STAUNTON
VIRGINIA

April 7, 2014

Mr. Mark D. Obenchain, Esq.
Lenhart and Pettit
90 North Main Street, Suite 201
P.O. Box 1287
Harrisonburg, Virginia 22803

Dear Mr. Obenshain:

The City already has compromised remarkably, affording and waiting an extended time for civil compliance with zoning provisions of the Staunton City Code. The date mentioned in my previous letter still affords your client reasonable opportunity to achieve compliance, although it appears from your letter that your client intends to refuse to do so even after yet all this time.

Please be sure that you and your client promptly disclose to any prospective purchaser or agent the City's position that there is a continuing zoning violation, despite the notable patience demonstrated by the City. We also ask that the City's previous correspondence to the Bellonis be disclosed to any such interested person so there is full information about the circumstances of the property and the City's repeated communications to seek voluntary compliance.

For any future legal communications with the City at this time, you may contact Mr. Victor Santos. I believe you know how to reach him. I emphasize, however, that the prior date mentioned in my previous letter remains the same so that there is no misunderstanding.

Sincerely,

Sharon E. Angle

Sharon E. Angle
Director of Planning/Zoning Administrator

cc: Victor M. Santos, Esq.

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EXHIBIT K

OBENSHAIN LAW GROUP

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December 13, 2017

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I represent Debra Chilton-Belloni and write this letter to you in your capacity as Chairman of the Staunton City Board of Zoning Appeals in order to request a hearing on Mrs. Chilton-Belloni's June 5, 2014 appeal to the Board of Zoning Appeals (BZA) following the issuance of a Supreme Court of Virginia Opinion in this matter on November 9, 2017.

Because of the long history involved in this matter, I will provide some historical background. In 2006, Dr. and Mrs. Chilton-Belloni bought a historic home at 1403 North Augusta Street in Staunton. Because of heavy traffic they wanted to build a wall in front to block the road noise. There was no application process for the approval of such a wall and no permit to issue, but the Bellonis nonetheless consulted city zoning officials and after a site visit they were told that the wall they planned to build would comply with the City's zoning ordinances.

After the wall was nearly complete, on September 20, 2007, the City Zoning office issued a notice to the Bellonis telling them that the wall actually violated the zoning ordinances. In response, the Bellonis citing hardship, asked the City's BZA to grant a variance. After considering the circumstances, on February 20, 2008, the BZA voted unanimously in favor of the variance.

The City then appealed the variance, arguing that the BZA had exceeded its authority. The City cited *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004), in which this Court held that the only hardships sufficient to justify the grant of a variance are those that are Constitutional in dimension—those that approach confiscation. The Staunton City Circuit Court agreed and reversed the BZA's grant of a variance.

After those proceedings, nothing happened for 2 years. The City took no action and the Bellonis took no steps to remove the wall. In 2011, the City filed criminal charges against Dr. Belloni citing the wall as violating its zoning ordinances. That case was dismissed at trial for the City's failure to take action within the period allowed by the statute of limitations.

Once again, nothing happened for two more years. The Bellonis reasonably believed that the City had exhausted its efforts. Then in late 2013, after a truck damaged a part of the wall, the City once again renewed its efforts to secure the removal of the wall. It sent a letter stating that the repair of the damage to the wall would be viewed as a new violation of the zoning ordinances and the City again demanded the removal of the wall.

Since the beginning of this process, and after the reversal of the 2008 variance by the Circuit Court, the Code of Virginia provisions defining a hardship sufficient to justify the award of a variance had been changed. The 2009 statutory amendment eliminated the *Cochran* requirement that hardship justifying a variance must be one that is confiscatory in favor of language allowing a variance if it will "alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. Given that the BZA had voted unanimously in favor of the variance in 2007 and that it would have stood but for the *Cochran* requirement, Mrs. Chilton-Belloni made her new 2014 request for a variance citing the code change as a significant change of circumstance.

The City Zoning Administrator summarily rejected the 2014 variance request and Mrs. Chilton-Belloni again appealed that ruling to the BZA. It is that variance request that remains pending and upon which Mrs. Chilton-Belloni is now requesting a hearing.

As you will recall, before a hearing was scheduled on Mrs. Chilton-Belloni's appeal, she was sued by the Zoning Administrator. Although Mrs. Chilton-Belloni asked for the Circuit Court proceeding to be stayed pending the BZA proceedings, the Staunton City Circuit Court refused and ruled that because Mrs. Chilton-Belloni had requested a variance in 2009, she was "not entitled to relitigate, or have additional review of the matter." As a consequence, when a BZA meeting was scheduled, the attorney for the Zoning Administrator shared the ruling of the Circuit Court and argued that it could take no action on Mrs. Chilton-Belloni's appeal. The BZA then declined to take any action at all on Mrs. Chilton-Belloni's request for a variance, which remains pending. The Circuit Court proceeded to enter an injunction requiring Mrs. Chilton-Belloni to tear down the wall that had been constructed in front of her property and which was the subject of her request for a variance.

Mrs. Chilton-Belloni appealed to the Supreme Court of Virginia which issued a November 9, 2017 Opinion and Order reversing the ruling of the Staunton City Circuit Court and remanding the case for further proceedings. I enclose a full copy of the Opinion.

In the Opinion, the Supreme Court of Virginia absolutely rejected the City's position – that the legal doctrine of *res judicata* should be applied to prevent a subsequent variance request, especially where circumstances and the law have changed. The Supreme Court of Virginia expressly ruled as follows:

> Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a

> property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a land owner from potential benefits to his or her property merely because he or she, or a previous owner had engaged in a prior appeal of the matter under different law.
>
> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error.

The Supreme Court ruled that the circuit court should have delayed taking any action and that it should have allowed the Board of Zoning Appeals to proceed with the consideration of Mrs. Chilton-Belloni's appeal given that the BZA has taken no action to grant or deny the variance.

I respectfully request a hearing by the Board of Zoning Appeals to consider the rezoning request and that such hearing be scheduled as soon as possible.

Thank you for your consideration of this request and the ruling of the Supreme Court of Virginia.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/eis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Mrs. Debra Chilton-Belloni

EXHIBIT L

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THOMAS R. NELSON (1899-1980)
RICHARD F. MCPHERSON (1925-2002)
FRANK L. SUMMERS (RETIRED)
VICTOR M. SANTOS
THOMAS P. MCPHERSON
JOHN C. WIRTH
B. SPENCER CROSS

JESSICA L. ROBINSON
DANIEL E. MOWRY

January 5, 2018

COPY

Mr. Paul Vames, Chair
Staunton Board of Zoning Appeals
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Repeated Variance request of Debra Chilton-Belloni
with respect to 1403 N. Augusta Street

Dear Mr. Vames:

As you may know, this firm represents the Zoning Administrator of the City of Staunton and the City of Staunton with respect to the repeated variance request of Debra Chilton-Belloni concerning a wall (the Wall) located at 1403 North Augusta Street (the Property). For approximately ten years, Ms. Belloni has been in violation of the zoning provisions of the Staunton City Code. Given your role as Chairman of the Staunton Board of Zoning Appeals (BZA), I write to reply initially to the December 13, 2017 correspondence of Mark Obenshain, counsel for Ms. Chilton-Belloni.

It is helpful to recall that, while the BZA plays an important role, its discretion in passing upon variance applications is limited. "Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals." *Martin v. City of Alexandria*, 286 Va. 61, 69 (2013). Variances may not be approved for reasons other than those set forth in the Virginia Code. *Adams Outdoor Adver. v. Bd. of Zoning Appeals*, 261 Va. 407 (2001).

The "historical background" cited by Mr. Obenshain in that correspondence omits several important details and fails to acknowledge the decade-long zoning violation by his client. It further risks sowing confusion as to the issues before the BZA. As but one example, this matter does not concern "rezoning," contrary to the assertion on the third page of Mr. Obenshain's correspondence. I write to provide a more complete, albeit preliminary and not comprehensive at this time perspective, which we anticipate supplementing at a later time.

In 2006, Mr. and Mrs. Belloni purchased the Property, which is located at the intersection of North Augusta Street and Ridgeview Road. At that time, as you may recall, there was significant construction taking place across North Augusta Street, at the site of the former Kings Daughters Hospital. Supposedly in the interest of creating a sound barrier from that temporary work, the Bellonis decided to construct a hollow-core block wall (the Wall) running parallel to both North

Augusta Street and Ridgeview Road.

Prior to commencing construction of the Wall, Mr. Belloni met with Tim Hartless, a City Zoning Inspector, who later testified before the BZA on February 28, 2008 that he told Mr. Belloni that "the City Code would prohibit a wall taller than 3 ½ feet in height in a front yard, and ... that since he did live on the corner of both N. Augusta Street and Ridgeview Road, that we would consider, uh, his property to have two front yards-because he fronted on two separate City streets" (Transcript of 2/28/08 BZA meeting, page 12.) The Zoning Ordinances were, of course, both then and now, easily accessible to the general public, both in print and via the internet, and clearly stated the 3 ½ ft. limit and other restrictions.

The Bellonis nonetheless proceeded to construct the Wall to a height of about 6-8 feet, well in excess of the 3 ½ ft. maximum authorized pursuant to Code § 18.120.010, asserting that they received advice from Earl Thompson, a (now former) official in the City's building office, that such construction was acceptable. Prior to the Bellonis' completion of the Wall, however, the initial advice received from Mr. Hartless, confirming that the Wall was illegal, was repeatedly confirmed, both orally and in writing, by zoning staff, including by Mr. Thompson himself (See 9/29/07 correspondence from Earl Thompson to Mr. and Mrs. Belloni). John Glover, then Zoning Administrator, hand-delivered a written notice of violation, again specifying the applicable provisions of the Zoning Ordinance and instructing the Bellonis of their right to appeal or to seek a variance. The Wall had not been completed as of that time (see, e.g., transcript of 2/28/08 BZA meeting, page 13), but the Bellonis defied Mr. Glover's notice and continued the construction, citing Mr. Thompson as authority, although under the law Mr. Thompson had no more authority to amend the Zoning Ordinance, or grant the Bellonis the right to defy it, than a police officer would to permit a motorist to disregard a posted speed limit. "[N]o subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [municipality's] ordinances." *Dick Kelly Enters. v. City of Norfolk*, 243 Va. 373, 382, 416 S.E.2d 680, 685 (1992). 'We must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute." *Richmond v. County of Henrico*, 185 Va. 176, 189 (1946).

The Bellonis appealed Mr. Glover's interpretation of the clear provisions of the Code and sought a variance from the BZA. A transcript of that proceeding is available and instructive, as it reveals the complete lack of any legal grounds for the Bellonis' application. Notwithstanding the City's arguments, the BZA unanimously upheld the Zoning Administrator's finding that the Wall violated the Zoning Ordinance, but, in defiance of the clear dictates of the law, nonetheless granted the variance. One member of the BZA at the time in fact referred to the law as "dumb" and helped lead the other members to disregard it, in effect prompting the litigation which the City had to pursue to uphold the rule of law.

The City appealed the BZA's grant of a variance to the Bellonis, as well as the BZA's grant of variances to two other property owners, to the Circuit Court, which in 2009 reversed the BZA in all three cases and invalidated the variances, noting that the BZA "acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the

law." The Bellonis noted no further appeal, the legal wrangling over the Wall appeared to be at an end, and the City looked forward to the property owners' compliance.

Though the other two property owners worked cooperatively with the City zoning staff and brought their properties into compliance, and despite the Court's invalidation of the variance granted by the BZA, the Bellonis continued to defy the law and refused any modification to the Wall. The City made numerous overtures to the Bellonis to work cooperatively and continued to encourage compliance, in the hope that further litigation could be avoided. For example, on September 9, 2013 Sharon Angle, the Zoning Administrator at the time, wrote Mr. and Mrs. Belloni, noting the existence of the "continuing illegal wall around your property," and the fact that "the City has continued to be extraordinarily patient in affording you more than reasonable time to bring the wall into compliance."

Finally, given the Bellonis' recalcitrance, they were charged in the General District Court with their continued violations of the Zoning Ordinance. Because the General District Court found that the language chosen in the Summons did not allege a continuing violation, but rather merely that the defendants did "unlawfully erect" the Wall, the one-year statute of limitations applicable to misdemeanors was applied, and the charge was dismissed.

On March 18, 2014 Ms. Sharon Angle, who by then had been appointed Zoning Administrator, again wrote Ms. Belloni, extending the City's condolences over Mr. Belloni's passing the previous summer but noting that the "zoning violation unfortunately remains unresolved even after the City's successful litigation in Circuit Court several years ago which invalidated the Board of Zoning Appeals' wrongful grant of a variance-and after all of the City's letters since then to [Mr.] Belloni and you as the owners of the property." Ms. Angle observed that Ms. Chilton-Belloni remained in violation of the City's zoning requirements and respectfully urged her to take action to achieve compliance before May 14, 2014, after which date, she noted, the City would "explore all of its options to take enforcement action, including the filing of necessary papers."

Further correspondence between Ms. Angle and Ms. Chilton-Belloni's counsel continued thereafter until on May 9, 2014 Mr. Obenshain wrote Ms. Angle to request "a modification from the zoning ordinance ... with respect to the size, height, location or features of a structure-in this instance, a wall-on her property." Ms. Angle responded on May 30, 2014, noting that she had no authority to grant a "modification" to the Staunton City Code and observing that "the matter of hardship already has been fully adjudicated with the Staunton Circuit Court having ruled several years ago against the property owners' position and in favor of the City-and reversing the board of zoning appeals because the board of zoning appeals had acted contrary to law." Ms. Chilton-Belloni then filed what she identified as "an appeal of an administrative decision" and requested "a variance from the above referenced ordinance with respect to size, height, location or features of a structure-a wall-built on the property."

In the meantime, the Zoning Administrator exercised the prerogative, pursuant to the Virginia Code (See, e.g., Va. Code Sec. 15.2-2208 and 2286 and City Code Sec. 18.225.010), to petition for an

injunction from the Staunton Circuit Court, seeking to compel Ms. Chilton-Belloni's compliance with the law. Facing a ruling on the legal merits of the issue—a ruling she clearly wanted to avoid at all costs, as she knew that the Wall continued to be plainly illegal—Ms. Chilton-Belloni sought a stay (that is, delay) of that proceeding while the new BZA appeal was pending. After consideration of written briefs from both sides, the Court heard argument from counsel and denied the stay, finding that the legal doctrine of *res judicata* prevented relitigation of a matter–Ms. Chilton-Belloni's request for a variance–which had been conclusively resolved pursuant to the earlier Court ruling in 2009. On June 30, 2015, following a trial which included the introduction of demonstrative evidence and the presentation of witnesses, the Court granted the Zoning Administrator's request for an injunction.

That ruling was appealed by Ms. Chilton-Belloni to the Supreme Court of Virginia, but no ruling was issued until November 9, 2017. A copy of that opinion has been provided to the BZA. The Court concluded that the doctrine of *res judicata* should not have barred Ms. Chilton-Belloni's application for a variance, and that the Circuit Court should have stayed the injunction proceeding while that application was pending before the BZA.

It is important to note that the Supreme Court neither ruled nor commented upon the substantive merits of Ms. Chilton-Belloni's request for a variance; nor did it rule upon the merits of the Zoning Administrator's request for an injunction. Instead, the ruling was technical and narrow, focused solely upon the question of whether the Circuit Court should have stayed the injunction proceeding until after Ms. Chilton-Belloni received a hearing before the BZA on her new variance application. The Court concluded:

> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error. As a result, the final order granting an injunction, when Chilton-Belloni had not in fact been afforded the opportunity to exhaust her administrative remedies, was also in error.

No adjudication was rendered at all as to the question of whether Ms. Chilton-Belloni's application should be approved, and the case was remanded (that is, returned) "for further proceedings consistent with this opinion."

Accordingly, the City has asked that the matter be heard in the Circuit Court for a status conference on January 9, 2018. Mr. Obenshain, however, has asserted his privilege, as a member of the General Assembly, to a continuance under Virginia Code § 30-5 (copy enclosed). This raises the question of whether the BZA can proceed with a March 13, 2018 hearing, as we understand was scheduled earlier this week by the Chairman. Mr. Obenshain's pleading indicates that the General Assembly is not scheduled to adjourn until March 10, 2018, so unless Mr. Obenshain or his associate make themselves available for a status conference with the Court prior to then we would not have an opportunity to receive guidance from the Court in advance of the BZA hearing. Plus, Virginia Code

§ 30-5 specifies that it applies to quasi-judicial tribunals and extends the delay period to a "period … ending 30 days after the adjournment [of the General Assembly]."

Regardless, the litigation remains and, in accordance with the Supreme Court decision, and subject to any guidance, direction or action by the Circuit Court, the BZA should substantively address whether Ms. Chilton-Belloni is entitled to a variance. We would anticipate extensive argument concerning the matter, but at this early stage would simply encourage the BZA's careful review of the strict requirements of the Virginia Code, in particular §§ 15.2-2201 and 15.2-2309 (1) and (2). A copy of those statutes, as well as a worksheet which sets forth the specific required findings, are attached. Even as a threshold matter Ms. Chilton-Belloni's application obviously fails to meet the statutory requirements for a variance; for example, the variance she seeks would not "alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance." (See Va. Code Sec. 15.2-2309(2).)

As stated, the Supreme Court remanded the injunction case for further proceedings, and with that in mind we have filed a praecipe to place the matter on the motions day docket of January 9, 2018 for further direction. For over ten years Ms. Chilton-Belloni has defied the same ordinances with which her neighbors are expected to comply, resisting every effort the City has made to encourage her compliance, including a compromise offer by the City to supply the means of removing the wall from the Property. The City looks forward to a final conclusion which reflects the limited role of a BZA and respects the rule of law.

Thank you for your time and attention to this matter.

Respectfully,

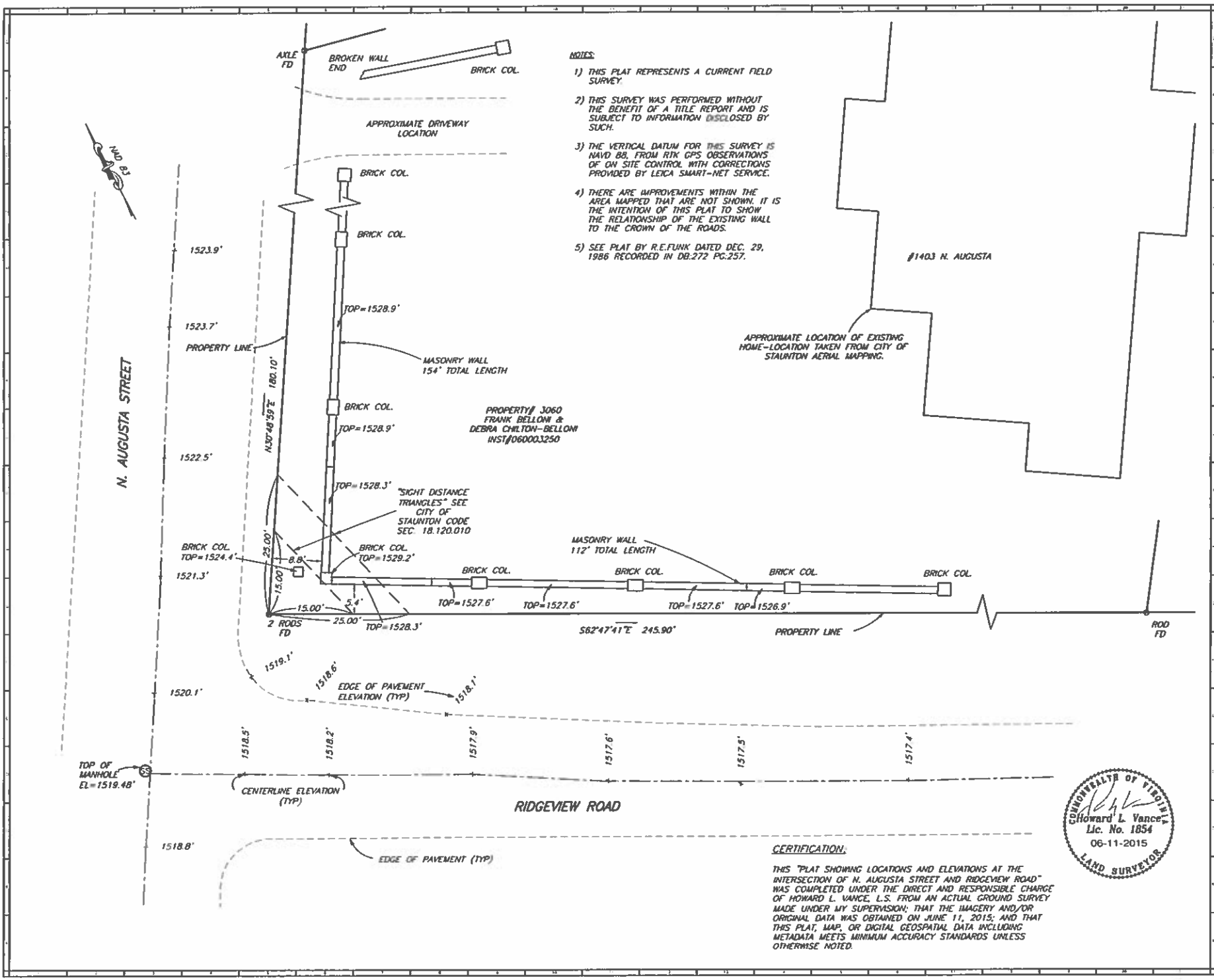
Victor M. Santos

Encls.

cc: Mr. Hal Sharp, Board of Zoning Appeals (w/encls.)
Mr. Willard H. Keeling, Board of Zoning Appeals (w/encls.)
Ms. Judith Wiegand, Board of Zoning Appeals (w/encls.)
Mr. Bradley G. Bryant, Board of Zoning Appeals (w/encls.)
Mark D. Obenshain, Esq. (w/encls.)

VMS/anh

EXHIBIT M



NOTES:

1) THIS PLAT REPRESENTS A CURRENT FIELD SURVEY.
2) THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE REPORT AND IS SUBJECT TO INFORMATION DISCLOSED BY SUCH.
3) THE VERTICAL DATUM FOR THIS SURVEY IS NAVD 88, FROM RTK GPS OBSERVATIONS OF ON SITE CONTROL WITH CORRECTIONS PROVIDED BY LEICA SMART-NET SERVICE.
4) THERE ARE IMPROVEMENTS WITHIN THE AREA MAPPED THAT ARE NOT SHOWN. IT IS THE INTENTION OF THIS PLAT TO SHOW THE RELATIONSHIP OF THE EXISTING WALL TO THE CROWN OF THE ROADS.
5) SEE PLAT BY R.E.FUNK DATED DEC. 29, 1986 RECORDED IN DB:272 PG:257.

CERTIFICATION:

THIS "PLAT SHOWING LOCATIONS AND ELEVATIONS AT THE INTERSECTION OF N. AUGUSTA STREET AND RIDGEVIEW ROAD" WAS COMPLETED UNDER THE DIRECT AND RESPONSIBLE CHARGE OF HOWARD L. VANCE, L.S. FROM AN ACTUAL GROUND SURVEY MADE UNDER MY SUPERVISION; THAT THE IMAGERY AND/OR ORIGINAL DATA WAS OBTAINED ON JUNE 11, 2015; AND THAT THIS PLAT, MAP, OR DIGITAL GEOSPATIAL DATA INCLUDING METADATA MEETS MINIMUM ACCURACY STANDARDS UNLESS OTHERWISE NOTED.

COMMONWEALTH OF VIRGINIA
Howard L. Vance
Lic. No. 1854
06-11-2015
LAND SURVEYOR

BALZER

0

PLAT SHOWING LOCATIONS AND ELEVATIONS AT THE INTERSECTION OF N. AUGUSTA STREET & RIDGEVIEW ROAD
CITY OF STAUNTON, VIRGINIA

DRAWN BY:HLV
DESIGNED BY:
CHECKED BY:
DATE:06-11-2015
REVISIONS:

SCALE:1"=10'

JOB NO.35150039.00

0219

EXHIBIT N

03/06/2018 11:38:00
0221

ROAD
WORK
AHEAD
JENNY MITCHELL
434.249.4151
NEST
REALTY
03/06/2018 11:30:19
0222

3

0223

JENNY MITCHELL
434 249-4151

03/06/2018 11:31:23

03/06/2018 11:34:38
0225

03/06/2018 11:35:48
0226

OBENSHAIN
LAW GROUP

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May 17, 2018

Via Email and US Mail

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John C. Wirth, Esquire
Nelson, McPherson, Summers and Santos, L.C
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Staunton, VA 24401
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Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Santos,

On Wednesday, March 28, I received a letter from Rodney Rhodes, the Senior Planner/Zoning Administrator for the City of Staunton along with the "agenda briefing materials" that Mr. Rhodes provided to members of the Board of Zoning Appeals before the then scheduled April appeal/variance hearing. I had understood from Mr. Wirth that you had requested a continuance of the April hearing in order for you and the City to consider the points I raised in my March 27, 2018 letter. Having heard nothing further as to the City's position on these issues, I wish to note my objections to the package of "agenda briefing materials" in multiple respects set forth below. Since the new date is approaching, it would be my hope that the City would update and correct these materials before the hearing.

- The "Agenda Briefing" contained at the front of the notebook along with Exhibits B, C, G and H all consistently refer the Board to erroneous statutory material and secondary sources. As was addressed in my letter of March 27, the City is now suggesting that the Board should apply the 2015 version of the statutes relating to variances. Ms. Chilton-Belloni filed her appeal/variance application more than a year before the 2015 amendments became effective. When the case was argued in the Supreme Court of Virginia (in writing and orally) in 2017, both the City and Ms. Chilton-Belloni were consistent in their references to and reliance upon the 2014 version of Virginia law as controlling. The 2015 amendments made wholesale changes to the law. Were the 2015 provisions to be applied, the standards contained therein would render it much more difficult for any property owner to secure approval of a variance. As more fully addressed on March 27, the retroactive application of the statutory changes is impermissible and would violate Ms. Chilton-Belloni's vested rights.

- In the event that you do not agree that the 2014 version of the variance statutes governs this application, please include both this letter and my letter

dated March 27, 2018, and the attachments thereto with the Briefing Materials distributed to the Board members.

- Exhibit I of the City's briefing materials is a copy of the Final Order of the Circuit Court Judge in reversing the grant of a variance by the Board of Zoning Appeals in connection with this property in 2008. The Order, by itself, provides little help or insight into the reasons for the reversal of the variance. The Order expressly incorporates the Court's January 14, 2009 letter, however, that letter is not included in the package provided to the Board by the Zoning Administrator. I have attached a copy of that Opinion letter and request its inclusion with the book of briefing materials distributed to the BZA members.

  The Opinion on page four makes it clear that the basis for the Court's ruling was that the law in 2008 required as a condition for granting a variance that the Board of Zoning Appeals must conclude that a zoning ordinance if enforced would interfere with "all reasonably beneficial uses of the property taken as a whole." The letter Opinion by Judge Irvine references the 2004 decision by the Virginia Supreme Court in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). There, the Supreme Court examined the then existing language of the statute authorizing the grant of a variance and pointed to the language defining "unnecessary hardship" and held that it applied "only in cases where application of zoning restrictions would appear to be constitutionally impermissible." That statutory language defining "unnecessary hardship" was the language that limited such hardships to those that are "approaching confiscation." Va. Code § 15.1-495(b)(1980). In 2009, the General Assembly removed that limitation from the code by deleting the words "approaching confiscation" from the variance statute. Following 2009 (until the 2015 amendment), variances could be granted in cases of hardship that did not rise to the level of those "approaching confiscation."

  Accordingly, it is clear that the Circuit Court would have reached a very different conclusion in 2009 if the Board of Zoning Appeals had authority to grant a variance in cases where the hardship was significant, but which did not rise to the level of depriving an owner of property of "all reasonable beneficial uses of the property." For the Board's information, I am enclosing a copy of a 2009 article published in the University of Richmond Public Interest Law Review addressing the effect of the 2009 amendment to Virginia Code § 15.2-2309. The author concludes as follows:

  > The new legislative changes to section 15.2-2309(2) suggest that BZAs should no longer inquire whether a zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole." Instead, BZAs should apply a less restrictive threshold question, adopting a standard which reflects the General Assembly's

decision to remove "approaching confiscation" from section 15.2-2309(2) and scrutinize variance petitions less. Virginia courts should also recognize the departure from a high hurdle of hardship and find more factors and circumstances deserving of an area variance. The hardship required to satisfy variance petitions no longer requires the deprivation of all reasonable use. A demonstration short of the *Cochran* test should now satisfy law.

It is certainly our contention that Ms. Chilton-Belloni's variance application, when judged under the standard in place at the time of her appeal/variance application clearly meets the hardship standard in law at the time and that it justifies the grant of a variance.

- Exhibit K is a copy of my December 13, 2017 letter to the Board reciting the history of this case and requesting a hearing on Ms. Chilton-Belloni's variance application. Attached to that letter should be a copy of the Supreme Court decision. Please provide a copy of that opinion with the revised briefing materials.

  It is clear from the Opinion issued by the Supreme Court of Virginia and from the briefs of both parties that everyone understood that the law as it existed in 2014 would be applied to Ms. Chilton-Belloni's variance request. Neither the City nor Ms. Chilton-Belloni have ever argued that the 2015 amendments would apply. On page 30 of the City's brief to the Supreme Court, it argued that the law as it existed at the time of the filing of its lawsuit – 2014 – should be applied. The Supreme Court made reference to the 2009 change in the statute that deleted "approaching confiscation" requirement. This was the focus of both the City and Ms. Chilton-Belloni throughout. Indeed, the Supreme Court noted that when the 2009 change was raised by Ms. Chilton-Belloni, the City argued then that the amendments "suggested no retroactive intent." *Chilton-Belloni*, 294 Va. at 333. It would be entirely inconsistent for the City to now contend that the 2015 amendments do suggest "a retroactive intent." The first time the City has ever suggested the application of the 2015 language was after the Supreme Court sent the case back for the Board of Zoning Appeals to consider the variance requests. The City should not and indeed cannot again unilaterally change the rules that apply to Ms. Chilton-Belloni.

I am also attaching the following additional documents for inclusion in the revised briefing materials to be provided to the members of the Board of Zoning Appeals:

- Petition and letters signed in 2007 and 2008 and submitted in support of a variance
- Traffic count and crash analysis compiled from VDOT and DMV data
- Letters in support of variance application (2018)

- Staunton News Leader Article "A couple, a city and the wall that divided them" (Nov. 4, 2016)
- Wall construction expenditures (2007)

The items listed above and identified as being attached are being transmitted by email only. Should you or any recipient desire a paper copy of any or all of these listed materials, please let me know and I will send it right away.

It remains my hope that the City will reconsider and abandon its opposition to Ms. Chilton-Belloni's variance request.

Respectfully yours,

Mark D. Obenshain

MDO/eis
Attachments

cc: Mr. Paul Vames, Board of Zoning Appeals
Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Mr. Rodney Rhodes
Ms. Debra Chilton-Belloni

BOARD OF ZONING APPEALS - VARIANCE REQUIREMENTS		
Specific Requirments	**Va. Code Section**	
The burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria set out in § 15.2-2309, and specifically § 15.2-2309(2).	§ 15.2-2309	Added by amendement in 2015
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, -- a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure. -- when the strict application of the ordinance would; -- unreasonably restrict the utilization of the property, -- **and** such need for a variance would not be shared generally by other properties, -- **and** provided such variance is not contrary to the purpose of the zoning ordinance "Variance" shall not include a changed in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	changed in 2018 from unnecessary or unreasonable hardship "and spirit" deleted in 2015
Notwithstanding any other provision of law, general or special, a variance shall be granted -- if the evidence shows that the strict application of the terms of the ordinance would unreasonably restirct the utilization of the property -- or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, **and**	§ 15.2-2309(2)	Added 2015 Added 2015

-- (i) **and** the property interest for which the variance is being requested was acquired in good faith -- **and** any hardship was not created by the applicant for the variance;	§ 15.2-2309(2)	Added 2015
-- (ii) **and** the granting of the variance will not be of substantial detriment to the adjacent property and nearby properties in the proximity of that geographical area;	§ 15.2-2309(2)	Added 2015
-- (iii) **and** the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendement to the ordinance;	§ 15.2-2309(2)	Added 2015
-- (iv) **and** the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property;	§ 15.2-2309(2)	Added 2015

2014 Va. Code Ann. § 15.2-2309

2014 Virginia Code Archive

CODE OF VIRGINIA > TITLE 15.2. COUNTIES, CITIES AND TOWNS > SUBTITLE II. POWERS OF LOCAL GOVERNMENT > CHAPTER 22. PLANNING, SUBDIVISION OF LAND AND ZONING > ARTICLE 7. ZONING

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision.

2. To authorize upon appeal or original application in specific cases such variance as defined in § 15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

   When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

No variance shall be authorized except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of

abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the

property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

History

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555; 1997, c. 587; 2000, c. 1050; 2002, c. 546; 2003, c. 403; 2006, c. 264; 2008, c. 318; 2009, c. 206.

CODE OF VIRGINIA
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End of Document

Commonwealth of Virginia

JUDGES
TWENTY-FIFTH JUDICIAL CIRCUIT

HUMES J. FRANKLIN, JR., CHIEF JUDGE
MALFOURD W. TRUMBO
MICHAEL S. IRVINE
VICTOR V. LUDWIG

ROCKBRIDGE COUNTY CIRCUIT COURT
JUDGE'S OFFICE
2 SOUTH MAIN STREET
LEXINGTON, VIRGINIA 24450
(540) 463-4758

CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF STAUNTON
CITY OF WAYNESBORO

January 14, 2009

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Christopher P. Lowery
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100 Wetherwood Street
Staunton, Virginia 24401

Frank Belloni
161 Seclusion Manor
Mineral, Virginia 23117

Re: John W. Glover, et al v. Board of Zoning Appeals of the City of Staunton, Virginia et al

Dear Ladies and Gentlemen,

These matters arise as the result of Petitions for Certiorari (Petitions) filed by the City of Staunton and its zoning administrator (Glover) challenging the Staunton Board of Zoning Appeals' (BZA) decisions to grant the property owners certain variances. It is important to note that although the BZA may have taken other action at its meetings involving the same property and certain decisions or interpretations of the zoning

administrator, the record shows that if in fact those decisions were final they were not appealed and are not before this Court. A hearing was held on December 4, 2008 at which time all parties were given the opportunity to present testimony or other evidence which they deemed necessary for proper disposition of the cases. Thereafter, the parties were given the opportunity to present additional written legal argument. The Court has received and considered the additional written argument submitted by Counsel for the BZA, Counsel for the City and Dr. Belloni, *pro se.*

Issue of Standing

The first question to be decided is that of "standing" which was raised by the BZA. This issue was fully argued and briefed and therefore the Court will not repeat here the positions of the parties. Suffice it to say that the BZA believes that the decisions of the Supreme Court of Virginia in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, et al.*, 268 Va. 441 (2004) and *Miller, et al. v Highland County, et al.*, 274 Va. 355 (2007), when read together, stand for the proposition that the Petitions were required to be brought in the name of the Staunton City Council, not the City of Staunton, and therefore the Petitions must be dismissed. After a careful reading those cases, the Court does not agree that those cases impose such a requirement in the cases now before the Court.

In *Miller* the Supreme Court of Virginia said that when contesting the decision of a "*governing body*" pursuant to §15.2-2285(F) of the Code of Virginia the "*governing body*" is a required (necessary) party and must be indicated as such within the time specified in the statute. It makes sense that one should not be allowed to challenge the decision of a "*local governing body*" without making that "*body*" a party to the challenge. However, that is not the situation now before this Court. This case is not a challenge of a decision pursuant to §15.2-2285(F). It is a petition filed pursuant to §15.2-2314 and the "*local governing body*" that made the decision (in this case the BZA) has been made a party. Accordingly, the only question as to "standing" is whether the City of Staunton is an aggrieved "*person*" who is permitted to file the Petitions.

As noted above, §15.2-2314 states, "*Any person or persons... or any officer, department, board, or bureau of the locality, may file...*" In the case of *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, supra,* relied upon by the BZA in this case, the Supreme Court held that the Board of Supervisors had standing to challenge the decision of the Fairfax BZA. However, it did not rule that the Board was the only entity that had standing to challenge. In fact, the decision cites many examples from other states where cities (notably not city councils) were recognized as having standing to challenge the decision of a BZA. The question then is whether under Virginia law the City is a "*person*" that has standing to challenge the decision of the BZA. §1-230 (formerly §1-13.19) of the Code of Virginia specifically says, " '*person' includes any individual, corporation...government, political subdivision, or any other legal or commercial entity...*" Certainly, the legislature was aware of that definition when it included the word "person" in §15.2-2314. There is no argument that

the City of Staunton is not a municipal corporation. Furthermore, §15.2-1404 states that a locality may sue and be sued in its own name. Filing a Petition for Certiorari is certainly a type of "legal suit".[1]

Finally, the BZA argues that §15.2-1401 supports its contention that City Council is the necessary moving party. That section states, "*unless otherwise clearly indicated by the context in which the provisions relating thereto are set forth, all powers granted to localities shall be vested in their respective governing bodies.*" This argument may have been compelling if filing of the Petitions had not been specifically authorized by the City Council. However, the evidence presented by the City (Exhibit #31 attached to Mr. Guynn's letter of December 5, 2008) in this case clearly proves that City Council exercised its power when its members voted in open sessions of Council to not only authorize but also direct the filing of the Petitions. Those Motions "*authorize and direct the filing of petitions and any other papers and take such other actions as legal counsel deems appropriate or necessary to obtain judicial review including by, but not limited to, means of certiorari of decision(s) by the Staunton Board of Zoning Appeals rendered on ..., and that the City Attorney, City Manager and the Zoning Administrator and the City Manager's staff are authorized and directed to proceed in accordance with this authorization and direction on behalf of the City.*"[2] Thus, the power that was granted to the City (locality) was exercised by City Council in whom the power was vested as required by §15.2-1401.

In addition, the Court finds that Glover, the zoning administrator, is an "officer" as stated in §15.2-2314. Moreover, the action of City Council in passing the foregoing Motion in open session properly clothed Glover with the authority to file the Petitions with this Court. The Motions passed by City Council therefore satisfy the requirement set forth in *Wolf, et al v. Board of Zoning Appeals of Fairfax County, et al*, 260 Va. 7 (2000) that the zoning administrator actually has authority to act on behalf of the governing body. It is clear that Glover was acting pursuant to and at the direction of the Staunton City Council as mandated by the duly adopted Motions of City Council. As noted by Counsel for the BZA, all three Petitions list "John W. Glover, in his separate capacity as Zoning Administrator of the City of Staunton, Virginia" as a separate petitioner. Therefore, even if this Court's reasoning is wrong and the City of Staunton is not a proper petitioner, the Court finds that Glover is a permitted petitioner under the statute and, when filing the Petition in his "separate capacity as Zoning Administrator of the City of Staunton, he was acting with due authority on behalf of the Staunton City Council and as directed by the Council. Accordingly, the BZA's request that the Petitions be dismissed for lack of standing is denied.

[1] Although this section was rejected by the Supreme Court in *Miller, supra*, as authority for naming Highland County as defendant instead of the Board of Supervisors, the Court stated that the reason §15.2-1404 was not controlling was because of the nature of the challenge and the specific language of the statute authorizing the challenge, i.e. questioning the decision of the "governing body" itself.

[2] Two separate Motions were adopted by City Council on different dates. However, the Motions are identical except for referring to the granting separate variances on different dates.

Substantive Issues

As noted earlier, although many arguments have been made regarding the applicability of the zoning restrictions to the properties involved, and the nature and extent of administrative decisions and interpretations that may have been made by the zoning administrator, there are no appeals or Petitions for Certiorari now before the Court regarding any such decisions or interpretations. Certainly any persons aggrieved by such decisions, if in fact there were final decisions, could have filed Petitions for Certiorari. Furthermore, there is no Motion for Declaratory Judgment or any other type of Complaint properly before the Court addressing such matters. The only matters before the Court concern whether or not the variances granted by the BZA were done so in accordance with existing law. A review of the record shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). Although the property owners argued then, and now, that the effect of the zoning ordinance if applied to their property interferes with "*all reasonable beneficial uses of the property, taken as a whole*," the Court finds that the BZA did not reach such a conclusion based upon the evidence before it, nor is there evidence in the record of the BZA to support such a conclusion. Furthermore, the additional evidence that has been submitted to this Court does not support such a conclusion. In fact, the BZA acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the law. The BZA and the property owners now urge the Court to review the zoning restrictions and make a determination as to whether the restrictions are even applicable to the properties involved. However, the Court is restrained from doing so because those matters are not properly before the Court at this time.

The statute provides that upon review of the matter, "*the court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.*" §15.2-2314 The only "decision" brought up for review was the BZA's decision to grant the variances. Either the variances were granted in accordance with correct principles of law or not. It has been conceded that they were not. If the variances had been correctly granted perhaps the Court could modify the decision to grant the variances by adding additional conditions or stipulations. However, if the variances were improperly granted what is there to modify? Again the evidence does not contain facts that would support granting the variances under *Cochran;* and although the BZA's decision is presumed to be correct, there is an acknowledgment by the BZA and the other respondents (the property owners) that the decision to grant the variances was incorrect. Applying the correct legal principles, there is no evidence that would have permitted the BZA then, or the Court now to grant variances in these cases. That being the case there is nothing further that the Court can do at this time except to reverse the BZA's decision to grant the variances.

In essence the BZA and the Respondents are requesting the Court to provide a binding opinion as to whether the zoning restrictions are even applicable to the properties involved in this litigation. There may be ways for such questions to be resolved by the courts but that question is not properly before this Court at this time.

One of the property owners, Frank Belloni, argues that he has been denied due process because the BZA never voted on his appeal of the administrative decision of the zoning administrator. Again, there may be ways to litigate that issue but the appeal of the zoning administrator's decision (or his interpretation) is not before the court at this time.

It is requested that Mr. Guynn prepare an Order in conformity with this opinion and after giving the Respondents an opportunity to endorse same with whatever objections they deem appropriate, the Order should be presented to the Court for entry.

Sincerely,

Michael S. Irvine

cc: Tom Roberts, Clerk
Staunton Circuit Court

Richmond Public Interest Law Review

Volume 12 | Issue 4 Article 11

1-1-2009

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Recommended Citation

Michael K. Medici, *House Bill 2326 and Its Effect on Cochran v. Board of Zoning Appeal's Chill: How Variances in Virginia May Thaw after Code Revision*, 12 RICH. J.L. & PUB. INT. 369 (2008).
Available at: http://scholarship.richmond.edu/pilr/vol12/iss4/11

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HOUSE BILL 2326 AND ITS EFFECT ON *COCHRAN V. BOARD OF ZONING APPEALS*'S CHILL: HOW VARIANCES IN VIRGINIA MAY THAW AFTER CODE REVISION

Michael Keoni Medici·

I. INTRODUCTION

"It was the best of times, it was the worst of times . . . ."[1] Depending upon which side one fell—whether petitioning landowner, Board of Zoning Appeals board member, or Board of Supervisors/City Council—these words rang true. The legal application of variances in Virginia law and other jurisdictions have traveled down a winding road.[2] A variance is a tool that a delegated body may use to permit a deviation from the local ordinance.[3] In Virginia, variances may only be granted for dimensional or area deviations.[4] Commonly referred to as an "escape

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1. CHARLES DICKENS, A TALE OF TWO CITIES 1 (Andrew Sander ed., Oxford University Press 1988) (1853).

2. *Cf.* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004) (stating that variances may only be granted in narrow circumstances to avoid an unconstitutional result); J. Elliott Drinard, *Municipal Corporations*, 46 VA. L. REV. 1638, 1640–42 (1960) (discussing changes in the law respecting variances in zoning regulations); David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295–99 (2004) (discussing how variances have been used widely in practice despite the law). For a quick summary of the *Cochran* case, *see* Brian R. Marron, *Real Estate and Land Use Law*, 39 U. RICH. L. REV. 357, 398–400 (2004).

3. STANDARD STATE ZONING ENABLING ACT § 7 (1926). This standard act provides limitations for variances "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." *Id.*; *see also* Brent Ellis Dickson, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398, 398 (1967) (stating that a variance should be distinguished from a special exception, which permits "property to be used for purposes which, although contrary to the specific zoning classification for the area in which the property is located, are expressly authorized by the ordinance as contingent upon board approval.").

4. VA. CODE ANN. § 15.2-2201 (Repl. Vol. 2008). A zoning ordinance variance is defined as:

> a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or

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hatch" or "escape valve,"[5] a variance provides localities with the ability to prevent unconstitutional takings that violate either the Constitution of the United States or the Constitution of Virginia.[6] As stated in an early Virginia variance case:

> there will arise from time to time exceptional situations which will justly call for the granting of individual variances within the prescribed legislative conditions and standards and in harmony with the intended spirit and purpose of zoning ordinances, thereby providing a safeguard from unreasonable restrictions on the use of property.[7]

For quite some time, those who applied for variances enjoyed a likelihood of realizing their efforts.[8] Since 2004, however, Virginia has experienced heightened judicial scrutiny over the administration of variances.[9] The 2009 General Assembly of Virginia reviewed relevant sections of the Code of Virginia and amended the law concerning variances.[10] The effect of the General Assembly's seemingly slight revision presents the purpose of this comment.

Part II of this comment presents the General Assembly's enactment. Part III discusses the development of the relevant area of variance law that has fostered dissent. This part also presents *Cochran v. Fairfax*

> unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done. It shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning.

Id. Virginia does not permit a use variance, which allows a jurisdiction to permit a property use prohibited by a zoning ordinance. *See* Dickson, *supra* note 3. One commentator notes that jurisdictions try to harmonize variance practice and statutory commands by applying less stringent tests to increase the availability of variances. Owens, *supra* note 2, at 289–90 (noting that jurisdictions apply less stringent standards for area variances than use variances because area variances are less harmful).

5. *See* Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980).

6. *See* U.S. CONST. amend. V; VA. CONST. art. I § 11.

7. Azalea Corp. v. City of Richmond, 201 Va. 636, 640, 112 S.E.2d 862, 865 (1960).

8. *See* Owens, *supra* note 2, at 295–96 ("Studies confirmed that variance approval rates in the 70%–80% range continued to be common throughout the 1960–1990 period in a wide variety of settings, including urban, small town, and rural jurisdictions.").

9. *See* Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004); Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004) (holding that a Board of Zoning Appeals has no authority to grant a variance unless the effect of the ordinance would represent an unconstitutional taking); *see also* Goyonaga v. Bd. of Zoning Appeals, 275 Va. 232, 657 S.E.2d 153 (2008); Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91 (2005); Aesy v. Bd. of Zoning Appeals, 66 Va. Cir. 382 (2005).

10. H.B. 2326, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206, 2009 Va. Acts ___).

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County Board of Zoning Appeals[11] as a landmark case in Virginia variance law and examines subsequent developments, which are all likely targets for revision. Part IV brings the previous parts to bear addressing and discussing the impact of House Bill 2326 on variance law.[12] Part of this discussion revisits case law for facts that exemplify and temper the Code revision. As this comment will demonstrate, the General Assembly has a legislative desire to decrease the scrutiny of the variance test.

II. HOUSE BILL 2326

The General Assembly amended section 15.2-2309 of the Virginia Code, which delegates authority to Boards of Zoning Appeals ("BZA") to grant variances.[13] Section 15.2-2309 provides the procedure, standards, and notice requirements for variances.[14] The General Assembly's revision deleted two words from the code provision:

> When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship ~~approaching confiscation~~, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.[15]

Therefore, what does removing "approaching confiscation" accomplish? To understand this question, one should be informed of contemporary Virginia variance practice and the importance of "approaching confiscation."

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11. 267 Va. 756, 594 S.E.2d 571 (2004).

12. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

13. VA. CODE ANN. § 15.2-2309 (Repl. Vol. 2008); H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206); *see also* E.A. Prichard, *The Fundamental of Zoning Law*, 46 VA. L. REV. 362, 364–66 (1960) (discussing the form and function of Virginia Boards of Zoning Appeals).

14. VA. CODE. ANN. § 15.2-2309 (Repl. Vol. 2008).

15. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

III. THE "UNNECESSARY HARDSHIP" HURDLE—VIRGINIA VARIANCE PRACTICE SINCE 2004

The originally conceived notion of permitting a variance from an ordinance contained language requiring a demonstration of "unnecessary hardship" before permitting deviation from legislatively enabled ordinances.[16] The "unnecessary hardship" provision, possibly the most challenging aspect of a variance application,[17] permeates state codes and common law.[18] "Unnecessary hardship" is an elusive term requiring BZAs and courts to determine the definition.[19] In Virginia, courts interpret the language of section 15.2-2309 when a BZA's application is appealed.[20] In 2004, the Supreme Court of Virginia settled any controversy concerning "unnecessary hardship" interpretation and explicated the proper standard and analysis.[21]

A. *Cochran v. Fairfax County Board of Zoning Appeals*

1. The Facts and Procedure of *Cochran*

In *Cochran*, the Supreme Court of Virginia consolidated three cases from Fairfax County, the Town of Pulaski, and the City of Virginia Beach involving variance applications.[22] Each case involved a landowner petitioning its respective BZA for an area variance pursuant to section 15.2-2309.[23] Discussion of the three cases will aid in understanding the court's analysis.

The Fairfax County case involved a landowner's petition for a variance from front yard setbacks to posture their proposed house and utilize a side garage.[24] The Fairfax County BZA granted the front yard setback variance and three other requested variances over neighborhood dissent.[25] The circuit court affirmed the BZA's decision.[26]

16. *See* STANDARD STATE ZONING ENABLING ACT § 7(3) (1926); Owens, *supra* note 2, at 282–84 (discussing zoning laws that predated the Standard State Zoning Enabling Act).
17. Owens, *supra* note 2, at 288.
18. *Id.* at 286–87.
19. *Id.* at 287 (noting that the term "unnecessary hardship" was left "to the judiciary and the good judgment of board of adjustment to fill in the details of just what situations qualify for a variance").
20. *See* Packer v. Hornsby, 221 Va. 117, 121–22, 267 S.E.2d 140, 142 (1980).
21. *See* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004) (holding that a BZA has authority to grant variances only to avoid an unconstitutional result).
22. *Id.* at 759–64, 594 S.E.2d at 573–76.
23. *Id.* at 759, 594 S.E.2d at 573.
24. *Id.* at 759–60, 594 S.E.2d at 573–74.
25. *Id.* at 761, 594 S.E.2d at 574.
26. *Id.*

The variance case from the Town of Pulaski also involved a landowner desiring to construct a garage.[27] The landowner planned to place the garage adjacent to a roadway within a setback.[28] The topography of their lot made building the garage in accordance with the ordinance nearly impossible.[29] The Pulaski BZA granted a modified variance permitting construction of a garage within the setbacks.[30] The circuit court affirmed the BZA's decision.[31]

The City of Virginia Beach variance case arose from an application to construct a shed.[32] Virginia Beach ordinances concerning accessory structures prohibited the landowners from constructing a shed at the landowner's desired height.[33] The landowner also petitioned to bring a previously constructed garage into conformity by seeking a variance for the twenty-eight feet by which the existing garage exceeded the limitations imposed by the zoning ordinance.[34] The Virginia Beach BZA granted the garage variance but denied the shed variance on the grounds that "no hardship" existed.[35] The landowner appealed, and the circuit court overruled the BZA's decision, thereby granting the shed variance.[36]

2. The Virginia Supreme Court's Analysis and Decision in *Cochran*

Before analyzing the merits of the three variance cases, the Virginia Supreme Court discussed precedent and the basis for the government's authority to decide such controversies.[37] The government's authority to grant variances comes from the section of the Constitution of Virginia that prohibits the government from depriving citizens from the use of their property without just compensation.[38] The court then restated the following proposition:

Because a facially valid zoning ordinance may prove unconstitutional in application to a particular landowner, some device is needed to

27. *Id.* at 761–62, 594 S.E.2d at 575.
28. *Id.*
29. *Id.* at 762, 594 S.E.2d at 575.
30. *Id.*
31. *Id.*
32. *Id.* at 763, 594 S.E.2d at 575.
33. *Id.* at 762–63, 594 S.E.2d at 575.
34. *Id.*
35. *Id.* at 763, 594 S.E.2d at 576.
36. *Id.* at 763–64, 594 S.E.2d at 576.
37. *Id.* at 764, 594 S.E.2d at 576.
38. *Id.* (citing VA CONST. art. I § 11(III)(C)).

protect landowners' rights without destroying the viability of zoning ordinances. The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch" or "escape valve." A statute may, of course, authorize variance in where an ordinance's application to a particular property is not unconstitutional. However, the language used in Code § 15.1-495(b) [now § 15.2-2309(2)] to define "unnecessary hardship" clearly indicates that the General Assembly intended that variances be granted *only in cases where application of zoning restrictions would appear to be constitutionally impermissible.*[39]

Applying the precedent of *Packer v. Hornsby*,[40] the court concluded that the BZA could only grant variances to circumvent "an unconstitutional result."[41] Finally, the court discussed the General Assembly's delegation of power to administrative bodies and quoted pertinent sections of the Virginia Code.[42]

The Virginia Supreme Court applied the cited Code and precedent to analyze the three individual cases in *Cochran*.[43] In each of the cases, the court evaluated the record to determine whether the applicants demonstrated "unnecessary hardship," and in each case, the court found the landowners failed to show "unnecessary hardship."[44]

In each of the three cases, the court remodeled and reconfigured the variance petitions. In the Fairfax County case, the court determined that the ordinance did not create an "unnecessary hardship" because the house could be moved two feet to satisfy the ordinance and creating "curb appeal" was not a proper justification for a variance.[45] In the Pulaski case, the court suggested that the garage could be moved or abandoned without denying the landowner reasonable use of his property.[46] Finally, in the Virginia Beach case, the court determined that the shed could be built as an adjoining home addition or abandoned

39. *Id.* (quoting Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

40. 221 Va. 117, 267 S.E.2d 140 (1980).

41. *Cochran*, 267 Va. at 764, 594 S.E.2d at 576.

42. *Id.* at 765–66, 594 S.E.2d at 577 (quoting Commonwealth *ex rel.* State Water Control Bd. v. County Utilities Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)). The court also addressed an argument raised in *Natrella v. Board of Zoning Apppeals*, 231 Va. 451, 345 S.E.2d 295 (1986), which involved an apartment conversion project where the court permitted a variance because the statute authorized a variance for an instance "where an ordinance's application to particular property is not unconstitutional." *Cochran*, 267 Va. at 766 n.3, 594 S.E.2d at 577 n.3 (citing *Packer*, 221 Va. at 122, 267 S.E.2d at 142).

43. *Cochran*, 267 Va. at 766–67, 594 S.E.2d at 577–78.

44. *Id.*

45. *Id.*

46. *Id.*

without interfering with all reasonable beneficial uses of the property.[47] The court recognized that the landowners still maintained "reasonable beneficial uses of the property, taken as a whole."[48] The final decision vacated variances granted in Fairfax County and the Town of Pulaski and reinstated the BZA's denial of a variance in Virginia Beach..[49] The landowners did not receive variances to construct and encroach upon setsbacks..[50]

B. Variance Administration and Review since *Cochran*

1. Supreme Court of Virginia Cases Applying *Cochran*

The Supreme Court of Virginia revisited the precedent of *Cochran* in two cases.[51] Only five months after *Cochran*, the court decided one case involving similar issues.[52] In *Board of Supervisors v. Board of Zoning Appeals*,[53] a landowner sought a variance to encroach the minimum lot width to subdivide and construct two homes on his property.[54] The BZA granted the landowner a variance conditioned on the landowner satisfying other requirements of the Code.[55] The circuit court affirmed the BZA's decision.[56] The Supreme Court of Virginia reversed the circuit court and vacated the BZA's variance grant.[57]

The Supreme Court of Virginia based its decision in *Board of Supervisors v. Board of Zoning Appeals* upon *Cochran*.[58] Unlike in *Cochran*, the court in *Board of Supervisors* first restated the important facts for variance review.[59] The court cited *Cochran* and *Packer* to

47. *Id.*
48. *Id.*
49. *Id.* at 767, 594 S.E.2d at 578.
50. *Id.*
51. *See* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 628 S.E.2d 324 (2006); Bd. of Supervisorsv. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004).
52. *Compare* Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004), *with* Cochran v. Fairfax County Bd. of Zoning Appeals,267 Va. 756, 594 S.E.2d 571 (2004).
53. 268 Va. 441, 604 S.E.2d 7 (2004).
54. *Id.* at 444, 604 S.E.2d at 8. This case focuses more upon an issue of standing than variance administration. *See id.* at 445–51, 604 S.E.2d at 8–12.
55. *Id.* at 444, 604 S.E.2d at 8.
56. *Id.*
57. *Id.* at 453, 604 S.E.2d at 13.
58. *Id.*
59. *Compare id.* at 451–52, 604 S.E.2d at 12, *with* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). The court resolved two issues in *Board of Supervisors*, whereas in *Cochran* the court reviewed only the variance issue. *Compare Board of Supervisors*, 268 Va. at 450–51, 604 S.E.2d at 12, *with Cochran*, 267 Va. at 764–66, 594 S.E.2d at 576–77.

support its finding that the ordinance did not deprive the landowner of "all reasonable beneficial uses" or create an "undue hardship."[60] According to the court, "undue hardship" could not be satisfied when an ordinance prohibited the subdividing of property and construction of newer homes.[61] Because the landowner owned and enjoyed the use of his home, the court decided the landowner did not incur an "undue hardship" warranting a section 15.2-2309 variance.[62]

The second case decided by the Virginia Supreme Court presented a more complex issue of variance administration because of overlapping setbacks.[63] In *Cherrystone Inlet*, the landowner sought a variance to construct four homes on four recently subdivided lots.[64] The overlap of ordinances establishing setbacks came from local road setbacks and locally adopted state Chesapeake Bay Preservation laws.[65] The BZA unanimously denied the landowners variance application.[66] The circuit court affirmed the BZA's decision.[67] The Supreme Court of Virginia affirmed the circuit court's decision.[68]

The Virginia Supreme Court first reasoned that variances were improper because the lots were not recorded before the Chesapeake Bay laws became effective.[69] Second, the court relied on *Cochran* and held that the landowner failed to demonstrate that the ordinances deprived him of "all reasonable beneficial uses."[70] Before affirming the BZA's variance denial, the court noted that the landowner could have built one house on six and a half acres of land resting on an inlet.[71]

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60. *Bd. of Supervisors*, 268 Va. at 452, 604 S.E.2d at 12–13 (quoting *Cochran*, 267 Va. at 766, 594 S.E.2d at 577–78). The court also cited the facts of *Board of Zoning Appeals v. Nowak*, 227 Va. 201, 315 S.E.2d 221 (1984), to show an ordinance that prevents the construction of a home in setback areas does not constitute a hardship. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13 (quoting *Nowak*, 227 Va. at 205, 315 S.E.2d at 223).

61. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13.

62. *See id.* at 453, 604 S.E.2d at 12–13.

63. *See* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 672, 628 S.E.2d 324, 324 (2006).

64. *Id.* at 672–73, 628 S.E.2d at 325.

65. *Id.*

66. *Id.* at 673–74, 628 S.E.2d at 325.

67. *Id.* at 674, 628 S.E.2d at 325–26.

68. *Id.* at 675, 628 S.E.2d at 326.

69. *Id.* The Chesapeake Bay Preservation Act only allows variances for intrusions under "very restricted circumstances." *See id.* at 673 n.2, 628 S.E.2d at 325 n.2.

70. *Id.* at 675, 628 S.E.2d at 326.

71. *Id.*

2. Circuit Court Cases Applying Cochran

Since 2004, two Virginia circuit courts have reviewed BZA decisions and have applied the *Cochran* rule.[72] In *Aesy v. Board of Zoning Appeals*,[73] a landowner purchased property with an accessory structure—a barn—that pre-dated the local zoning ordinances.[74] The barn became an issue after the landowner built and attempted to occupy a home.[75] To remedy the zoning violation and occupy his home, the landowner sought a variance for the seventy-five year old barn.[76] The BZA denied the variance application.[77] When the circuit court reviewed the variance denial, the court relied on *Cochran* and stated, "if any reasonable beneficial use of the property can be made in accordance with the existing zoning ordinance, then the BZA has no authority to grant a variance, and an unnecessary hardship as contemplated by statute [section 15.2-2309] does not exist."[78] The court reasoned that no undue hardship existed because the landowner could remove the barn and enjoy a reasonable use of his property.[79] The circuit court affirmed the BZA's denial.[80]

In the second circuit court case applying the standard of *Cochran*, the court reviewed a request for a sign to encroach upon a height limitation.[81] In *Amherst County Board of Supervisors*, the landowner operated a John Deere tractor retail operation.[82] Franchise rules and state regulations required the retail store to erect a sign.[83] Local law limited the sign to ten feet in height, while the landowner desired the sign to be twenty feet in height.[84] The landowner sought a variance to construct a twenty-foot sign, because a ten-foot sign would be nearly obstructed on one side and fully obstructed on the other side.[85] The

72. Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91 (2005); Aesy v. Bd. of Zoning Appeals, 66 Va. Cir. 382 (2005).
73. 66 Va. Cir. 382 (2005).
74. *Id.* at 382.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 383–84.
79. *Id.* at 384. The landowner pleaded to the court that he could not afford demolition. *Id.* at 382.
80. *Id.* at 382.
81. Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91, 91 (2005).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 91–92.

BZA granted the variance.[86] In a letter opinion, the circuit court reversed and vacated the variance grant.[87] The court cited the standard given in *Cochran* and held that unnecessary and undue hardship only exists when an ordinance "interfere[s] with all reasonable beneficial uses of the property, taken as a whole."[88] The court explained that variances are only permitted when "zoning restrictions are so constitutionally impermissible that there is a hardship approaching confiscation."[89]

IV. HOUSE BILL 2326'S EFFECT ON *COCHRAN*

In response to this strict interpretation of "unnecessary hardship," the General Assembly amended the language of the statute governing BZAs evaluation of variance petitions.[90] The Supreme Court of Virginia relied upon the previous code section to evaluate variance decisions in *Cochran*.[91] The impact of deleting two words from the Code has profound implications for the administration and review of variances. Alternatively, the various bodies that make zoning appeals decisions may nullify the impact of removing these two words. The following discussion argues that deleting the words "approaching confiscation" impacts variance administration and review by decreasing the degree of hardship applicants must show.

A. Does House Bill 2326 Revert Variance Practice to Pre-*Cochran*?

For most of the twentieth century, petitioning landowners received variances without much difficulty, aside from presenting their case.[92] In Virginia, the Virginia Supreme Court ended variance abuse with the *Cochran* case.[93] The court's heightened standard in *Cochran*, however,

86. *Id.* at 91.

87. *Id.*

88. *Id.* at 92 (citing Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004)).

89. *Id.* at 93 (citing Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

90. *See* H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

91. *See Cochran*, 267 Va. 756, 594 S.E.2d 571; *see also* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 628 S.E.2d 324 (2006); Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004).

92. *See, e.g.*, Roderick M. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287, 292–94 (1966); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 320–21 (1961); Owens, *supra* note 2, at 295–96. The approval rate raised concern that the merits of each individual case may not satisfy the purpose of variances. *Id.* at 297–98.

93. *Cf. Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

may have gone too far.[94] The General Assembly's amendment removed an important phrase:[95] two words that make variance hardship less stringent.

Removing the phrase "approaching confiscation" alters the *Cochran* analysis directly because it undermines *Cochran*'s rule of law. The *Cochran* court demanded that the threshold question of BZA variance petitions be whether the zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole."[96] The court arrived at that proposition because the language of the statute commanded demonstration of an "unnecessary hardship" by showing how a variance would "alleviate a clearly demonstrable hardship *approaching confiscation*."[97] Virginia courts and BZAs should now recognize the legislative intent in removing these two crucial words. If takings jurisprudence is no longer the fall line,[98] then the statutory command of "unnecessary hardship" must be something short of the "no reasonable use" test.[99]

B. The New Meaning of "Unnecessary Hardship"

In the near future, the Supreme Court of Virginia and Virginia circuit courts will be forced to interpret the new meaning of "unnecessary hardship." Before that review, BZAs will apply the revised law. When courts review variance cases concerning whether the landowner demonstrated "unnecessary hardship," the *Cochran* standard should be considered too restrictive. Because of the recent legislative changes, courts should move toward a definition of "unnecessary hardship" that is less stringent than *Cochran*'s rule.

94. *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (borrowing Oliver Wendell Holmes's famous phrase "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

95. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

96. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

97. *Id.* at 765–66, 594 S.E.2d at 577 (emphasis added).

98. The line of cases decided by the Supreme Court of the United States includes: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

99. The *Cochran* court cited to *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to support the takings test of interference "with all reasonable beneficial uses of the property, taken as a whole." *Cochran*, 276 Va. at 764–65, 594 S.E.2d at 576 (citing Commonwealth v. County Utils., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)) (emphasis removed).

Before *Cochran*, the Virginia Supreme Court recognized the use of a variance as a flexible tool to avoid constitutional issues.[100] In *Azalea Corp. v. City of Richmond*,[101] a landowner sought a variance to construct roadways across residentially zoned property for its commercial operation.[102] The City of Richmond denied the landowner a variance because the city thought the requested roads would violate the zoning ordinance.[103] The BZA and circuit court affirmed the variance denial.[104] The Virginia Supreme Court reversed and issued a variance for the road construction.[105] The court recognized that without commercially supportable road access, the landowner's property would lose substantial real estate value and the grant of road access to the landowner would not damage the value of residences in the surrounding area.[106] For these reasons, the Virginia Supreme Court found the grant of a variance "would do substantial justice."[107]

The court's language in *Azalea* is unlike that of *Cochran*. But the issues faced, between a substantial loss in value in *Azalea* and a major inconvenience in *Cochran*, are similar. *Azalea* demonstrates the court's desire to recognize certain factors as important in a variance request and appreciate those factors as an "unnecessary hardship."

Packer followed *Azalea* by twenty years, but forms a bridge between the reasoning and language of *Azalea* and *Cochran*.[108] *Packer* involved a landowner wishing to build an addition within a setback area.[109] The BZA granted the landowner's variance.[110] The circuit court reversed the BZA and denied the variance.[111] The Virginia Supreme Court affirmed, finding that the BZA abused its discretion and the landowner failed to demonstrate the required hardship.[112] *Packer*'s significance comes more from its recognition that "[a] statute may... authorize variances in cases where an ordinance's application to particular property is not

100. Drinard, *supra* note 2. A granted variance would not stand if the record was devoid of evidence or the decision was arbitrary and capricious. *Id.* at 1640.

101. 201 Va. 636, 112 S.E.2d 862 (1960).

102. *Id.* at 637, 112 S.E.2d at 863. The property in question was both in Henrico County and the City of Richmond. *Id.*

103. *Id.*

104. *Id.* at 638, 112 S.E.2d at 864.

105. *Id.* at 643–44, 112 S.E.2d at 867–68.

106. *Id.* Without road access, the value of the property would decline from $729,000 to $202,000, or a 72% decrease. *Id.* at 643, 112 S.E.2d at 867.

107. *Id.* at 644, 112 S.E.2d at 867.

108. *See* Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980).

109. *Id.* at 119–20, 267 S.E.2d at 141.

110. *Id.* at 120, 267 S.E.2d at 141.

111. *Id.*

112. *Id.* at 120, 123, 267 S.E.2d at 141, 143.

unconstitutional."[113] This finding recognizes that the language of the statute, specifically "approaching confiscation," was commensurate with takings jurisprudence. While the landowner's variance petition in *Packer* would likely still fail today for other reasons, a court could not discount all hardship because some hardship existed.[114] In other words, section 15.2-2309(2)'s "unnecessary hardship" is not the same degree as before.

The Virginia Supreme Court's language used in the *Azalea* and *Packer* decisions suggests that some law exists to consider section 15.2-2309(2)'s "unnecessary hardship" as less than *Cochran*'s "no reasonable use" standard. In fact, some jurisdictions do not use the language "unnecessary hardship," using instead the language "practical difficulties" to evaluate granting a variance.[115] "Practical difficulties" is clearly not the standard in Virginia, but this standard helps realize the boundaries of "unnecessary hardship." Jurisdictions using the "practical difficulties" standard apply the test by asking whether an "affected property or structure cannot, as a practical matter, be used for a permitted purpose under the applicable zoning classification."[116] An affirmative answer to the "practical difficulties" inquiry warrants a variance.[117]

The General Assembly's revision of section 15.2-2309(2) reflects a move to decrease scrutiny and evaluate hardship less stringently.[118] A less stringent approach to variance administration promotes fairness and flexibility.[119] Variances prove more cost-effective than either amending ordinances upon request or through rezoning.[120]

Even *Cochran* assists in determining what the court views or should view as demonstrated hardships satisfying section 15.2-2309(2).[121] In

113. *Id.* at 122, 267 S.E.2d at 142.

114. *Id.* "[T]he Packers do not face a 'hardship ~~approaching confiscation~~,' nor has their use of their land been effectively prohibited or unreasonably restricted." *Id.* at 122, 267 S.E.2d at 142–43 (language stricken to reflect the H.B. 2326 revision). This statement loses its value with the removal of "approaching confiscation." *Packer* is not the best example case because the landowners spoke about, and the court grasped onto, a desire to expand their home for better views and because everyone else was encroaching setbacks. *Id.* at 119–22, 267 S.E.2d at 141–43.

115. *See* Bryden, *supra* note 92, at 323.

116. 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.14[1][b] (2008); *see also* Bryden, *supra* note 92, at 324.

117. *See* POWELL, *supra* note 116; *see also* Bryden, *supra* note 92, at 324.

118. *See* Owens, *supra* note 2, at 290 (citing Simplex Tech., Inc. v. Town of Newington, 766 A.2d 713, 717 (N.H. 2001)).

119. *See* Dickson, *supra* note 3, at 411.

120. *See* Owens, *supra* note 2, at 317.

121. Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 767, 594 S.E.2d 571, 578 (2004).

Cochran, the court mentioned the following facts of the three cases as providing compelling reasons: taxes, aesthetic improvements, landowner planning to mitigate effects, neighbor support and/or opposition, landowner expense, and personal need.[122] The court did not classify these factors as hardships but commented on them as deserving of attention.[123] Although *Cochran*'s main proposition no longer guides variance decisions, these factors help to decipher the requirements necessary to satisfy "unnecessary hardship."

C. What Cases Should Pass the New "Unnecessary Hardship" Test?

When considering the impact of the new hardship standard, it will help to review a set of facts and determine whether the landowner demonstrated "a clearly demonstrable hardship" satisfying "unnecessary hardship." The Virginia Beach and Pulaski cases from *Cochran* may have turned out differently if the revised section 15.2-2309 applied.[124] The Pulaski case involved a garage siting with various factors posing a hardship, but not enough for an undue hardship approaching confiscation.[125] Based upon the court's opinion, the landowner may have satisfied the new hardship standard because it would be more expensive to build the garage to code, the topography of the property justifies its location, and alternative placement would most likely weaken or destroy a retaining wall.[126] An ordinance prohibiting a landowner from building a garage may satisfy an "unnecessary hardship" requirement short of the no reasonable use determination. Requiring an individual to construct a garage that costs more, creates other issues, and presents a design conflict would most likely constitute a hardship that a variance could alleviate.

The Virginia Beach case involved the desire to build a storage shed.[127] The landowner's desired shed was only a few hundred square feet in excess of the limitation.[128] The purpose of the shed was to hold belongings so that a family member could assist a seriously ill and

122. *Id.* Other factors considered include: "reasonable return, inability to sell, financial loss, the effect of adjacent uses, the effect of heavy traffic, or the shape, size, or grade of the property." POWELL, *supra* note 116.

123. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

124. *Id.* at 761–64, 594 S.E.2d at 574–76. The Fairfax case, doomed by the statement "curb appeal," should still fail "unnecessary hardship." *Id.* at 759–61, 594 S.E.2d at 573–74.

125. *Id.* at 761–62, 594 S.E.2d at 574–75.

126. *Id.* at 762, 594 S.E.2d at 575.

127. *Id.* at 762–64, 594 S.E.2d at 575–76.

128. *Id.*

disabled family member.[129] The personal needs of this family alone might not constitute an "unnecessary hardship," but considering the lack of community opposition, these facts could be classified as a hardship that a variance could alleviate.[130]

D. Jurisdictions, Administrators, and Neighbors Should Welcome the New "Unnecessary Hardship" Standard

The General Assembly revised only two words in Virginia Code section 15.2-2309;[131] the majority of the statute remains intact with established judicial interpretations and precedent.[132] Petitioners still are required to satisfy other factors.[133] The statute commands BZAs to make three findings.[134] The standards require the BZA to record its findings based upon the applicant's presentation, and the BZA's report creates a record for courts to consider and ensures that variance power is not abused.[135] This change will not cause variance petitions to run rampant, but now petitioning landowners will no longer have to meet the standard of takings—the "no reasonable use" test—to justify their area variance.

E. What Cases Should Fail?

To address the community concerns of possible arbitrary and capricious variance administration, revisiting some case law should calm interested parties. The Fairfax County case in *Cochran* would still be denied by the BZA and the judiciary.[136] The landowner's frivolous desire to construct a home may not constitute a satisfactory hardship, but it does conflict with the language of section 15.2-2309, which prohibits

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129. *Id.* at 763–64, 594 S.E.2s at 576.

130. *See id.*

131. *See* H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

132. *See id.* ; *see also* Steele v. Fluvanna County Bd. of Zoning Appeals, 246 Va. 502, 507, 436 S.E.2d 453, 457 (1993) (holding that a landowner cannot create their own hardship).

133. *See* VA. CODE ANN. § 15.2-2309(2).

134. *Id.* § 15.2-2309(2)(a)–(c) ("That the strict application of the ordinance would produce undue hardship relating to the property; that the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and that the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.").

135. *See* Drinard, *supra* note 2, at 1641.

136. *See* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 759–61, 594 S.E.2d 571, 573–74 (2004).

variances for special privilege.[137] In *Packer*, the issue of consistency extinguishes the landowner's chance of variance.[138] The landowner attempted to show a hardship by virtue of other properties not satisfying setbacks along the waterfront, which the BZA accepted.[139] Even where facts point to other violations, no BZA should grant, nor should a court affirm, a variance because the hardship is generally shared.[140] House Bill 2326's revisions do not grant BZAs unfettered discretion. The rule of law developed by the Virginia Supreme Court will still guide BZAs and judicial variance review.

V. CONCLUSION

The new legislative changes to section 15.2-2309(2) suggest that BZAs should no longer inquire whether a zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole." Instead, BZAs should apply a less restrictive threshold question, adopting a standard which reflects the General Assembly's decision to remove "approaching confiscation" from section 15.2-2309(2) and scrutinize variance petitions less. Virginia courts should also recognize the departure from a high hurdle of hardship and find more factors and circumstances deserving of an area variance. The hardship required to satisfy variance petitions no longer requires the deprivation of all reasonable use. A demonstration short of the *Cochran* test should now satisfy law.

137. *See* VA. CODE ANN. § 15.2-2309(2); *Cochran*, 267 Va. at 760, 594 S.E.2d at 574.
138. *See* Packer v. Hornsby, 221 Va. 117, 119–20, 267 S.E.2d 140, 141 (1980).
139. *Id.* at 122, 267 S.E.2d at 143.
140. *See* VA. CODE ANN. § 15.2-2309(2)(b).

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December 13, 2017

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I represent Debra Chilton-Belloni and write this letter to you in your capacity as Chairman of the Staunton City Board of Zoning Appeals in order to request a hearing on Mrs. Chilton-Belloni's June 5, 2014 appeal to the Board of Zoning Appeals (BZA) following the issuance of a Supreme Court of Virginia Opinion in this matter on November 9, 2017.

Because of the long history involved in this matter, I will provide some historical background. In 2006, Dr. and Mrs. Chilton-Belloni bought a historic home at 1403 North Augusta Street in Staunton. Because of heavy traffic they wanted to build a wall in front to block the road noise. There was no application process for the approval of such a wall and no permit to issue, but the Bellonis nonetheless consulted city zoning officials and after a site visit they were told that the wall they planned to build would comply with the City's zoning ordinances.

After the wall was nearly complete, on September 20, 2007, the City Zoning office issued a notice to the Bellonis telling them that the wall actually violated the zoning ordinances. In response, the Bellonis citing hardship, asked the City's BZA to grant a variance. After considering the circumstances, on February 20, 2008, the BZA voted unanimously in favor of the variance.

The City then appealed the variance, arguing that the BZA had exceeded its authority. The City cited *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004), in which this Court held that the only hardships sufficient to justify the grant of a variance are those that are Constitutional in dimension—those that approach confiscation. The Staunton City Circuit Court agreed and reversed the BZA's grant of a variance.

After those proceedings, nothing happened for 2 years. The City took no action and the Bellonis took no steps to remove the wall. In 2011, the City filed criminal charges against Dr. Belloni citing the wall as violating its zoning ordinances. That case was dismissed at trial for the City's failure to take action within the period allowed by the statute of limitations.

Once again, nothing happened for two more years. The Bellonis reasonably believed that the City had exhausted its efforts. Then in late 2013, after a truck damaged a part of the wall, the City once again renewed its efforts to secure the removal of the wall. It sent a letter stating that the repair of the damage to the wall would be viewed as a new violation of the zoning ordinances and the City again demanded the removal of the wall.

Since the beginning of this process, and after the reversal of the 2008 variance by the Circuit Court, the Code of Virginia provisions defining a hardship sufficient to justify the award of a variance had been changed. The 2009 statutory amendment eliminated the *Cochran* requirement that hardship justifying a variance must be one that is confiscatory in favor of language allowing a variance if it will "alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. Given that the BZA had voted unanimously in favor of the variance in 2007 and that it would have stood but for the *Cochran* requirement, Mrs. Chilton-Belloni made her new 2014 request for a variance citing the code change as a significant change of circumstance.

The City Zoning Administrator summarily rejected the 2014 variance request and Mrs. Chilton-Belloni again appealed that ruling to the BZA. It is that variance request that remains pending and upon which Mrs. Chilton-Belloni is now requesting a hearing.

As you will recall, before a hearing was scheduled on Mrs. Chilton-Belloni's appeal, she was sued by the Zoning Administrator. Although Mrs. Chilton-Belloni asked for the Circuit Court proceeding to be stayed pending the BZA proceedings, the Staunton City Circuit Court refused and ruled that because Mrs. Chilton-Belloni had requested a variance in 2009, she was "not entitled to relitigate, or have additional review of the matter." As a consequence, when a BZA meeting was scheduled, the attorney for the Zoning Administrator shared the ruling of the Circuit Court and argued that it could take no action on Mrs. Chilton-Belloni's appeal. The BZA then declined to take any action at all on Mrs. Chilton-Belloni's request for a variance, which remains pending. The Circuit Court proceeded to enter an injunction requiring Mrs. Chilton-Belloni to tear down the wall that had been constructed in front of her property and which was the subject of her request for a variance.

Mrs. Chilton-Belloni appealed to the Supreme Court of Virginia which issued a November 9, 2017 Opinion and Order reversing the ruling of the Staunton City Circuit Court and remanding the case for further proceedings. I enclose a full copy of the Opinion.

In the Opinion, the Supreme Court of Virginia absolutely rejected the City's position – that the legal doctrine of *res judicata* should be applied to prevent a subsequent variance request, especially where circumstances and the law have changed. The Supreme Court of Virginia expressly ruled as follows:

> Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a

> property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a land owner from potential benefits to his or her property merely because he or she, or a previous owner had engaged in a prior appeal of the matter under different law.
>
> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error.

The Supreme Court ruled that the circuit court should have delayed taking any action and that it should have allowed the Board of Zoning Appeals to proceed with the consideration of Mrs. Chilton-Belloni's appeal given that the BZA has taken no action to grant or deny the variance.

I respectfully request a hearing by the Board of Zoning Appeals to consider the rezoning request and that such hearing be scheduled as soon as possible.

Thank you for your consideration of this request and the ruling of the Supreme Court of Virginia.

With best regards.

Very truly yours,

Mark D. Obenshain

MDO/eis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Mrs. Debra Chilton-Belloni

PRESENT: Lemons, C.J., Goodwyn, Mims, Powell, Kelsey, and McCullough, JJ., and Millette, S.J.

DEBRA CHILTON-BELLONI

v. Record No. 160612

SHARON E. ANGLE, ZONING ADMINISTRATOR FOR AND ON BEHALF OF THE CITY OF STAUNTON, ET AL.

OPINION BY
SENIOR JUSTICE LEROY F. MILLETTE, JR.
November 9, 2017

FROM THE CIRCUIT COURT OF THE CITY OF STAUNTON
Charles L. Ricketts III, Judge

In this appeal of two related zoning actions tried together, we address whether a circuit court properly relied on principles of res judicata to refuse to stay an injunction brought by the City of Staunton's Zoning Administrator against the landowner pending further proceedings before the City's Board of Zoning Appeals, and whether the circuit court properly granted the injunction against the landowner. For the reasons stated herein, we conclude that the circuit court erred, and we will reverse and remand as to the injunction. We decline to address the accompanying appeal from the denial of the landowner's petition for a writ of mandamus.

I. FACTS AND PROCEEDINGS

In 2006, a building official from the City of Staunton visited the home of Frank Belloni (now deceased) and Debra Chilton-Belloni to review the site and plans to build a wall. Their historic home was located on a now-busy street, and the purpose of the wall was primarily for sound proofing and privacy. The building official informed them they could legally build the wall, and the Bellonis began construction of the wall consistent with those plans.

In 2007, John Glover, then Zoning Administrator for the City of Staunton, advised the Bellonis that the nearly completed wall in fact violated a Staunton zoning ordinance. The

essence of the violation included obstruction of the line of sight at an intersection and wall height exceeding the permitted three and a half feet. He acknowledged that "there may have been a miscommunication with my staff, but that does not change the fact that the wall is in violation of Section 18.120.010(2) of the City of Staunton Code."

The Bellonis sought a variance from the Board of Zoning Appeals, which was granted in February 2008. Glover and the City then appealed the variance to the circuit court, arguing that the BZA lacked the authority under current law to issue the variance. The relevant statute at the time required a "clearly demonstrable hardship approaching confiscation" in order to grant a variance. Code § 15.2-2309 (2007). Agreeing with the City, the circuit court reversed the decision granting the variance by a final order entered June 17, 2009.

The Bellonis did not take down or alter the wall, and the City did not immediately pursue action to ensure that they did so. In July of 2009, the statute was changed so as to delete the "approaching confiscation" language. 2009 Acts ch. 206. In 2011, the City filed criminal charges against the Bellonis for failure to remove the wall, but the prosecution was found time-barred.

In 2013, the wall was damaged by a third party. In September 2013, Chilton-Belloni, now the sole owner of the property due to her husband's recent passing, received a letter from the new Zoning Administrator, Sharon Angle. The letter advised her that the City had observed "some missing pieces [of the wall]," and Chilton-Belloni should "be advised that any action to do any work on the wall, other than to bring the entire wall into compliance, will be considered yet another violation."

In the subsequent months, numerous letters were exchanged between Angle and Chilton-Belloni. On May 9, 2014, in response to demands that Chilton-Belloni demolish the wall,

Chilton-Belloni requested a modification or variance from the zoning ordinance, citing hardship. She noted that the BZA had agreed that the original "misunderstanding" had constituted undue hardship, but that the state of the law at the time resulted in the circuit court reversing the ruling. However, in light of the 2009 change in the statute, deleting the "approaching confiscation" requirement, Chilton-Belloni requested a modification or variance at this time.

On May 30, 2014, Angle replied in a letter she did not have that power to authorize a modification or variance and that the issue was already fully adjudicated. Additionally, while she expressed no view on the changes to Code § 15.2-2309, she stated the provisions suggested no retroactive intent.

On June 5, 2014, Chilton-Belloni filed an appeal of Angle's decision to the BZA. She sought a variance, acknowledging that she had sought one previously, prior to the statutory change. Chilton-Belloni contends that Angle refused to convene the BZA for a hearing on the matter following her filing.

On July 10, 2014, pursuant to Code §§ 15.2-2208(A) and 15.2-2286(A), Angle sought an injunction compelling Chilton-Belloni's compliance with the City Code and removal and remediation of the wall. Chilton-Belloni moved to stay the circuit court proceedings to allow the BZA to consider her request for a variance. The circuit court denied the stay based on the doctrine of res judicata.

On March 24, 2015, following the denial of the stay, Chilton-Belloni filed a petition for a writ of mandamus against the BZA, demanding that it convene and hold a hearing on her case as such action was a nondiscretionary statutory duty. Sharon Angle and the City of Staunton then filed a motion to intervene as defendant-intervenors in the mandamus action, which was granted.

The circuit court tried and ruled on the actions together, issuing a shared letter opinion but separate orders. The court denied the petition for the writ of mandamus on the basis of res judicata and granted the injunction because Chilton-Belloni had "exhausted her administrative remedies" in the proceedings "concluded by the Order of the Staunton Circuit Court entered on June 17, 2009"; "the Court has already ruled that she is not entitled to re-litigate, or have additional review of the matter"; and the circuit court engaged in its own determination that a violation occurred. We granted Chilton-Belloni this appeal.

II. DISCUSSION

The mandamus action and the injunction application were tried together due to the related underlying facts, and counsel initially attempted to combine the two actions for the purposes of appeal. However, the BZA, an indispensable party to the mandamus action, was not noticed on the notice of appeal. This ordinarily results in our dismissal of that appeal. *Asch v. Friends of Mt. Vernon Yacht Club*, 251 Va. 89, 92-93, 465 S.E.2d 817, 819 (1996); *Butler v. Butler*, 219 Va. 164, 167, 247 S.E.2d 353, 355 (1978). When asked to address the mandamus appeal, specifically the notice issue, at oral argument, Chilton-Belloni's counsel stated, "I would respectfully submit that the proceedings are self-contained in the injunction proceedings,"* and provided substantive argument on the injunction issue alone. We treat this as an abandonment of the mandamus argument and accept his invitation to address the issues as contained within the injunction proceedings.

The circuit court's 2015 denial of the stay was clearly and unequivocally based on the doctrine of res judicata and the conclusion that a change in the law is not a change in circumstance permitting Chilton-Belloni to revisit the BZA. This same reasoning became

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* Oral argument at 11:40.

inextricably linked to the final order granting the injunction, as the final order rested in part on the conclusion that Chilton-Belloni had "exhausted her administrative remedies" and was not entitled to re-litigate them. We therefore examine the underlying denial of the stay and its reliance on res judicata.

"A judicially-created doctrine, res judicata rests upon considerations of public policy which favor certainty in establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties." *Bates v. Devers*, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974) (internal citations omitted). The doctrine of res judicata includes principles of claim preclusion and issue preclusion. *Lee v. Spoden*, 290 Va. 235, 245, 776 S.E.2d 798, 803 (2015). As the circuit court used the term res judicata generally, we consider whether either principle could have been a valid basis for the circuit court's ruling. Both preclusion doctrines impose the same burden: the party asserting the preclusion must show by a preponderance of the evidence that litigation of the claim or issue should be precluded by the prior judgment. *Bates*, 214 Va. at 671, 202 S.E.2d at 921. Whether preclusion is applicable at all, however, generally represents a question of law to be reviewed de novo. *Rhoten v. Commonwealth*, 286 Va. 262, 267, 750 S.E.2d 110, 112 (2013).

In invoking res judicata in its 2015 denial of the stay, the circuit court could only have relied on a single prior proceeding with two distinct phases and rulings: one administrative appeal and one judicial appeal. We look at the potential res judicata effects of each.

A. The 2009 Circuit Court Ruling

Because there is no doubt that res judicata is applicable to findings and judgments in judicial proceedings, we first examine the ruling in the prior appeal by the City to the circuit court which resulted in the 2009 reversal of the BZA's variance. *Grose v. Cohen*, 406 F.2d 823,

824 (4th Cir. 1969). Issue preclusion bars "successive litigation of an issue of fact or law *actually litigated and resolved* in a valid court determination essential to the prior judgment." *Lee*, 290 Va. at 246, 776 S.E.2d at 803 (internal citation omitted) (emphasis added). We therefore look to the issue appealed and ruled upon by the circuit court, to what was adjudicated by that court at that time. In reviewing the final order from the 2009 proceeding, the incorporated letter opinion, and the testimony as to the scope of the proceeding, *see Bernau v. Nealon*, 219 Va. 1039, 1041, 254 S.E.2d 82, 84 (1979) (discussing elements of the record cognizable in ruling on preclusion claims), it is clear that the appeal and holding were narrowly tailored to a single issue: whether the BZA had exceeded its authority to grant a variance by improperly applying the law as it existed at that time. Specifically, the incorporated letter opinion observes:

> As noted earlier, although many arguments have been made regarding the applicability of the zoning restrictions to the properties involved, and the nature and the extent of administrative decisions and interpretations that may have been made by the zoning administrator, there are no appeals or Petitions for Certiorari now before the Court regarding any such decisions or interpretations. . . . The only matters before the Court concern whether or not the variances granted by the BZA were done so in accordance with existing law. A review of the record shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756[, 594 S.E.2d 571] (2004). . . . The BZA and the property owners now urge the Court to review the zoning restrictions and make a determination as to whether the restrictions are even applicable to the properties involved. However, the Court is restrained from doing so because those matters are not properly before the Court at this time.
>
> . . . .
>
> That being the case there is nothing further that the Court can do at this time except reverse the BZA's decision to grant the variances.

The narrow nature of this ruling is insufficient to provide a basis to preclude Chilton-Belloni's 2014 appeal to the BZA seeking a variance under subsequent law. The circuit court did not issue a general ruling that the Bellonis were not entitled to a variance, or even adjudicate

whether the wall was in fact in violation in the first place, much less whether the owner's use of the property should be enjoined pursuant to Code § 15.2-2309 (2007). The court simply held, as a matter of law, that the BZA had erred.

B. The 2007-2008 Administrative Appeal

We therefore turn to the original administrative appeal before the BZA. Here, Angle relies on the argument that the Bellonis had previously sought a variance for their wall, and Chilton-Belloni is now seeking another based on the same wall, which should be barred as res judicata. We need not reach the issue of whether res judicata applies to administrative proceedings generally, because even if it can apply in some contexts, we find its application in the realm of zoning appeals for this variance request to be improper.

As a judicial doctrine, we must be cautious about the appropriate use of res judicata in administrative settings in which actions may not always be truly adjudicative. "Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata." *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 534, 201 S.E.2d 758, 766 (1974). Accordingly, "[a]n adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication," including, among other requirements, "[a] formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status." Restatement (Second) of Judgments § 83 (1982). We require a level of formality to adjudication akin to that of a court of competent jurisdiction. *See Simmons v. Commonwealth*, 252 Va. 118, 120-21, 475 S.E.2d 806, 807 (1996) ("[T]he establishment of a prior judgment rendered by a court of competent jurisdiction is a condition precedent to the allowance of any plea in bar asserting [the

doctrine of res judicata]. Yet, by no stretch of the imagination can it be said that an administrative suspension of an operator's license for failure to take a blood or breath test is a judgment rendered by a court of competent jurisdiction. What is involved is neither more nor less than the term administrative suspension implies, an administrative act, not a judgment by a court of competent jurisdiction."); *see also Plotkin v. Fairfax County Dep't of Family Servs.*, Record No. 0085-98-4, 1998 Va. App. LEXIS 535 (Oct. 13, 1998) (unpublished) (declining to apply the doctrine of res judicata to Division of Social Services administrative hearings at the Division of Social Services because a "DSS administrative hearing, which lacks due process guarantees, enforcement power or even an impartial adjudicator, is not a court").

With this high standard in mind, we turn to whether a BZA, in issuing variances, operated in a manner equivalent to a court of competent jurisdiction. We find that it clearly did not. The incarnation of Code § 15.2-2309 applicable at the time of the Belloni's original appeal set forth a base standard for the "power" to "authorize" a variance. However, the language of the statute did not clearly require the granting of a variance if the base requirements were met; beyond the statutory floor, the essence of a variance was essentially a discretionary opportunity for the BZA to accommodate an exception to existing law and so cannot be a true "adjudication" akin to that of a court of competent jurisdiction. Furthermore, in this case in particular, as the circuit court ruled and the BZA itself admitted, the BZA neglected to follow any prescribed formula on issues of law.

Our inquiry is further framed with the acknowledgment that "[r]es judicata of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings." *Grose*, 406 F.2d at 824. The Fourth Circuit provides a helpful framework for considering the application of res judicata to a particular form of administrative law:

> Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, *e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940); but practical reasons may exist for refusing to apply it, *e.g.*, *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927). And in any event, when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958).

Id. at 824-25.

In the context of a government agency responsible for continuing administration of a body of law affecting the public generally, a change in applicable legal context can produce disparate results over time, resulting in an inequity that is in tension with the principles of res judicata. Restatement (Second) of Judgments § 28 cmt. c. In such circumstances, the refusal to apply a preclusive effect may be justified if the effect of applying preclusion would be to favor or disfavor similarly situated parties based on the timing of the administration of the law. *Id.* In regards to zoning, the Supreme Court of Rhode Island said it well:

> [A] strict rule of res adjudicata in zoning matters could have unfortunate consequences such as denying a landowner once refused relief the right to a reconsideration of an application based upon intervening circumstances resulting in a deprivation of all beneficial use of his property. Such an undesirable result could have serious constitutional implications and would do violence to the expressed legislative will authorizing zoning boards to vary the terms of zoning ordinances in hardship cases.

Marks v. Zoning Bd. of Review, 203 A.2d 761, 763 (R.I. 1964).

Local zoning offers a unique administrative challenge in that property remains held over time in changing neighborhoods, inevitably producing changes in the law, including in zoning ordinances themselves and applicable statutes. These reflect the changing desires of the locality as to the direction of development of the neighborhood and, in the case of statutes from the General Assembly, of the scope of authority provided to accommodate such changing circumstances.

As a result, in the case of administration of local zoning ordinances and exceptions thereto, the interests in finality and judicial economy may at times give way to the interest in treating various landowners fairly and equally at a given time. Restatement (Second) of Judgments § 28 cmt. c. & illus. 4. Examining the question of administration of variances in particular, we see no reason that either claim or issue preclusion would be required to apply.

In the context of zoning law, it is in the interest of finality and administrative economy for the BZA to enjoy the freedom to invoke principles of res judicata to decline to constantly rehear the same cause of action absent the allegation of changed circumstances. That is not the case here, however. Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a landowner from potential benefits to his or her property merely because he or she, or a previous owner, had engaged in a prior appeal of the matter under different law.

In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error. As a result, the final order granting an injunction, when Chilton-Belloni had not in fact been afforded the opportunity to exhaust her administrative remedies, was also in error.

III. CONCLUSION

As to the mandamus action, for the reasons stated, the appeal is dismissed. As to the stay and the injunctive relief sought, for the reasons stated, we will reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Dismissed in part,
reversed in part,
and remanded.

Chilton Hall Wall
1403 N. Augusta Street, Staunton

Wall Construction Expenditures-2007

26,561.00	Total consisting of the following documented expenditures:
1,961.00	Ck#1995: Guy C. Eavers Excavating: Trenching/Jimmy Harper
999.00	Check #1970: Casey-Jeff LaPort/Footer Installation
1,562.00	Ck#11962: Transit Mixed Concrete
4,156.00	Ck#622:Suntrust EL: Fauber Masonry, Labor for wall
6,118.00	Ck#2008: Fauber Masonry/ Labor for 12 Brick Columns
7,845.00	Ck#1999 and VISA: August Block /Materials: 2,100 Blocks, 230 Caps and 6 Lintels to span tree roots
1,787.00	Ck#1994 ($153) & Visa Charges ($1,387 & $146) & MC ($101): Augusta Paint/ wall painting materials
250.00	Ck#1997 ($110) & Ck#1825 ($140): Julian Carter, painting wall
989.00	Ck#1972 ($633): Ferguson/Gate fabrication; MC charge ($223))/Virginia Framers, treated lumber; MC charge ($38) & Ck#1823 ($87)/Ferguson, gate bolts and plates, Visa ($8), Young's Hardware
519.00	Visa charges ($214 & $305): Village Garden Center/Landscape material for wall: 4 Japanese and Nellie Stevens Holly, 2 Pyracantha, 4 Laurel
175.00	Ck#2003: Augusta Lumber/Mulch
200.00	Ck#2010: Mike Peeden & Gavin Anderson/backfill dirt and general clean-up

SUMMARY - TRAFFIC VOLUME AND CRASH DATA

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Annual Avg. Daily Traffic Volume - North Augusta Street between Edgewood Rd. and Lambert St. Intersections (Approx. .28 of a mile, which includes Ridgeview Rd.)*	9900	10000	9600	9100	9200	9300	8900	9300	9400	8800	9000	Not available
Annual Traffic Crash Count - North Augusta Street between Edgewood Road and Lambert St. Intersections**	Not available	Not available	Not available	Not available	1	3	8***	7	6	2	3	1
Annual Traffic Crash Count - North Augusta Street at Intersection with Ridgeview Road**	Not available	Not available	Not available	Not available	1	0	0	0	0	0	0	0

*Source: VDOT Traffic Engineering Divison - Daily Traffic Volume Estimates - Special Locality Report - City of Staunton/Augusta County

**Source: DMV and TREDS Crash Data by Jurisdiction

***Note: This number may be too high because DMV included a little more than just Edgewood to Lambert St. and no plot map to compare locations.

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
The Statler Brothers	By — Phillip E. Baldwin	1409 N. Augusta St.	12/20/07
Scott MacMillan	Scott MacMillan	1417 N. Augusta St.	14 Jan 08
Tom Alderidge		1320 North Augusta	1-18-08
Carol L. Coleman		27 Ridgewood Dr.	1/19/08
Bruce Frank	Bruce Frank	1310 N. Augusta St	1-19-08
Jennifer Frank	Jennifer Frank	1310 N. Augusta St.	1-19-08
Moira Coleman-Leigh	Moira Coleman-Leigh	10 Crescent Drive	1-20-08
Joseph Leigh		10 Crescent DR	1-20-08
Penelope Ferguson	Penelope E Ferguson	52 Ridgewood Rd	20 Jan 08
Garland Duvall		1422 Dogwood	1-20-08
Stephanie T Brooks	Stephanie T Brooks	30 Ridgeview	2/16/08
Jack R. Cochard		1315 N. Augusta St.	2/17/08 - See original
Elizabeth H. Campbell		1431 Dogwood Rd.	2/17/08 See original

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Sara L. Marks	Sara L Marks	1314 N. Augusta St	12/17/07
[illegible]	[illegible]	[illegible]	12-17-07
R. Fontaine McPherson, Jr.	R. Fontaine McPherson, Jr.	1403 N. Augusta	12-19-07
[illegible]	[illegible]	[illegible]	[illegible]
Woody Dixon	Woody Dixon	1323 N. Aug St	12-21-07
Caroline N. Bell	Caroline N. Bell	38 Ridgeview Rd.	12/21/07
Marden Bell	"	"	"
William Stevens	William Stevens	45 Ridgeview Rd	12/21/07
Amy Cash	Amy Cash	1403-3 North Augusta Street	12/21/07
[illegible]	[illegible]	[illegible]	[illegible]
Nancy S. Allison	Nancy S. Allison	1411 N. Augusta St. Staunton Va	12-27-07
Mary Patterson O'Brien MD	Mary Patterson O'Brien MD	50 Ridgeview Rd Staunton Va	24
Page E. Kable	Page E. Kable	50 Ridgeview Rd. Staunton, Va	1470

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N Augusta Street and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to abate traffic noise and thereby renders the front garden of Chilton Hall, 1403 N Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Kevin Sweeney	Kevin Sweeney	78 Emerald Heights Dr Fishersville, VA 22939	1/22/08
[illegible]	[illegible]	[illegible]	
Peggy C. Cook	Peggy C. Cook	1311 N Augusta St	
Harold T. Holden		25 Crescent Dr	1/23/08
Ruth Bugas		2937 Shuttlesville Mill Rd Staunton, VA 24401	1/23/08
Jaimee L. Renne		1027 Selma Blvd Staunton VA	01/24
Teresa Fitzgerald		51 Roller Ave mt S.d.eg	1-24-08
Linda J Holden		25 Crescent Drive Staunton VA 24401	1/25/08
Karen D. Hanna		22 Crescent Dr Staunton, VA	1/27/08
Rochelle St. Clair		805 Randolph St Staunton VA	24401 1/24/

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Amanda DiMeo	Amanda L. DiMeo	8 Waverley Green Staunton	12.6.07
Paula Homes	Paula Homes	37 Homes Lane Staunton Va	12.6.07
Mark Baffin		1757 Churchville Ave Staunton	12/6/07
SHARON PAXTON	Sharon Paxton	1705 VINSON ST, STN.	12/6/0
Brenda Conners		1090 Kenwood St Staunton VA	12
Cheryl McDowell	Cheryl McDowell	438 Belmont Staunton VA	12/7/07
Lynn Metz		804 Whoke Rd Staunton VA	
		41 Frederick St. Apt. 101 Staunton Va. 24401	12-14-07
Kelly K. Nesmith		902 Churchville Ave Staunton VA 24401	12-14-0
Baldwin Jeanneret		332 SHARON LA Staunton	17 DEC 07
John E Mayo		10 CRESTWOOD Dr Churchville VA	Dec 21-0
Nancy Spahn		234 W Frederick St 24401	Dec 21 20
Jean T. Hoffman	Jean T. Hoffman	68 Globe School Road Staun	Va
Rhonda Ward		29 N. Augusta St. Staunton, Va. 244 410 Audubon St. Staunton, Va 24401	

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
KITTY BRAUN	Kitty Braun	133 Crompton Waynesboro	11/15/08
Linda Perkins	Linda Perkins	108 Tiffany Dr. W'boro	11/15/08
NANCY BOYERS	Nancy Boyers	218 Heston Farm Lane Wboro, VA	1/15/08
Dana Crawn	Dana J Crawn	408 Wyndham Hill Dr. Fishersville, VA.	1/18/08
Katie Bosserman	Katie Bosserman	1804 Orange St Staunton VA 24401	1/18/08
Darren Bowles	Darren Bowles	836 Washington Ave Wboro 22980	1/
Carolyn Morris	Carolyn A Morris	177 Long Ridge Ln Staunton VA	1/18/08
Melvin E. Sweeney	Melvin E. Sweeney	1527 Dogwood Rd Staunton	1/18/08
Jeanne T. Huffman	Jeanne T. Huffman	120 Tinmouth Mill Rd 24479	1/
FRANK PERRENOT	Frank Perrenot	355 Livick Road P.O. Box 5 SWOOPE, VA. 24479	
Carla Perrenot	Carla N. Perrenot	355 Livick Rd Swoope VA 24479	
JOHN FOSTER	John Foster	838 EIDSON CREEK RD VA 2240	
HARRIET	Groesbeck	572 Eidson Creek Rd Staunton 24401	
Pete Groesbeck		572 Eidson Creek Rd. Staunton 24401	
Donald Bredder Tracey Bredder	Donald P. Bredder	57 Glebe School Rd, Staunton, Va	

S 886-4174

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N Augusta Street and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to abate traffic noise and thereby renders the front garden of Chilton Hall, 1403 N Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Angie Latham		637 Parkview Ave	1/25/08
Jean S. Bazzrea		1323 Blandford St.	1/25/08
Libby Smith		929 Nelson St	1-25-08
Elizabeth N.		Staunton Va	
Mary Jane Cason		809 Lamartmore Rd.	1-25-08
[illegible] Hope		520 Robin Street Staunton, VA 2401	1-25-08
Joseph A. Miska		211 Church St Staunton	2/8/08
Jimmy Borzelleca		510 W Beverley St.	2/8/08
[illegible]		3 Lewis Lane Staunton	2/8/08
Donald Middleton		105 Clifford St Staunton	2/8/08
Janet Schaf		426 Windermere Dr	2/15/08

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
William J Ferguson		765 Middlebrook Rd	1/14/08
Ashton Reed		1221 Jackson	1/12/08
Jane Gnali	Jane Gnali	117 Austin Ave	1-18-08
Giancarlo Gnali	Giancarlo Gnali	117 Austin Ave	1-18-08

[10.] Note: Names/addresses of Petitioners (81) typed for clarity

Petition: The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly-constructed masonry and brick wall at the corner of N. Augusta Street and Ridgeview Road. Said wall, which is landscaped to blend in with the existing hedge, serves to block traffic noise, and thereby renders the garden of Chilton Hall liveable for its owners.

Judy C Cook, 1311 N AUGUSTA ST, Staunton [886-3800]

✓ Kenneth Monroe, 1319, N AUGUSTA ST, Staunton [886-3858]

Sara Monroe, 1319,k N AUGUSTA ST, Staunton [886-3858]

Rhonda and Sid Ward, 29 N AUGUSTA ST, Staunton [540 213-0606]

Fontaine McPherson, 1403 N AUGUSTA ST, Staunton [886-1429]

Rebecca Allison, 1411 N AUGUSTA ST, Staunton [885-5117]

Nancy Allison, 1411 N AUGUSTA ST, Staunton

Woody Dixon, 1327 N AUGUSTA ST, Staunton [885-0346]

Amy Cash, 1403 N AUGUSTA ST, Staunton [886-5080]

The Statler Brothers, 1409 AUGUSTA ST, Staunton [885-7297]

Scott MacMillan, 1417 N AUGUSTA ST, Staunton

Tom Aldridge, 1320 N AUGUSTA ST, Staunton [885-5656]

Bruce Frank, 1310 N AUGUSTA ST, Staunton [885-3438]

Jennifer Frank, 1310 N AUGUSTA ST, Staunton [885-3438]

✓ Caroline Bell, 38 RIDGEVIEW RD, Staunton [885-2146]

✓ Dr. Mardre Bell, 38 RIDGEVIEW RD, Staunton [885-2146]

Dr. William Sowers, 45 RIDGEVIEW RD, Staunton [885-2087]

Dr. Mary O'Brien, 50 RIDGEVIEW RD, Staunton [886-1791]

Page Kahle, 50 RIDGEVIEW RD, Staunton

Penelope Ferguson, 52 RIDGEVIEW RD, Staunton [886-6384]

✓ Dr. Stephanie T. Brooks, RIDGEVIEW RD, Staunton 886-4053 886-5775

Karen D. Hanna, 22 CRESCENT DR, Staunton [~~886-7612~~]

Linda F. Holden, 25 CRESCENT DR, Staunton [885-2720]

Jack Cowherd, 1315 N. Augusta St, Staunton [885-8578]

Note: All persons contacted signed the petition - save for two attorneys citing potential conflicts of interest.

Moira Coleman-Leigh, 10 CRESCENT DR, Staunton [887-7301]

Joseph Leigh, 10 CRESCENT DR, Staunton [887-7201]

Howard Holden, 25 CRESCENT DR, Staunton [885-2720]

Wayt Timberlake, 29 CRESCENT DR, Staunton [885-0738]

Garland Newell, 1422 DOGWOOD RD, Staunton [885-4479]

Melvin Sweeney, 1527 DOGWOOD RD, Staunton [885-8390

Lee Cochran, 24 RIDGEWOOD DR, Staunton [886-0188]

Linda D Hanna, 39 EDGEWOOD RD, Staunton [885-8363]

Nancy Spahr, 234 FREDERICK ST, Staunton [887-2345]

Patsy S. Wilson, 41 FREDERICK ST, Staunton [885-7575]

Rochelle St. Claire, 805 RANDOLPH ST, Stainton

Kevin Sweeney, 58 EMERALD HEIGHTS DR, Fisherville [942-5544]

Ruth Burgas, 2937 SHUTTERLEE MILL RD, Staunton

Amanda DiMea 8 WAVERLEY GREEN, Staunton

Paula Homes, 37 HOMES LANE, Staunton [885-6617]

Mark Battin, 1759 CHURCHVILLE AVE, Staunton [886-6332]

Jaimee L Renne, 1027 SELMA BLVD, Staunton

Kitty Braun, 133 CROMPTON, Waynesboro

Linda Perkins, 108 TIFFANY DR, Waynesboro

Nancy Boyers, 218 HESTON FARM LANE. Waynesboro

Dana Craun, 408 WYNDHAM HILL DR, Fisherville

Katie Bosserman, 1804 ORANGE ST, Staunton

Darren Bowles, 836 WASHINGTON AVE, Waynesboro

Carolyn Morris, 177 LONG RIDGE LN, Staunton [337-3888]

Sharen Paxton, 1705 VINSON ST. Staunton [886-1750]

Brenda Canning, 109 OAKENWOLD ST, Staunton [[885-3865]

Cheryl McDowell, 428 BENSON ST, Staunton

Elizabeth Campbell, 1431 Dogwood Rd, Staunton [~~885-3750~~]

Kim Metje, 80A WOODLEE RD, Staunton [294-2161]

Lesley, Merritt, 902 RICHMOND RD, Staunton

Baldwin Jennings, 3325 SHARON LA, Staunton

John E Mozian, 10 CRESTWOOD DR, CHURCHVILLE [886-0103]

Jean T Hoffman, 68 GLEBE SCHOOL RD, Staunton [886-1985]

Jeanne T. Hoffman, 120 TRIMBLERS MILL RD, Swoope [885-9593

Frank Perrenot, 355 LIVICK RD, Swoope [887-6959]

Carla Perrenot, 355 LIVICK RD, Swoope [887-6959]

Teresa Fitzgerald, 51 ROLLER AVE, Mt Sidney

John Foster, 828 EIDSON CREEK RD, Staunton [885-3047]

Harriet Groeschel, 572 EIDSON CREEK RD, Staunton [886-3758]

Pete Groeschel, 572 EIDSON CREEK RD, Staunton [886-3758]

David Bredder, 57 GLEBE SCHOOL RD, Staunton [885-2545]

Tracey Bredder, 57 GLEBE SCHOOL RD, Staunton [885-2545]

William Ferguson, 765 MIDDLEBROOK AVE, Staunton [8 85-5658]

Ashton Reed, 1221 JACKSON, Staunton

Jane Gnali, 117 Austin Ave, Staunton [886-1403]

Giancarlo Gnali, 117 Austin Ave, Staunton [886-1403]

Ginger Ham, 637 Parkview Ave, Staunton

Jean Bazzrea, 1323 Blanford St, Staunton [886-1401]

Elizabeth N. Swik, 929 Nelson Street, Staunton

Dwight & Mary Faye Cason, 809 Lammermoor Dr, Staunton [886-7737]

James T O'Hare 520 Robin St, Staunton [886-2250]

Joseph Miska, 211 Church St, Staunton

C Borzellaca, 510 W Beverly St, Staunton [885-1828]

David Schwartz, 1 Beverly St, Staunton [886-3915]

Donnie Middleton, 105 Clifford St, Staunton [886-1828]

J.S. Juke, 56 Lowery Lane, Swope

8 FEBRUARY 2008

To the Board of Zoning Appeals,

The wall at Chilton Hall, 1403 N. Augusta St. was constructed after permission was granted by the Board of Zoning. Why is it now in violation of code?

Aesthetically, it appears to be in good taste.

We are in support for the wall to remain.

Jane Grahl

Edward Grahl

Staunton Board of Zoning Appeals

Regarding: Intersection North Augusta Street and Ridgeview Road

17 February 2008

Dear Zoning Board Members,

I am a 15 year resident of 52 Ridgeview Road, here in Staunton. I use the intersection of Ridgeview Road and North Augusta Street daily (some days multiple times). The Bellamy's have recently erected an architecturally stately wall inside the already well-established shrub hedge on their property. This wall is aesthetically pleasing, as it frames the existing hedge, the wall color blends in with the natural vegetation making it a nice *backdrop*. Since this wall is inside the established hedge line it does not hinder nor impact any part of line-of-vision for safe driving.

I was amazed when the Bellamy's contacted me that someone had filed a complaint regarding the construction of the wall. This couple has artfully increased the aesthetics of their home, added value to their home and perhaps even the street. Since being contacted by them, each time I (daily) use this intersection, I stop and think, "Is this creating a hazard? Is my line-of-vision impaired?" Each time the answer is "NO", there is no impediment, and there is no reasonable explanation for someone to complain.

I very willingly signed the petition to 'allow the wall to remain' and I will continue to support the Bellamy's to keep the wall as is. Please allow this letter to their support. The Appeals Board is welcomed to contact me as needed.

Sincerely,

for file

Penelope E. Ferguson

52 Ridgeview Road (Staunton)

886.6384

March 24, 2018

Dear Board Members,

We are writing as residents of 1403 N. Augusta St, Unit 1, in the City of Staunton. We have lived at this residence for the last eight months. In relocating to Staunton and seeking to find a home in the City, we were drawn to the property by the beautiful architecture of the home and the privacy of the home afforded by the masonry wall that surrounds the front and side of the property.

As the property is located on a busy street, the wall acts as a buffer for the road noise and provides a sense of privacy.

In exiting the property from the front driveway onto Augusta St, the wall does not pose a hazard or block our line of sight in either direction.

We support the efforts of the owner to preserve the wall is it stands.

Best regards,

Deborah Elkins

Teresa Elkins

Dr. John McCarty
1403 North Augusta Street #5
Staunton, VA 24401
515.371.8350

29 March 2018

Board of Zoning Appeals
City of Staunton
116 West Beverley Street
Staunton, VA 24401

Re: North Augusta St. and Ridgeview Road Intersection

Dear Zoning Board Members,

As a six-year resident of 1403 North Augusta Street in Staunton, I drive through the intersection of North Augusta and Ridgeview Road at least once a day. The wall on Debra Belloni's property has never impeded my vision or hindered my ability to safely drive through that intersection. The wall is located behind a row of hedges and is painted to blend into the vegetation. In fact when I heard that there had been complaints about the wall making the intersection dangerous, I had to make a point to notice the wall as I drove through the intersection the next day, because it simply does not impact my daily drives through that intersection. In addition, I am sure that the wall serves as an important noise barrier blocking the residents of 1403 North Augusta from the sounds of traffic on this portion of North Augusta.

As someone who regularly drives through and has made all possible turns through the intersection of North Augusta and Ridgeview Road, I can say with certainty that the wall on Debra Belloni's property does not impact my daily travels through this intersection. The wall also provides me, as a resident at 1403 North Augusta Street, an important buffer from the traffic sounds coming from North Augusta. For the reasons explained above, I am happy to write this letter in support of allowing Debra Belloni to keep the wall on her property as is.

Please feel free to contact me with any additional questions.

Sincerely,

John McCarty

John McCarty

March 31, 2018

Dear Staunton Board of Zoning Appeals,

I am writing to you with regards to the wall bordering Chilton Hall on the property of Ms. Debra Belloni. I have been a tenant at Chilton Hall for seven years. The wall has never been the cause of any concern for me. Rather, I have appreciated its provision of a sense of security and privacy, especially considering that the property borders the busy road of N. Augusta St. I believe that the wall is well designed to blend into its natural surroundings of hedge and other foliage. Thus it does its job of providing the above mentioned safety features without removing aesthetic appeal from the property.

I have never begrudged the wall as an impairment of vision while driving from Ridgeview Rd. onto N. Augusta St. Visibility is impaired at that intersection with the presence of a hill. Were the wall, the hedge, the tree and all electric poles to be removed from that area, it would still be a challenging intersection to cross. I know this to be true, as I often cross to Chilton Hall from the opposite side of the street, on foot, when returning from a walk. The hill is the cause of any visual challenges I have experienced at that intersection. In conclusion, I request that you allow the wall to remain as a positive feature of the property.

Sincerely,

Kelly Mansoor
Resident of Chilton Hall
1403 N. Augusta St.

Staunton Board of Zoning Appeals

Regarding: Wall at 1403 North Augusta Street, which intersects with Ridgeview Road

April 2, 2018

Dear Zoning Board Members,

From January, 2010 to March, 2013, I resided at 1403 N. Augusta Street also known as "Chilton Hall". During this time I used the intersection at Ridgeview Road and North Augusta Street many times and continue to use this intersection frequently. I have never experienced any issues with impaired vision or navigating this intersection due to the wall on the property of 1403 N. Augusta Street. Considering that Staunton is notorious for odd shaped intersections that crisscross, transect in sharp angular corners, fork in V and Y shapes, I would conformably state that the intersection at Ridgeview Road and N. Augusta Street is unexceptional to dozens of other intersections.

During the time I lived at 1403 North Augusta (Chilton Hall), I found the wall to be essential as a sound barrier to the very busy traffic on North Augusta Street. North Augusta Street (US 11) is the main feed to Downtown Staunton from Interstate 81, exit 225. It also is the main thoroughfare for the high population of residents north of town. Traffic is continuous to and from these areas. The US Post Office, which has a 24 hour a day operation (consisting of multiple trucks and tractor trailer transportation), is three blocks north of Chilton Hall. This operation generates traffic by employee vehicles, mail delivery vehicles, and customer vehicles. Directly across the street is The Legacy, a high volume senior living complex, and Kings Daughter Nursing Home. This also generates twenty four hours of traffic and constant noise triggered by emergency responders, fire trucks and rescue squads en route to The Legacy.

The Wall, at 1403 N. Augusta Street (Chilton Hall), which is constructed inside of well-established hedging, is aesthetically pleasing and conforms to the stately ambiance of the property. The owners, Frank and Debra Belloni, went to great lengths to involve the neighbors prior to and even during the construction of the wall. Neighbors were even included when design and color were considered. The wall color is a shade of green that blends nicely with the surrounding vegetation. The columns are very becoming, constructed of traditional style bricks and capped with the ORIGINAL Chilton Hall wall column caps, which are over 118 years old.

In conclusion, I affirm that the wall, located at 1403 N. Augusta Street (Chilton Hall), is NOT a hazard. It does not create any issues or obstacles which impair vision at the intersection of North Augusta and Ridgeview Road. It is tastefully constructed, aesthetically pleasing, and enhances the stately integrity of the neighborhood. It is my opinion, Ms. Belloni should be granted any variance or special use to ensure that the Wall remains. I am requesting to speak at any public hearings or meetings concerning this matter. The Board members are welcome to contact me at any time.

Sincerely,

Sonny L. Cubbage
2618 N. Augusta Street
Staunton VA 24401 (540-383-6090)

Dear Board of Zoning Members, 03 April 2018

I am a resident of Chilton Hall located at 1403 N Augusta St and am writing this letter in support of keeping the wall that was erected inside the hedge-line that runs along N Augusta St. The wall provides additional separation and privacy from the frequent street traffic, which as a resident I value greatly. It also adds to the overall aesthetics of the property.

As I understand, there have been claims of "impaired line-of-sight" due to the proximity of the wall to the street. Again, the wall is inside the hedge-line and is a very suitable distance from the street. I use the intersection at Ridgeview Rd an N Augusta St on a daily basis and the only challenge to seeing traffic is a hill on N Augusta St that crests just north of Ridgeview Rd. The wall in question does not block the view of traffic from the intersection or affect the surrounding properties in any way. Destruction of the wall would be an unnecessary waste of time and resources and would take away from the stately beauty of the Chilton Hall property.

Please weigh the benefits of the wall remaining as-is on the property against the fact that it does not cause any hinderance or impairment to traffic or surrounding properties.

I thank you for your time and consideration.

Kind Regards,

Chandra M. Clarke
1403 N Augusta St #4
Staunton, Va 24401
(765) 656-7271

Karen Wilkins

From: Mark Obenshain
Sent: Wednesday, April 11, 2018 5:44 AM
To: Karen Wilkins
Subject: Fwd: letter to Staunton Board of Zoning Appeals re: 1403 N. Augusta St Wall

Sent from my iPad

Begin forwarded message:

From: Brian McDermott <bgmcd222@outlook.com>
Date: April 11, 2018 at 7:36:41 AM EDT
To: "mdo@Obenshainlaw.com" <mdo@Obenshainlaw.com>
Cc: Brian McDermott <bgmcd222@outlook.com>
Subject: letter to Staunton Board of Zoning Appeals re: 1403 N. Augusta St Wall

Dear Mr. Obenshain,
Please accept the letter below as our support for Debra Chilton-Belloni's request to the Board of Zoning Appeals. Thank You.
Brian

****

Brian G. McDermott
525 Glass Hollow Road.
Afton, VA 22920
978-505-0662
bgmcd222@outlook.com

April 9, 2018

From:
Brian G McDermott
525 Glass Hollow Road
Afton, VA 22920

To:
City of Staunton Board of Zoning Appeals
Staunton, VA, 24401

Dear Members of the Board of Zoning Appeals,

I am writing to offer my support of the request of Ms. Debra Chilton-Belloni of 1403 N. Augusta St. Staunton, Virginia, for a variance to sections 18.120.010(2) and 18.120.010(3)(b) and 18.120.010(3)(d) Yard, Building Setback, and Open Space Exceptions, of the Code of the City of Staunton, to allow a wall over 3 and ½ feet in the front yard and over 2 and ½ feet at the intersection of N. Augusta St. and Ridgeview Rd.

My wife and I are previous tenants of the first floor apartment at 1403 N. Augusta Street (Apt A). We lived at this address from August 2016 through July 2017. We thoroughly enjoyed our stay at this location while we looked for a house to purchase in the area.. One of the main reasons we enjoyed living in this apartment is because of how the hedge and wall provides not only a sight and sound barrier between the front yard and the busy N. Augusta Street traffic, it also provides an entrance into one of Staunton's admired and well kept neighborhoods.

We understand that concerns have been raised regarding traffic safety because of the wall. During our entire stay at this location, we did not find any issues with traffic safety due to the wall. In fact, in our experiences entering and exiting N. Augusta Street either from the driveway or Ridgeview Road it is the crest of the hill and/or the hedge that caused any traffic difficulty. The wall itself does not obstruct any view or cause any safety concerns in our opinion.

Sincerely,
Brian McDermott

A couple, a city and the wall that divided them

Gabe Cavallaro, gcavallaro@newsleader.com 6:40 p.m. EDT November 4, 2016

(Photo: Holly Marcus/Special to The News Leader)

STAUNTON - The Bellonis moved to Staunton in 2006. They built a wall around their property. The city said the wall violated the zoning code and needed to be torn down. They refused. A 10-year legal battle ensued.

It all started when Debra and Frank Belloni decided they wanted to block out noise at their Augusta Street property and the best way to do that was to build a wall. They didn't just go and build it though — they got permission from a city zoning official first — which is a big reason why Debra Belloni can't believe this ordeal is still dragging on.

"We were very well aware of zoning, that's why we went to the city to ask," she said.

Earl Thompson, who was an authorized official of the zoning office at the time, told them they could build the wall and what the Bellonis constructed was what he expected them to, they didn't mislead him, according to his testimony from 2011 Staunton District Court. Yet, the city says the wall violates the zoning code, as it's greater than 3 feet high and sits on a street corner where it obstructs the line of sight for turning vehicles — this law needs to be enforced so as not to set a precedent, city officials say.

Debra Chilton-Belloni has been fighting to keep a wall that she and her husband had built around a 19th century house they bought 10 years ago to help reduce traffic noise along N. Augusta Street in Staunton in this photo taken on July 27, 2016. The city of Staunton said the wall was not built in accordance to the zoning regulations for a corner lot. (Photo: Holly Marcus/Special to The News Leader)

"All we're asking her to do is what any other citizen is required to do, which is comply with the law," said Victor Santos, the private attorney the city has hired on retainer to handle this case. "You can't selectively enforce."

Santos said the way the law is written is black and white and the Bellonis' wall violates that law and so if they don't agree with that, they should tell their representatives in the Virginia General Assembly to change the law.

"Laws need to be enforced and if the law's not a good law, then it needs to be changed — that's how you do it," he said.

That's not how Debra Belloni see things though — she said since they did everything they could as citizens to make sure they were following the rules and then chose to make the investment of building the wall, why should they have to tear it down?

"I just think that government has certain obligations and that citizens ought to be able to rely on them, they ought to be able to within reason use their own property as they see fit and particularly if government tells them that they can do something with their property, they ought to be able to rely on it," said Mark Obenshain, Belloni's lawyer.

Belloni said she thinks if the city of Staunton can succeed in having her tear down the wall, the real precedent that would be set is that a citizen can't get advice from the city and expect to rely on it.

0293 Buy Photo

Debra Chilton-Belloni points out a wall that was built 10 years ago behind a hedge row to help reduce traffic noise at her 19th century home along N. Augusta Street in Staunton on July 27, 2016. The city of Staunton said the wall was not built in accordance to the zoning regulations for a corner lot. (Photo: Holly Marcus/Special to The News Leader)

When this mindset has met the city's steadfastness in enforcing the code as written, the result has been a seemingly never-ending saga that started with the Staunton Board of Zoning Appeals, made its way to Staunton District Court and will soon be heard in the Virginia Supreme Court, after Belloni's appeal was accepted last week.

"It's been a huge disappointment and I try to stay positive and hope that common sense will prevail and that right will somehow come out of all this, but I have to say it's been very disappointing," Belloni said. "Who wins? It just seems like what they want is very destructive without any benefit for anybody — it's costly and it's destructive."

Santos for his part agreed that after 10 years, this case has cost the city too much.

"It appears as if somehow we're beating up on her, but all we're asking is for her to comply with what the law is and it's not fair to the city to frankly spend resources on me, when they could be using it for other purposes that benefit the community as a whole," he said. "The cost of appealing to the Supreme Court of Virginia, you know attorneys' fees, is not cheap, the city's paying my bill."

He insists the city has no vendetta against Belloni and that they've been very patient, even offering compromises to the couple over the years, saying they would be amenable if they deconstructed the wall to a specified level that was still technically in violation of the code.

Yet time has passed and no agreement was ever reached. Debra Belloni lost her husband, Frank, in 2013 within days of a truck crashing into it, which has left the wall in its current state of disrepair. If Belloni were to repair it, the city has notified her that this would be considered a fresh violation.

And so this battle marches on, to the Supreme Court of Virginia.

"If it goes long enough, I won't be here either anymore," Belloni said.

Former News Leader reporter Claire Cooper contributed reporting to this article.

THE NEWS LEADER

Navigating regulation tricky for evolving Staunton Airbnb economy

(http://www.newsleader.com/story/news/local/2016/11/03/navigating-regulation-tricky-airbnb-economy-stauntont/92768020/?from=global&sessionKey=&autologin=)

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May 30, 2018

Via US Mail and Email

John Wirth, Esquire
Victor M. Santos, Esquire
Nelson, McPherson, Summers & Santos, L.C.
P.O. Box 1298
Staunton, VA 24401
johnwirth@nmsslc.com
santos@nmsslc.com

Re: Chilton-Belloni Variance Application

Dear John and Victor,

I tried to call you this morning and had hoped to speak with you about a number of issues in connection with the upcoming hearing. I understand that the City has posted a new advertisement in the newspaper for the upcoming public hearing. I would be grateful if you would send me a copy of that notice.

I would also be grateful if you would send me a copy of the notification sent to neighboring property owners. Of course, if there are any new or different briefing materials circulated to the board members, I would be grateful if you would provide me with those as well.

I have written letters on March 27and May 17 concerning the legal standard the City is asking the BZA to apply to Mrs. Chilton-Belloni's variance application and concerning certain briefing materials that were either omitted or which we have asked to have included in an updated set of briefing materials. After the first letter, you asked for a continuance so you could evaluate our position.

I have not received a response to either letter. It would be helpful, I think to both of us, if we knew the universe of issues in dispute. If the City agrees that the Board should apply the statutory standard for granting variances that was in existence on the date of Mrs. Chilton-Belloni's variance application, it would shorten any hearing and simplify the issues we are asking the BZA to decide.

Thank you for your assistance and attention to these matters.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/eis

cc: Mr. Paul Vames, Board of Zoning Appeals
Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Mr. Rodney Rhodes
Mrs. Debra Chilton-Belloni

NELSON, McPHERSON, SUMMERS & SANTOS, L.C.
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THOMAS R. NELSON (1899-1980)
RICHARD F. MCPHERSON (1925-2002)
FRANK L. SUMMERS (1930-2018)
VICTOR M. SANTOS
THOMAS P. MCPHERSON
JOHN C. WIRTH
B. SPENCER CROSS

JESSICA L. ROBINSON
DANIEL E. MOWRY

May 31, 2018

Via Email and Mail

Mr. Paul Vames
Staunton Board of Zoning Appeals
P.O. Box 2442
Staunton, VA 24402

Re: 1403 N. Augusta Street

Dear Mr. Vames:

After further consultation with Mr. Rhodes, the Zoning Administrator, we are responding to Mr. Obenshain's correspondence of May 17th. Although Mr. Obenshain directed the correspondence to counsel, it is clear that his intended audience was the Board of Zoning Appeals (BZA), to which he provided a copy. Accordingly, while we are providing Ms. Obenshain with a copy of this letter, this correspondence is directed to you as Chairman of the BZA.

Enclosed please find a copy of the notice of hearing which appeared in *The News Leader* on May 24, 2018 and which will again run on May 31, 2018. In accordance with Ms. Chilton-Belloni's objections, and in order to avoid any grounds she might claim for appeal, all references to the required statutory requirements have been removed from the Notice. That revision to the original Notice does not, however, reflect any change in the legal positions of the City or the Zoning Administrator; nor is it a waiver or relinquishment by the City or the Zoning Administrator with respect to the law which is to be applied with respect to this matter.

Additionally, and in effort to further accommodate Ms. Chilton-Belloni, Mr. Rhodes will supplement the Agenda Briefing of March 23, 2018, though the materials provided at that time remain applicable and relevant to this proceeding. In his recent correspondence Mr. Obenshain proposes the inclusion of several additional items, each of which I will address herein.

2009 Letter Opinion. We do not object to the BZA's consideration of Judge Irvine's January 14, 2009 letter opinion, which overturned the BZA's earlier grant of a variance. Therein the Court notes, on page 4, that the BZA "acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the law." The Court does, of course, cite *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004)

and notes that applying Virginia law, the evidence did not meet the standard set forth in *Cochran*.

At no point has the Virginia Supreme Court overturned *Cochran* or ruled that the analysis set forth therein became irrelevant after the two words "approaching confiscation" were excised from the statute in 2009. To the contrary, in fact, in *Martin v. City of Alexandria*, 286 Va. 61 (2013), the Court denied a variance despite the applicant's argument that removal of the words "approaching confiscation" in the Alexandria City Charter, which the Court held to contain language "virtually identical" to that found at Va. Code §15.2-2309(2), authorized the granting of variances which previously were unauthorized. The Court held that the applicant's argument ignored the fact that the rest of the Charter language remained unaltered. Accordingly, the Court held that the Alexandria Board of Zoning Appeals acted erroneously in granting the variance, in that its doing so was contrary to law.[1]

There is absolutely no basis to conclude, as Ms. Chilton-Belloni asserts, that Judge Irvine would have ruled differently in 2009 had two words been deleted from the statute before he rendered his decision. Nothing in his letter opinion makes this assertion, and at no point does the Court state that those two words formed the sole basis for its ruling.

2017 Supreme Court ruling. We also do not object to the BZA's review of the Supreme Court's ruling in the *Chilton-Belloni v. Angle* case. Therein the Zoning Administrator sought a mandatory injunction to compel Ms. Chilton-Belloni to comply with the law. Prior to trial Ms. Chilton-Belloni asked the Court to stay (place on hold) that case until her new variance application (the same one currently pending today) was heard by the BZA. The Circuit Court declined, applying principles of *res judicata*[2] and rejecting Ms. Chilton-Belloni's argument that

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[1]See also, "Analysis of the Hardship Issue by Virginia Courts Prior to HB 1849," prepared by Greg Kamptner, then Deputy County Attorney (now County Attorney), County of Albemarle, included as Exhibit G with the briefing materials provided to the BZA by Mr. Rhodes in March. On pages B-3 and B-4 of that article Mr. Kamptner discusses the *Martin* case. We would respectfully submit that this analysis is more comprehensive and reliable than that contained in the 2009 law review article, written by a law student four years prior to the decision in *Martin* and submitted by Mr. Obenshain with his May 17 letter.

[2]"Res judicata is a judicially created doctrine founded upon the 'considerations of public policy which favor certainty in the establishment of legal relations [and] demand an end to litigation.'" *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 617 (1989) (quoting *Bates v. Devers*, 214 Va. 667, 670 (1974)). It prohibits litigation "with the same person . . . of precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction." *United States v. Cal. Bridge & Constr. Co.*, 245 U.S. 337 (1917).

an alleged change in circumstances (specifically, the 2009 amendments which deleted the words "approaching confiscation" from the statute) entitled her to again present a variance application to the BZA. The case then went to trial, and the Court ordered Ms. Chilton-Belloni to bring the wall into compliance with the Staunton City Code. Ms. Chilton-Belloni appealed, and the Supreme Court ruled that the Circuit Court should have granted the stay because, it held, Ms. Chilton-Belloni had a right to have her variance application considered before the injunction proceeding was heard. The Court did not address whether the application meets the standard required for a variance, either at the time it was originally submitted or today.

Mr. Obenshain asserts that in that litigation the City took the position that the 2014 statute applied, but he ignores the clear reason why the version of the statute which existed prior to the 2015 amendments was cited in the context of that case. As was noted in the City's appellate brief, the case then being appealed was tried in the Circuit Court on June 30, 2015, a date which was one day *before* the 2015 amendments to the Code went into effect. The City argued that the Circuit Court acted correctly in denying the stay, and that there had been no significant change in circumstances since it had denied the same variance in 2009. The Supreme Court ruling is based on an analysis of whether *res judicata* applies to prohibit a BZA's substantive reconsideration of variance applications after the statutory framework has been amended. The Court ruled that the application should have been considered and ruled upon, and that the Circuit Court should, therefore, have stayed the injunction proceeding.

The Virginia Supreme Court has often ruled in administrative contexts that the local administrative bodies involved should apply the legal framework as it exists at the time of a hearing, even in situations in which that framework changes between the date of the application and the hearing date. In each of those cases the Court held that it is the law that existed *at the time the locality acted (or failed to act)* that should be considered, instead of the law as it existed at the time the application was filed.

In *Ancient Art Tattoo Studio v. City of Virginia Beach*, 263 Va. 593 (2002), for instance, an application was filed seeking permits to operate a tattoo parlor. Following that application, but before the Zoning Administrator acted upon it, the City amended its zoning ordinance to prohibit the placement of tattoo parlors in the location sought by the applicant. The Court held that the applicant "was not entitled to a decision under the City's existing zoning ordinance before the enactment of the amendments." *Id.* at 599-600. The Court therein referenced its earlier decision in *Parker v. County of Madison*, 244 Va. 39 (1992), which dealt with a subdivision application, for the principle that "the obligation to act in accordance with the new law, not the former, is not affected by the mere filing of an application before the new law becomes effective." *Id.* at 600. See also *Chesterfield Civic Assoc. v. BZA*, 215 Va. 399 (1974) (the law as it applied on the date of the hearing before the BZA, not the law as it applied at the

time of the application, governed the proceedings).

In *Island Grill v. BZA*, 34 Va. Cir. 492 (City of Richmond, 1994), an application for a special use permit for a topless bar was denied when, after the application was filed, but before the hearing before the BZA, the City Council amended its zoning laws to prohibit such establishments in B-5 districts. The Court held that "since the proceeding at issue here – the issuance of, not the application for, the building permit – took place after the enactment of the zoning law amendment, the proceeding should have conformed to the amended law." *Id.* at 501.

It is also important to consider that, as in all of the above cases, the matter before the administrative panel or official (in this instance, the BZA) is not a *suit* pending before a trial court, but rather an *application* filed by a local resident. In the November 9, 2017 ruling which Ms. Chilton-Belloni asks be included in the record, the Supreme Court held that a BZA, in issuing variances, did not operate in a manner equivalent to a court of competent jurisdiction. The case which was before the Supreme Court was a *suit* brought in *Court* and not an administrative matter before a Zoning Board. In such latter, administrative contexts, the Board must apply the law as it exists at the time of the proceeding – that is, the *current law*. Ms. Chilton-Belloni's application should be treated no differently than any other variance application would, and the BZA should apply the *existing* legal standards, in determining if she is entitled to the relief she seeks.

That being said, the Zoning Administrator recognizes that though some members of the BZA have availed themselves of training designed to assist them in their service, the BZA's membership does not consist of lawyers or judges, and it is challenging to expect them to be able to determine which of two legal positions, presented by two competent attorneys, are accurate. Ultimately, there is every reason to believe that this matter will be determined in Circuit Court. If the BZA denies the variance, Ms. Chilton-Belloni is very likely to appeal; if the BZA grants the variance, the Zoning Administrator will certainly appeal.

As stated, the Zoning Administrator rightly maintains his position that the current statutory framework, which of course includes the 2015 amendments to Code § 15.2-2309, is applicable. We see no reason, however, for the BZA to be dragged into a legal dispute over whether it should apply the current law in evaluating this application, and if Ms. Chilton-Belloni wants the BZA to apply the 2014 statutes then the Zoning Administrator will address those at the hearing and in the aforementioned supplement.[3] Ms. Chilton-Belloni's argument has always been

[3]No statements contained herein should be construed as a waiver of the Zoning Administrator's right to continue to assert in this hearing and/or on appeal that the *current* statutory and legal framework applies to this proceeding. The Zoning Administrator maintains that position, but is interested in moving this matter forward in a fashion which is considerate of the time and limited legal training of the BZA.

based on her own subjective notion of "fairness" and her efforts to engender sympathy, rather than on the law which the BZA and the Courts must apply. Though we do not believe she is entitled to greater sympathy in this proceeding than that afforded any other City resident, we do not want the legal confusion which she is attempting to sow to take away from the BZA's focused application of the law to the facts.

The fact of the matter is that under either standard – the one which applied prior to the 2015 amendments or the one which applied afterwards – Ms. Chilton-Belloni's application fails. Mr. Rhodes will address this reality in his supplemental briefing, but under no circumstances would "strict application of the ordinance ... produce undue hardship relating to the property" as Va. Code §15.2-2309 required in 2014. Ms. Chilton-Belloni is unhappy because she is faced with the prospect of having to pay a contractor to lower the height of her wall in order to comply with the law, but her desire to avoid that expense does not justify a variance under the terms of the Code. Nor can the Board properly find, as the 2014 version of the statute required, "that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." There is nothing particularly unique or unusual about this property which justifies setting aside the provisions of the Zoning Ordinance, and if the elected members of City Council wish, they can resolve the matter by reducing the height requirement of the Ordinance at any time. They have not chosen to do so, and the BZA should resist the invitation to exercise a legislative prerogative it was not elected to exert. "A board of zoning appeals, when considering an application for a variance, acts only in an administrative capacity and under constitutional principles is empowered to act only in accordance with the standards prescribed by the legislative branch of government." *Amherst County Bd. of Supervisors v. Amherst County Bd. of Zoning Appeals*, 70 Va. Cir. 91 (Amherst Co., 2005).

Other items. Ms. Chilton-Belloni's efforts to turn this proceeding into a legislative one, and distract from the strict burden she must meet under the *law*, is illustrated by the fact that she asks the BZA to consider a petition and letters from 2007 and 2008, as well as additional letters from 2018, a newspaper article from 2016 and an itemization of her expenditures. Nor is it clear what relevance the chart entitled "Summary - Traffic Volume and Crash Data" would have to these proceedings. Though perhaps those documents might be relevant were she to take her views before our elected City Council, in an effort to convince Council to amend the Zoning Ordinance, none are relevant to this Board's review of the statutory and other legal requirements which govern its consideration of a variance application. The Zoning Administrator has not gone door-to-door to elicit signatures or written opinions from city residents; nor has he commissioned a survey to determine whether a broader cross-section of those same residents believe Ms. Chilton-Belloni should be required to abide by the same legal requirements with which they must comply. Frankly, seeking such a petition would be an insult to this Board, as it would assume that the BZA will not apply the law to the facts in an objective and straightforward fashion. We object to inclusion of these irrelevant materials, and trust that the BZA will ignore them in discharging its duty.

Thank you for your time and attention to this matter.

Respectfully,

Victor M. Santos

cc: Mr. Hal Sharp, Board of Zoning Appeals (via email and mail)
Mr. Willard H. Keeling, Board of Zoning Appeals (via email and mail)
Ms. Judith Wiegand, Board of Zoning Appeals (via email and mail)
Mr. Bradley G. Bryant, Board of Zoning Appeals (via email and mail)
Mark D. Obenshain, Esq. (via email and mail)

The News Leader

Classified Ad Receipt
(For Info Only - NOT A BILL)

Customer: STAUNTON CITY OF

Address: 116 W BEVERLEY ST
STAUNTON VA 24401
USA

Ad No.: 0002939855
Pymt Method Invoice
Net Amt: $1,155.88

Run Times: 2

No. of Affidavits: 1

Run Dates: 05/24/18, 05/31/18

Text of Ad:

NOTICE OF MEETING AND PUBLIC HEARING
REGARDING REQUESTED ZONING VARIANCES

The City of Staunton Board of Zoning Appeals, established under Chapter 18.200 of the Staunton City Code, will meet and hold a public hearing on Tuesday, June 12, 2018 at 2:00 p.m., local time, in City Council Chambers on the first floor of City Hall, at 116 West Beverley Street, Staunton, Virginia, to consider the following:

A request by Ms. Debra Chilton-Belloni, owner, for after-the-fact zoning code variance(s) to allow violative wall(s) at the intersection of North Augusta Street and Ridgeview Road. The property is located at 1403 North Augusta Street, Staunton, Virginia, identified as City of Staunton Parcel ID #3060, and is zoned P-1 Professional District. The applicant seeks variance(s) to Staunton City Code, Title 18, Chapter 18.120 Yard, Building Setback, and Open Space Exceptions from the following generally applicable Staunton City Code zoning requirements:

Section 18.120.010(2): On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections;

Section 18.120.010(3)(b): In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent; and

Section 18.120.010(3)(d): Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

The Zoning Administrator opposes the variance request.

Members of the public may attend the meeting and hearing, and persons affected may appear and present their views.

Also, members of the Board of Zoning Appeals will meet and conduct a field trip to visit the site, 1403 North Augusta Street, on Tuesday, June 12, 2018 at 1:15 p.m., local time, prior to the meeting. Members of the public may be present for the field trip.

Copies of the variance application, Staunton City Code provisions and other materials may be examined at the Community Development Department, Division of Planning & Zoning, 116 West Beverley Street, third floor. Persons with hearing loss or speech impairment desiring to attend the meeting and hearing may contact the Clerk of Council directly by phone at 540-332-3810 or by email at SimmonsSF@ci.staunton.va.us to request an interpreter.

Provisions of the Staunton City Code may be accessed online at: http://www.codepublishing.com/VA/Staunton/.

Notice of the hearing is being given to the owners, their agents, and occupants of abutting property and property immediately across the street from the property affected.

Rodney S. Rhodes,
Senior Planner/ Zoning Administrator

0002939855-01

STAUNTON
VIRGINIA

COMMUNITY DEVELOPMENT
Planning & Zoning Division

MEMORANDUM

To: Board of Zoning Appeals Members

From: Rodney S. Rhodes, Senior Planner/Zoning Administrator

Date: June 7, 2018

RE: Agenda Packet for June 12, 2018 Board of Zoning Appeals Meeting

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The enclosed agenda packet for next week's meeting includes the following:

- Agenda for June 12, 2018 BZA Meeting
- Minutes of February 13, 2018 Meeting in Final Draft Form
- Notice of Meeting and Public Hearing
- Supplement to Agenda Briefing (Please reference the April 3, 2018 packet for Briefing, Application, Attachments, etc.)
- Letters with Attachments from Attorneys are Included as Part of the Official Record (BZA members should have already received copies of these letters.)

Reminder: The Board of Zoning Appeals will meet and conduct a field trip to visit the site, 1403 North Augusta Street, on Tuesday, **June 12, 2018 at 1:15 p.m.**, local time, prior to the meeting.

STAUNTON
VIRGINIA
COMMUNITY DEVELOPMENT
Planning & Zoning Division

MEMORANDUM

To: Board of Zoning Appeals Members

From: Rodney S. Rhodes, Senior Planner/Zoning Administrator

Date: June 6, 2018

RE: June 12, 2018 Board of Zoning Appeals Meeting

The City of Staunton Board of Zoning Appeals will meet on Tuesday, **June 12, 2018, at 2:00 p.m.** in City Council Chambers on the first floor of City Hall, 116 West Beverley Street.

If you **cannot** attend this meeting, please contact the Community Development Department, Division of Planning & Zoning at 332-3862 by no later than **noon on Monday, June 11, 2018**.

AGENDA

		Action Taken
1.	Call to Order	_____
2.	Moment of Silence	_____
3.	Approval of Minutes: Regular Meeting of February 13, 2018	_____
4.	New Business	

	a. A request by Ms. Debra Chilton-Belloni of 1403 N. Augusta St. Staunton, Virginia, for a variance to sections 18.120.010(2) and 18.120.010(3)(b) and 18.120.010(3)(d) Yard, Building Setback, and Open Space Exceptions, of the Code of the City of Staunton, to allow a wall over 3 and ½ feet in the front yard and over 2 and ½ feet at the intersection of N. Augusta St. and Ridgeview Rd.	_____
5.	Old Business	_____
6.	Other Business	_____
7.	Adjournment	_____

BOARD OF ZONING APPEALS
City of Staunton, Virginia
February 13, 2018
2:00 P.M.

BZA MEMBERS PRESENT:	Paul Vames, Chair
	Willard Keeling, Vice Chair
	Bradley Bryant
	Hal Sharp
	Judith Wiegand
[]CITY OFFICIALS PRESENT:	Rodney Rhodes, Zoning Administrator
	Timothy Hartless, City Planner
	Linda Nesselrodt, Zoning Technician
	Suzanne F. Simmons, Clerk of Council

Call to Order

Mr. Vames called the meeting to order at 2:00 p.m. and asked that a moment of silence be observed at that time.

Election of Officers

Mr. Keeling moved that Mr. Vames be elected Chair. The motion was seconded by Mr. Bryant. The nomination carried 4-0-1, with Mr. Vames abstaining.

Mr. Keeling moved that Mr. Bryant be elected as Vice Chair. The motion was seconded by Mr. Sharp. The nomination carried unanimously.

Establishing Meeting Dates and Times for 2018-2019

The second Tuesday of each month at 2:00 p.m. was the consensus of the Board for the established meeting date and time, as needed.

Approval of Minutes

Ms. Wiegand stated she would abstain as she was not a member of the board at that time.

Mr. Sharp moved for approval of the minutes of the March 14, 2017, meeting. The motion was seconded by Mr. Keeling and carried 4-0-1.

NEW BUSINESS:

Annual Report:
Board of Zoning Appeals
Staunton, VA
Annual Report
January 1, 2017 – December 31, 2017

Mr. Sharp made a motion to accept the annual report as presented. Ms. Wiegand stated she would abstain as she was not a board member. The motion was seconded and carried 4-0-1.

OLD BUSINESS:

There was no old business.

CLOSED MEETING: Discussion on Possible Appointment of Legal Counsel per Virginia Code 2.2-3711(A)(7) and 2.2-3711(A)(8) as noted in Mr. Shmidheiser's January 23, 2018 Letter

Mr. Vames questioned if the Board wished to go into closed session. He stated he had a prepared form the Board would need to follow for FOIA regulations. Mr. Vames then asked if the Board wished to have a short discussion and then asked Mr. Shmidheiser to present information to the board regarding legal representation.

Mr. Bill Shmidheiser stated he had briefly represented the board approximately 7-8 years ago on the appeal from this Board's decision regarding the Belloni case. He stated the City's insurance carrier then retained counsel, Mr. John Conrad, who handled the appeal from that time forward. Mr. Shmidheiser stated the initial decision by the Board was reversed by the circuit court because the board did not follow the proper procedure in making its decision. He stated the reason that the Belloni case is back before the court now is the law has changed which sets forth the standards that the BZA is supposed to apply and the Virginia Supreme Court rendered a decision in November, 2017 stating Mrs. Belloni could ask the BZA to reconsider the prior decisions made in the matter.

Mr. Shmidheiser stated he had represented Mr. Vames years ago, but currently did not have any legal connections. Mr. Shmidheiser stated he had received a call from Mr. Vames asking if he thought it would be appropriate for the Board to retain counsel on this rehearing. Mr. Shmidheiser stated there had been some exchanges of letters regarding why was Mr. Vames was communicating with him and felt he was exploring if the Board wanted and/or needed an attorney, or were they allowed to have an attorney that was their attorney. Mr. Shmidheiser stated he answered in the affirmative that they were under the statute which creates the Board of Zoning Appeals and is entitled to retain independent legal counsel of its own. He then cited an example of a fellow partner working with the Rockingham County BZA and the City of Harrisonburg. In that case, he stated the wrong

process was followed with litigation ensuing and appeals followed.

Mr. Shmidheiser stated he was aware that preliminarily the City of Staunton has indicated they did not wish to pay for the BZA to have legal counsel. He stated at this point the BZA has not decided if they would like to have legal counsel and would hope the City would hear with an open mind the request if and when it came through. Mr. Shmidheiser stated he believed Mr. Vames asked him to be present today at this point for the BZA to consider a) does it, not so much for Bill Shmidheiser to be seeking a job, but to consider does the BZA for this matter want to have legal counsel? He stated his understanding was they already have an advance of any hearing briefs from some of the finest lawyers in Staunton on both sides, in John Wirth and Victor Santos. He noted on the other side is going to be Senator Mark Obenshain.

Mr. Shmidheiser stated the role of an attorney is not to tell the BZA what to do. He stated the board members do not question the attorney about what they should do. Mr. Shmidheiser stated the only role of the attorney would be to make sure that the right process is followed in making the decision so that there's not another 8 to 10 years of litigation. He stated he was not there to sell his services. Mr. Shmidheiser stated he understood there was a concern that at one time he was partners with Mark Obenshain, but he was also at one-time partners with Doug Guynn, City Attorney. He noted Mr. Vames asked him to look at whether this would be something that would have the option of going into closed session.

Mr Shmidheiser he told Mr. Vames he thought the choice of employment of legal counsel or not is something that's appropriate if you want, but certainly didn't have to have. He noted some emails had been exchanged regarding why Mr. Vames was contacting him and Mr. Shmidheiser thought he was just trying to be a good BZA member and chairman while trying to figure out the best approach to resolve the matter coming before the BZA in April, 2018.

Mr. Vames stated they were in a position where the board members could ask Mr. Shmidheiser questions or go into closed session. Mr. Bryant questioned if the board chose to go into a closed session, who is left, just the five of them, and who is excluded? Mr. Vames stated it would only be the five board members and anyone that the board members wanted to invite. He noted if they wanted to have City people come in with them, that is also proper, but it's up to the Board to make the decision.

Mr. Sharp stated since the issue had been raised, should the board go ahead and go into closed session. He noted if the Chairman feels strongly that they should go into closed session.

Mr. Vames stated he wanted to take a neutral position in this matter as much as he can and wouldn't have called Mr. Shmidheiser if he felt like he was more comfortable with it. He noted the Board was trying to vote from their hearts as to what they felt was right, but it ended up being challenged. Mr. Vames referred to Mr. Shmidheiser saying if the BZA would have had all of the proper instructions prior to that, then the Board might have

made a different decision, but would not say that for sure and noted the law has changed since then.

Mr. Keeling stated when the Belloni case started, he was one of two people on the board with Mr. Vames at the time, and it has been an interesting process to observe over the past ten years and that they supposedly made the wrong decision. Mr. Keeling stated while listening to Mr. Shmidheiser, his feeling is that his role, if the board were to retain him, would not to be to tell the board what to do, but to help them make sure that they don't make that mistake again. Mr. Keeling stated for that reason, he would be inclined to say the BZA does not need a closed session,but would like to make a motion that the board considers retaining Mr. Shmidheiser for assistance to make the proper decision for no other reason.

Mr. Bryant stated he would like to table that motion in order to have a greater discussion regarding it. Mr. Keeling replied that was fine. Mr. Bryant stated he was not feeling comfortable that the board was ready to vote on whether to retain counsel or not. He stated that he felt the board needed some intake from the City.

Mr. Vames stated that in the way that Mr. Guynn's letter addressed the BZA most recently, is that the BZA would have to go back through and make an appeal to the City he thought. Mr. Vames stated he did not think the City would accept a third party making any payments to Mr. Shmidheiser.

Mr. Shmidheiser stated it was correct that the counsel cannot be paid anything more than the City authorizes. He noted this actually came up in the appeal because the BZA was a party to that appeal in the first place and when the BZA suggested they needed counsel for their appeal, the City stated they would not pay for counsel. Mr. Shmidheiser noted the judge, who was in charge of appointing counsel, stated he would ask them to do that and hoped they would take his request seriously. Mr. Shmidheiser stated he did not think counsel could be paid except as authorized by the City. He noted a lot of money has already been spent litigating the issue of whether the BZA may follow the right process before in this case. He stated it would seem to him of the possibility of saving a lot of money to make sure the BZA follows the right process this time under the changed statute.

Mr. Vames questioned the board if they felt comfortable continuing the discussion or did they need to go into closed session. Ms. Wiegand stated she did not think the BZA needed a closed session from her perspective. Mr. Shmidheiser stated he would bifurcate this and ask themselves if they wanted an attorney of their own.

Mr. Sharp noted if in the past City Council or someone else replaced Mr. Shmidheiser with another attorney which the insurance company wanted, would the same thing happen if the BZA were to engage counsel, would City Council be allowed to or able to authorize to set the attorney aside, and choose their own.

Mr. Shmidheiser stated that procedure was a little odd because under the procedure then

obtained, the appeal from the decision of the BZA was styled City of Staunton versus Staunton Board of Zoning Appeals and Mr. and Mrs. Belloni. He stated in this case, the BZA has not been sued by anyone. Mr. Shmidheiser then explained that procedure to the board members. He stated it was up to the BZA to decide if they wanted counsel and to choose its counsel, and then it was up to the City to decide if was willing to pay for that counsel.

Mr. Sharp questioned the board and staff if any attorney would only give the board legal opinion, would the board would be responsible for following the process, does the Virginia State Code give the board sufficient guidance to follow the process to make a decision.

Mr. Bryant questioned where the BZA gets their guidance for the procedure stating that is what came into question and that is where the appeal was won. Mr. Bryant then questioned if the board is only able to ask their counsel about how they are proceeding and if the process is correct.

Mr. Keeling stated he was sure with all of the legality and all of the information that is available to guide the BZA, the right decision can be made if the BZA is able to properly interpret the legal wording. He stated he was not a lawyer and didn't think anyone else on the board was a lawyer. Mr. Keeling stated in the past, he thought the reason the board made a mistake the first time was they were not legally trained and able to properly interpret the guidance given to them. He stated it was his understanding if the BZA retained a lawyer, then that lawyer would simply help the BZA understand the legal guidance which was already available to them.

Ms. Wiegand stated she was probably the most recent board member to take the course and she noted while reading the material she found it to be clear regarding the process for deciding variances and other items. She stated she was not convinced at that point if an attorney was needed to tell her what the process is. Ms. Wiegand stated she was not sure if an attorney was needed.

Mr. Vames stated the one thing he was concerned about is the new guideline. He asked Mr. Rhodes if he could read it out for the board members.

Mr. Vames noted before it bordered on confiscation, and the statement had been changed. He stated to him it was almost more confusing as it opened up a wider possibility to interpretation.

Mr. Keeling noted it said something about hardship.

Mr. Vames stated what hardship is to some may be different to him or for the petitioner. He noted it opened up a wide variety of interpretation and that concerned him. He stated is was definitely more flexible than the old one as the new interpretation did not border on confiscation, but did border on an interpretation.

Mr. Vames then stated the board could just take one step at a time and not necessarily do any action on taking an attorney and making an agreement or trying to find an attorney, and just see how the process went. He stated if the board gets to a situation where they have questions, then they could possibly approach the City.

Mr. Shmidheiser stated the BZA of each jurisdiction is not made up of lawyers, so the idea is each member brings their experience as citizens to the decisions of what is an undue hardship, etc. He remarked the BZA members are somewhat similar to being a jury. He then gave members an example of a case from Rockingham County. Mr. Shmidheiser stated he agreed with Ms. Wiegand on threshold issue and with the training and experience of the board members, is a lawyer needed or could it be decided on common sense principles.

Mr. Sharp stated it seemed to him that only if the BZA thought they would be in some type of legal jeopardy, would they need counsel. He added if the BZA goes beyond this level, to a higher level and to a higher court, and if the BZA would be subject to legal action, would the board need an attorney. Mr. Sharp stated all types of cases are always represented by two parties where everyone interprets codes or statutes differently. He stated to that extent if the BZA needs guidance at some point then that would be a good time to obtain legal counsel, but if the BZA would not be facing "legal jeopardy" then the board could probably follow the statutes as they are written for the state codes.

Mr. Vames stated Mr. Sharp made a good point as far as both sides presenting their cases. Mr. Vames stated it would suit him if the closed session be delayed to where it may be in the future to go in that direction the board would have that option to do so.

Ms. Wiegand stated she was inclined to agree with Mr. Sharp that it would be a very good idea for the BZA to consider this and see what comes before the board. She stated she did not necessarily think that was where it was heading. She felt the board would be given a set of facts and an application for the board to make a decision. She stated that those members who had taken the course have an idea of what the process should be. Ms. Wiegand stated after having a meeting and discussing it, then if the board needs an attorney, she felt it would be more obvious and it would be much easier for the board at that time to ask City Council to fund an attorney for the BZA. She stated she felt the process would be better to see how the board is doing and then if the board needs something to ask City Council to grant permission to obtain someone.

Mr. Bryant thanked Mr. Vames for bringing the matter before the board. He stated it was very pertinent for what is pending and that Mr. Vames had the forethought to get it going in their direction. Mr. Bryant then read "that a well-trained BZA should be able to able to complete its work decisively and with confidence because it knows the legal principles that apply to the matter pending before it. Understands which facts are relevant to those legal principles and is able to identify and discard the irrelevant information from the decision-making process". Mr. Bryant stated everything within their training which they have been going through is that they should not be heart-lead and that they are here as a board of five members to only decide whether what one member of the zoning

administration, is their interpretation of the rule which is in question. He stated between the five members, they were intelligent enough to stay out of the weeds and stay into the regulation which they are questioning. Mr. Bryant stated he felt very comfortable that if the board maintains a position that the board will stop the proceedings or table a motion or come back to it so they don't get over their heads with legal jargon. He stated he believed that the retention of counsel is not possibly necessary.

Mr. Vames asked if any of the members felt like making a motion. Mr. Bryant stated he had a motion earlier to table the voting for counsel and to stay in the discussion mode. Mr. Vames stated Mr. Bryant could remake the motion and state it again if he wanted to.

Mr. Bryant moved that the BZA table making a decision as to obtain legal counsel at this time. Ms. Wiegand seconded the motion.

Mr. Sharp asked if Mr. Vames was satisfied with the discussion. Mr. Vames replied that he was satisfied. Mr. Sharp stated he wanted to be sure everything had been covered to make this decision. Mr. Vames replied that he felt they had, but if the board gets to the point where things change and anyone feels uncomfortable, the situation could always be revisited.

Mr. Bryant stated the BZA was not bound because they are in session to make a decision this day. He questioned if that gave the BZA the perfect opportunity to obtain counsel at that time if they wished. Mr. Shmidheiser stated the only disadvantage of that would be presumably then whatever counsel the BZA would retain would not have heard the discussions and might not understand the context of your questions. Mr. Bryant questioned if at that point in time would the BZA not be able to present the minutes to their counsel if they had been approved for the BZA and would the BZA then be able to go into a closed session to discuss and bring their counsel up to date. Mr. Shmidheiser stated he believed the answer is yes and he could concede it might even be of an advantage because at that point whatever counsel is retained would be purely advising on process. Mr. Shmidheiser stated if the hearing goes forward on April 3, 2018 it would be fine and not at a disadvantage to wait until after the hearing and then request counsel.

Mr. Vames stated if the BZA got into that situation at that meeting and did not feel comfortable, the board could table the vote and then at that time retain counsel. Mr. Bryant stated felt that all parties involved would rather the BZA make the proper decision.

Mr. Vames questioned members all in favor of the motion as it stands now.

Mr. Bryant restated the motion of tabling a decision or a vote on invoking counsel at this time. Ms. Wiegand seconded the motion.

Paul Vames, Chair	aye
Willard Keeling, Vice Chair	aye
Bradley Bryant	aye

Hal Sharp	aye
Judith Wiegand	aye

The motion carried 5-0.

OTHER BUSINESS:

Mr. Rhodes stated although the board has established the second Tuesday of each month for this meeting, if any cases are pending, there is a case pending on April 3, 2018 at 2:00 p.m. as the second Tuesday of that month did not work for the City or for the applicant.

There was no other business.

There being no further business, the meeting adjourned at 2:46 p.m.

_____

Suzanne F. Simmons
Clerk of Council

DRAFT

N O T I C E OF MEETING AND PUBLIC HEARING
REGARDING REQUESTED ZONING VARIANCES

The City of Staunton Board of Zoning Appeals, established under Chapter 18.200 of the Staunton City Code, will meet and hold a public hearing on Tuesday, **June 12, 2018 at 2:00 p.m.**, local time, in City Council Chambers on the first floor of City Hall, at 116 West Beverley Street, Staunton, Virginia, to consider the following:

A request by Ms. Debra Chilton-Belloni, owner, for after-the-fact zoning code variance(s) to allow violative wall(s) at the intersection of North Augusta Street and Ridgeview Road. The property is located at 1403 North Augusta Street, Staunton, Virginia, identified as City of Staunton Parcel ID #3060, and is zoned P-1 Professional District. The applicant seeks variance(s) to Staunton City Code, Title 18, Chapter 18.120 Yard, Building Setback, and Open Space Exceptions from the following generally applicable Staunton City Code zoning requirements:

Section 18.120.010(2): On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 15 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections;

Section 18.120.010(3)(b): In any required front yard, except as provided in subsection (2), (3)(d), or (3)(e) of this section, no fence or wall shall be permitted above the height of three and one-half feet, except as to retaining walls on lots with a grade in excess of 15 percent; and

Section 18.120.010(3)(d): Only for the purposes of this section, on any lot having frontage on more than one street, the orientation of the front or main door of the principal structure, as determined by the address assigned by the city, shall establish a primary front yard and all other front yards shall be considered secondary front yards. In secondary front yard(s), no fence or wall shall be permitted above the height of three and one-half feet unless the fence or wall is set back at least half the required front setback for the lot.

The Zoning Administrator opposes the variance request.

Members of the public may attend the meeting and hearing, and persons affected may appear

and present their views.

Also, members of the Board of Zoning Appeals will meet and conduct a field trip to visit the site, 1403 North Augusta Street, on Tuesday, **June 12, 2018 at 1:15 p.m.**, local time, prior to the meeting. Members of the public may be present for the field trip.

Copies of the variance application, Staunton City Code provisions and other materials may be examined at the Community Development Department, Division of Planning & Zoning, 116 West Beverley Street, third floor. Persons with hearing loss or speech impairment desiring to attend the meeting and hearing may contact the Clerk of Council directly by phone at 540-332-3810 or by email at SimmonsSF@ci.staunton.va.us to request an interpreter.

Provisions of the Staunton City Code may be accessed online at: http://www.codepublishing.com/VA/Staunton/.

Notice of the hearing is being given to the owners, their agents, and occupants of abutting property and property immediately across the street from the property affected.

Rodney S. Rhodes,
Senior Planner/ Zoning Administrator

Please run this Ad on Thursday, **May 24, 2018** and Thursday, **May 31, 2018.**

CERTIFICATE OF ADVERTISEMENT REQUIRED. Please forward to City of Staunton, Community Development, Division of Planning & Zoning, P.O. Box 58, Staunton, VA 24402.

BOARD OF ZONING APPEALS

SUPPLEMENT TO AGENDA BRIEFING

Staunton, VA

Meeting Date:	**June 12, 2018**	**Zoning Administrator:** **Rodney Rhodes, Certified Zoning Admin.**
Item #		
Applicant	**Debra Chilton-Belloni: Variance Request**	
Location	**1403 North Augusta Street (PID #3060)**	
Code Section	**Various Virginia Code provisions; and Staunton City Code Sections 18.120.010(2), 18.120.010 (3)(b), 18.120.010(3)(d)**	

Introduction

This briefing supplements my original briefing which was prepared in anticipation of the scheduled April 3, 2018 board of zoning appeals (BZA) meeting to consider Ms. Belloni's latest application for variance from the City of Staunton zoning provisions under Title 18 of the Staunton City Code. Once more, she is seeking special treatment, asking the BZA to grant her a variance, now arguing that current law under the Virginia Code should not apply. Instead, apparently believing that she has a better chance of getting a variance under old law, she wants the BZA to apply old law. My position as the Zoning Administrator is that whether under the old law or the current law, Ms. Chilton-Belloni falls far short of establishing entitlement to special treatment in the form of a variance.

In the original Agenda Briefing supplied to the BZA in March before Ms. Chilton-Belloni informed everyone that she would attempt to use old law, I provided an analysis of the standard(s) which the 2015 amendments of the Virginia Code mandated for the BZA's consideration of a variance application. Given that Ms. Chilton-Belloni now lately asserts that the applicable statutory provisions are those which existed in 2014, however, I am supplementing to provide the BZA with my analysis and judgment as to consideration of the 2014 provisions, although it continues to be my view that my prior analysis obtained and required denial of a variance. Let me emphasize: this supplemental briefing is not intended to *replace* my original briefing, with attachments; but rather, it assumes for the purpose of argument, without waiving my prior position, that the old 2014 law applies and provides additional analysis and information within the framework of Ms. Chilton-Belloni's assertion that the law as it existed in 2014 is

applicable to this hearing. My view is that, while I preserve my prior position that current law applies, the BZA should make alternative decisions under the old and current law—and under either and both, Ms. Chilton-Belloni fails to be entitled to a variance as a matter of fact and of law.

Variance Standards Under 2014 Code

In 2014, under the provisions of Virginia Code Section 15.2-2201 a "variance" meant, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land or the size[1], area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It does not—and, also in the language of the statute, shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning. In addition to some review of the language of the Virginia Code, I offer the BZA my analysis of the Belloni situation so that the BZA may witness for itself that even under the old law, which actually is not that different from the current law, Ms. Chilton-Belloni cannot prevail and the BZA's grant of a variance would be fundamentally flawed.

Under the provisions of Virginia Code Sec. 15.2-2309 as it existed in 2014, boards of zoning appeals were permitted to authorize in specific cases such variance as defined in § 15.2-2201 from the terms of a locality's zoning provisions applicable to everyone else similarly situated as follows as delineated:

- as will not be contrary to the public interest,
- when, owing to special conditions a literal enforcement of the provisions will result in *unnecessary hardship*
- provided that the spirit of the ordinance shall be observed and substantial justice done,
- when a property owner can show that his property was acquired in good faith and
- where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto,
- the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant,
- provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

[1] It appears to me that the term "height" was added in 2015, but was not a part of the 2014 statute, which Ms. Chilton-Belloni contends is applicable.

0318

Further, it is abundantly clear and unequivocal in 2014 no such variance was authorized unless the Board found:

(1) That the strict application of the ordinance would produce undue hardship *relating to the property*;

(2) That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

(3) That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance; and

(4) That the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In my view as an experienced zoning administrator, it is at least very doubtful whether the above standards are significantly different than those which were applied by boards of zoning appeals prior to the 2009 amendments which removed the requirement that the applicant demonstrate a hardship "approaching confiscation" before a variance could be granted. To illustrate this point, for example, in *Martin v. City of Alexandria*, 286 Va. 61 (2013) the variance applicants argued that since they were now not required to prove a hardship "approaching confiscation" the BZA could "authorize variances in instances that previously were not authorized." The Supreme Court of Virginia held that the "argument ignores, however, the fact that the amendment did not alter the remainder of" the City Charter, which contained language "virtually identical" to that found at Va. Code §15.2-2309(2). Taking into consideration the considerable remaining requirements for a variance, none was justified, and the Court of Virginia held that the Alexandria board of zoning appeals acted erroneously—as did this BZA originally— in granting a variance, in that its doing so was contrary to law. While I acknowledge that the *Martin* case involved the City Charter, the same reasoning applies because, as the Supreme Court of Virginia, noted, the applicable language of the City Charter and the Virginia Code Section 15.2-2309(2) were "virtually identical".

Regardless, the same analysis which results in a denial of the variance application under the current law, which reflects amendments made in 2015, the old-law standard merits and requires that I recommend the same denial under the version of the statute which applied prior to the 2015 amendments. I urge the BZA to deny the variance under both the old law and the current law, and yet as I mentioned, I will illustrate the fatal flaws in Ms. Chilton-Belloni's position even under the old, pre-2015 law. What Ms. Chilton-Belloni hopes is that the BZA will try to find some language, even under a distorted reading of it, that will allow the BZA erroneously to act from feelings or from the "heart" to purport to grant her what she is not entitled to get as a special treatment that her other neighbors would not get. If the BZA acts erroneously to give her what she wants, it essentially will be deciding that all other properties in the neighborhood would be entitled to have a wall that violates the Staunton City Code.

Illustrative Analysis Under 2014 Statute

I offer the following illustrative analysis of some aspects to show that a variance cannot, within even the old 2014 law, be granted in this situation. In essence, Ms. Chilton-

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Belloni must show that all requirements are satisfied, as reflected in the table which is part of the attachments to this briefing, and she cannot do so.

As one example of a standard that cannot be met to gain a variance, Ms. Chilton-Belloni has not shown that enforcement of the zoning ordinance would "result in unnecessary hardship" as the 2014 statute required.

The subject property, for example, obviously has no unique physical condition (shape, size, slope, etc.) that restricts its use more so than other lots in the same zoning district or in the neighborhood vicinity. It has no "exceptional narrowness, shallowness, size or shape" or any "exceptional topographic conditions" as referenced in the 2014 statute. None of her arguments can change the reality that the lot is rectangular, nearly 1.3 acres, and relatively level with a front yard depth of approximately 100 feet when the P-1 District requires a minimum set back from the street right-of-way of only 25 feet.

Furthermore, in the language of the old 2014 Virginia statute, there is no "condition, situation, or development of property immediately adjacent thereto" that "effectively prohibits or unreasonably restricts the utilization of the property". The adjoining lots are zoned P-1 and most have been developed with residential dwellings. The adjoining property to the north, 1409 North Augusta Road, was at one time even utilized as a gift shop. The property to the south, across Ridgeview Road, is zoned R-2 Low Density Residential and is developed with a single-family dwelling. None of these adjacent uses "effectively prohibits or unreasonably restricts the utilization of the property".

In this situation, a variance is not needed to reach parity with other lots in the district and, actually, to grant a variance in this instance would be affording this property and its owner what really is truly preferential treatment compared to other properties. It would be a "special privilege or convenience" which the 2014 statute specifically prohibited.

In addition, strict application of the zoning regulations does not "effectively prohibit or unreasonably restrict" Ms. Chilton-Belloni's utilization of her property. To the contrary, the property has been utilized as residential for over 100 years—and apparently still is today, even being used beyond its original purpose to operate separately rented apartments to tenants. It's still residential today—and, maybe, in a sense, even more residential and lucrative. Without doubt, the property may continue to be used for this purpose without the granting of a variance. The wall as currently configured is an accessory structure which, by definition under Section 18.10.020 of the Staunton City Code, is incidental to the main building or house and, even without it, the reasonable utilization of the property remains and will remain as all along.

Further, it is notable that the 2014 statute prohibits issuance of a variance unless the BZA finds that "strict application of the ordinance would produce undue hardship *relating to the property*". Ms. Chilton-Belloni suggests no such hardship, and a limitation on the height of exterior walls at the property does not prevent its full and complete utilization in any logical sense. The only "hardship" which Ms. Chilton-Belloni appears to propose is that her compliance with the law would cause her *economic loss* because she would have to modify what she regards as an *improvement* which she made to the property. Yet, such economic losses, standing alone, have not been found by the Courts to constitute the sort of "hardship" which justify the grant of a variance. I refer you to the cases cited by Greg Kamptner, County Attorney for Albemarle County, in the analysis provided as Exhibit G with the original briefing materials. (Mr. Kamptner is the author of materials used to provide statewide training certification to members of locality

boards of zoning appeals.) That analysis includes, as Appendix B (pages B-1 through B-6) a detailed review of the state of the law prior to the 2015 amendments, and I respectfully encourage the BZA to review it thoroughly.

At its last meeting, although I did not know or expect it would be a subject of discussion by the BZA, especially given the absence of counsel for Ms. Chilton-Belloni and counsel for the Zoning Administrator, the BZA pursued the concept of "hardship." But, let me be sure that the BZA understands that the term "hardship" under the controlling law, whether it be in 2014 or 2015, *must relate to the property*. There is no such connection to a physical condition relating to the property. None.

Finally, Ms. Chilton-Belloni has not demonstrated that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance. If City Council wished to reduce, or even eliminate, the wall height requirement of the zoning ordinance, it can certainly do so by adopting an ordinance to effect such an amendment to the existing zoning provisions of the Staunton City Code. Its making that choice would certainly be "reasonably practicable" even if, in my view, not necessarily prudent. Regardless, the fact that the height requirements can be addressed legislatively by Council, thus resolving the special privilege Ms. Chilton-Belloni asks the BZA to grant, makes her variance application even less tenable, given the requirements of the 2014 statute.

The applicant fails to meet other applicable requirements as well, including in my view the reality that the wall, as currently configured, has changed the character of the neighborhood—and, by necessity of precedent by decision of the BZA, would do so even more because any other property owner in the vicinity would expect the same special privilege . In effect, Ms. Chilton-Belloni really is asking the BZA to be an unelected, super-City Council, to legislate changes to the City's zoning provisions.

In my earlier submission to the BZA I provided a table, drawn from the current provisions of the Virginia Code, to illustrate the test that must be met for entitlement to a variance. It illustrated the lack of merit of Ms. Chilton-Belloni's application. In like form, attached as Exhibit O is a similar table, referencing the statutes as they existed in 2014 under the old law that Ms. Belloni seeks to exploit.

Whether before or after adoption of the 2015 amendments to the Virginia Code, Ms. Chilton-Belloni fails to establish that her application meets the standard for a variance as defined in Va. Code Section 15.2-2201 and the criteria set out in Va. Code Section 15.2-2309. A variance issued for a lesser reason or simply because the BZA feels it is doing "justice" or following its "heart," a word used either explicitly or implicitly by one or more BZA members, at the BZA's February 13, 2018 meeting, would constitute a disregard of the law, plainly wrong decision-making, and a failure to follow and apply the law as written, whether under the old or current law.

Staff Recommendation

The Zoning Administrator continues to oppose and urge denial of the variance request.

Exhibits:

Exhibit O – Zoning Administrator Table Entitled "Board of Zoning Appeals – Variance Provisions of 2014 Statues"

EXHIBIT O

BOARD OF ZONING APPEALS – VARIANCE PROVISIONS OF 2014 STATUTES

Specific Requirements	Va. Code Section	
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, __ a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure __ when the strict application of the ordinance would: __ result in unnecessary or unreasonable hardship to the property owner, __ **and** such need for a variance would not be shared generally by other properties, __ **and** provided such variance is not contrary to the intended spirit and purpose of the zoning ordinance, __ **and** would result in substantial justice being done. "Variance" shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	
Boards of zoning appeals shall have the following powers and duties: __ 2. To authorize upon appeal or original application in specific cases such variance as defined in § 15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:	§ 15.2-2309(2)	

When a property owner can show that his property was acquired in good faith __ **and** where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, __ the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property __ **or** where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.	§ 15.2-2309(2)	
No such variance shall be authorized by the board unless it finds: __ a. That the strict application of the ordinance would produce undue hardship relating to the property; __ b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; **and** __ c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.	§ 15.2-2309(2)	

BOARD OF ZONING APPEALS – VARIANCE PROVISIONS OF 2014 STATUTES, CONTINUED

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.	§ 15.2-2309(2)	

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May 31, 2018

Via Email and Mail

Mr. Paul Vames
Staunton Board of Zoning Appeals
P.O. Box 2442
Staunton, VA 24402

Re: 1403 N. Augusta Street

Dear Mr. Vames:

After further consultation with Mr. Rhodes, the Zoning Administrator, we are responding to Mr. Obenshain's correspondence of May 17th. Although Mr. Obenshain directed the correspondence to counsel, it is clear that his intended audience was the Board of Zoning Appeals (BZA), to which he provided a copy. Accordingly, while we are providing Ms. Obenshain with a copy of this letter, this correspondence is directed to you as Chairman of the BZA.

Enclosed please find a copy of the notice of hearing which appeared in *The News Leader* on May 24, 2018 and which will again run on May 31, 2018. In accordance with Ms. Chilton-Belloni's objections, and in order to avoid any grounds she might claim for appeal, all references to the required statutory requirements have been removed from the Notice. That revision to the original Notice does not, however, reflect any change in the legal positions of the City or the Zoning Administrator; nor is it a waiver or relinquishment by the City or the Zoning Administrator with respect to the law which is to be applied with respect to this matter.

Additionally, and in effort to further accommodate Ms. Chilton-Belloni, Mr. Rhodes will supplement the Agenda Briefing of March 23, 2018, though the materials provided at that time remain applicable and relevant to this proceeding. In his recent correspondence Mr. Obenshain proposes the inclusion of several additional items, each of which I will address herein.

2009 Letter Opinion. We do not object to the BZA's consideration of Judge Irvine's January 14, 2009 letter opinion, which overturned the BZA's earlier grant of a variance. Therein the Court notes, on page 4, that the BZA "acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the law." The Court does, of course, cite *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004)

and notes that applying Virginia law, the evidence did not meet the standard set forth in *Cochran*.

At no point has the Virginia Supreme Court overturned *Cochran* or ruled that the analysis set forth therein became irrelevant after the two words "approaching confiscation" were excised from the statute in 2009. To the contrary, in fact, in *Martin v. City of Alexandria*, 286 Va. 61 (2013), the Court denied a variance despite the applicant's argument that removal of the words "approaching confiscation" in the Alexandria City Charter, which the Court held to contain language "virtually identical" to that found at Va. Code §15.2-2309(2), authorized the granting of variances which previously were unauthorized. The Court held that the applicant's argument ignored the fact that the rest of the Charter language remained unaltered. Accordingly, the Court held that the Alexandria Board of Zoning Appeals acted erroneously in granting the variance, in that its doing so was contrary to law.[1]

There is absolutely no basis to conclude, as Ms. Chilton-Belloni asserts, that Judge Irvine would have ruled differently in 2009 had two words been deleted from the statute before he rendered his decision. Nothing in his letter opinion makes this assertion, and at no point does the Court state that those two words formed the sole basis for its ruling.

2017 Supreme Court ruling. We also do not object to the BZA's review of the Supreme Court's ruling in the *Chilton-Belloni v. Angle* case. Therein the Zoning Administrator sought a mandatory injunction to compel Ms. Chilton-Belloni to comply with the law. Prior to trial Ms. Chilton-Belloni asked the Court to stay (place on hold) that case until her new variance application (the same one currently pending today) was heard by the BZA. The Circuit Court declined, applying principles of *res judicata*[2] and rejecting Ms. Chilton-Belloni's argument that

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[1]See also, "Analysis of the Hardship Issue by Virginia Courts Prior to HB 1849," prepared by Greg Kamptner, then Deputy County Attorney (now County Attorney), County of Albemarle, included as Exhibit G with the briefing materials provided to the BZA by Mr. Rhodes in March. On pages B-3 and B-4 of that article Mr. Kamptner discusses the *Martin* case. We would respectfully submit that this analysis is more comprehensive and reliable than that contained in the 2009 law review article, written by a law student four years prior to the decision in *Martin* and submitted by Mr. Obenshain with his May 17 letter.

[2]"Res judicata is a judicially created doctrine founded upon the 'considerations of public policy which favor certainty in the establishment of legal relations [and] demand an end to litigation.'" *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614, 617 (1989) (quoting *Bates v. Devers*, 214 Va. 667, 670 (1974)). It prohibits litigation "with the same person . . . of precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon the merits, by a court of competent jurisdiction." *United States v. Cal. Bridge & Constr. Co.*, 245 U.S. 337 (1917).

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an alleged change in circumstances (specifically, the 2009 amendments which deleted the words "approaching confiscation" from the statute) entitled her to again present a variance application to the BZA. The case then went to trial, and the Court ordered Ms. Chilton-Belloni to bring the wall into compliance with the Staunton City Code. Ms. Chilton-Belloni appealed, and the Supreme Court ruled that the Circuit Court should have granted the stay because, it held, Ms. Chilton-Belloni had a right to have her variance application considered before the injunction proceeding was heard. The Court did not address whether the application meets the standard required for a variance, either at the time it was originally submitted or today.

Mr. Obenshain asserts that in that litigation the City took the position that the 2014 statute applied, but he ignores the clear reason why the version of the statute which existed prior to the 2015 amendments was cited in the context of that case. As was noted in the City's appellate brief, the case then being appealed was tried in the Circuit Court on June 30, 2015, a date which was one day *before* the 2015 amendments to the Code went into effect. The City argued that the Circuit Court acted correctly in denying the stay, and that there had been no significant change in circumstances since it had denied the same variance in 2009. The Supreme Court ruling is based on an analysis of whether *res judicata* applies to prohibit a BZA's substantive reconsideration of variance applications after the statutory framework has been amended. The Court ruled that the application should have been considered and ruled upon, and that the Circuit Court should, therefore, have stayed the injunction proceeding.

The Virginia Supreme Court has often ruled in administrative contexts that the local administrative bodies involved should apply the legal framework as it exists at the time of a hearing, even in situations in which that framework changes between the date of the application and the hearing date. In each of those cases the Court held that it is the law that existed *at the time the locality acted (or failed to act)* that should be considered, instead of the law as it existed at the time the application was filed.

In *Ancient Art Tattoo Studio v. City of Virginia Beach*, 263 Va. 593 (2002), for instance, an application was filed seeking permits to operate a tattoo parlor. Following that application, but before the Zoning Administrator acted upon it, the City amended its zoning ordinance to prohibit the placement of tattoo parlors in the location sought by the applicant. The Court held that the applicant "was not entitled to a decision under the City's existing zoning ordinance before the enactment of the amendments." *Id.* at 599-600. The Court therein referenced its earlier decision in *Parker v. County of Madison*, 244 Va. 39 (1992), which dealt with a subdivision application, for the principle that "the obligation to act in accordance with the new law, not the former, is not affected by the mere filing of an application before the new law becomes effective." *Id.* at 600. See also *Chesterfield Civic Assoc. v. BZA*, 215 Va. 399 (1974) (the law as it applied on the date of the hearing before the BZA, not the law as it applied at the

time of the application, governed the proceedings).

In *Island Grill v. BZA*, 34 Va. Cir. 492 (City of Richmond, 1994), an application for a special use permit for a topless bar was denied when, after the application was filed, but before the hearing before the BZA, the City Council amended its zoning laws to prohibit such establishments in B-5 districts. The Court held that "since the proceeding at issue here – the issuance of, not the application for, the building permit – took place after the enactment of the zoning law amendment, the proceeding should have conformed to the amended law." *Id.* at 501.

It is also important to consider that, as in all of the above cases, the matter before the administrative panel or official (in this instance, the BZA) is not a *suit* pending before a trial court, but rather an *application* filed by a local resident. In the November 9, 2017 ruling which Ms. Chilton-Belloni asks be included in the record, the Supreme Court held that a BZA, in issuing variances, did not operate in a manner equivalent to a court of competent jurisdiction. The case which was before the Supreme Court was a *suit* brought in *Court* and not an administrative matter before a Zoning Board. In such latter, administrative contexts, the Board must apply the law as it exists at the time of the proceeding – that is, the *current law*. Ms. Chilton-Belloni's application should be treated no differently than any other variance application would, and the BZA should apply the *existing* legal standards, in determining if she is entitled to the relief she seeks.

That being said, the Zoning Administrator recognizes that though some members of the BZA have availed themselves of training designed to assist them in their service, the BZA's membership does not consist of lawyers or judges, and it is challenging to expect them to be able to determine which of two legal positions, presented by two competent attorneys, are accurate. Ultimately, there is every reason to believe that this matter will be determined in Circuit Court. If the BZA denies the variance, Ms. Chilton-Belloni is very likely to appeal; if the BZA grants the variance, the Zoning Administrator will certainly appeal.

As stated, the Zoning Administrator rightly maintains his position that the current statutory framework, which of course includes the 2015 amendments to Code § 15.2-2309, is applicable. We see no reason, however, for the BZA to be dragged into a legal dispute over whether it should apply the current law in evaluating this application, and if Ms. Chilton-Belloni wants the BZA to apply the 2014 statutes then the Zoning Administrator will address those at the hearing and in the aforementioned supplement.[3] Ms. Chilton-Belloni's argument has always been

[3]No statements contained herein should be construed as a waiver of the Zoning Administrator's right to continue to assert in this hearing and/or on appeal that the *current* statutory and legal framework applies to this proceeding. The Zoning Administrator maintains that position, but is interested in moving this matter forward in a fashion which is considerate of the time and limited legal training of the BZA.

based on her own subjective notion of "fairness" and her efforts to engender sympathy, rather than on the law which the BZA and the Courts must apply. Though we do not believe she is entitled to greater sympathy in this proceeding than that afforded any other City resident, we do not want the legal confusion which she is attempting to sow to take away from the BZA's focused application of the law to the facts.

The fact of the matter is that under either standard – the one which applied prior to the 2015 amendments or the one which applied afterwards – Ms. Chilton-Belloni's application fails. Mr. Rhodes will address this reality in his supplemental briefing, but under no circumstances would "strict application of the ordinance ... produce undue hardship relating to the property" as Va. Code §15.2-2309 required in 2014. Ms. Chilton-Belloni is unhappy because she is faced with the prospect of having to pay a contractor to lower the height of her wall in order to comply with the law, but her desire to avoid that expense does not justify a variance under the terms of the Code. Nor can the Board properly find, as the 2014 version of the statute required, "that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." There is nothing particularly unique or unusual about this property which justifies setting aside the provisions of the Zoning Ordinance, and if the elected members of City Council wish, they can resolve the matter by reducing the height requirement of the Ordinance at any time. They have not chosen to do so, and the BZA should resist the invitation to exercise a legislative prerogative it was not elected to exert. "A board of zoning appeals, when considering an application for a variance, acts only in an administrative capacity and under constitutional principles is empowered to act only in accordance with the standards prescribed by the legislative branch of government." *Amherst County Bd. of Supervisors v. Amherst County Bd. of Zoning Appeals*, 70 Va. Cir. 91 (Amherst Co., 2005).

Other items. Ms. Chilton-Belloni's efforts to turn this proceeding into a legislative one, and distract from the strict burden she must meet under the *law*, is illustrated by the fact that she asks the BZA to consider a petition and letters from 2007 and 2008, as well as additional letters from 2018, a newspaper article from 2016 and an itemization of her expenditures. Nor is it clear what relevance the chart entitled "Summary - Traffic Volume and Crash Data" would have to these proceedings. Though perhaps those documents might be relevant were she to take her views before our elected City Council, in an effort to convince Council to amend the Zoning Ordinance, none are relevant to this Board's review of the statutory and other legal requirements which govern its consideration of a variance application. The Zoning Administrator has not gone door-to-door to elicit signatures or written opinions from city residents; nor has he commissioned a survey to determine whether a broader cross-section of those same residents believe Ms. Chilton-Belloni should be required to abide by the same legal requirements with which they must comply. Frankly, seeking such a petition would be an insult to this Board, as it would assume that the BZA will not apply the law to the facts in an objective and straightforward fashion. We object to inclusion of these irrelevant materials, and trust that the BZA will ignore them in discharging its duty.

Thank you for your time and attention to this matter.

Respectfully,

Victor M. Santos

cc: Mr. Hal Sharp, Board of Zoning Appeals (via email and mail)
Mr. Willard H. Keeling, Board of Zoning Appeals (via email and mail)
Ms. Judith Wiegand, Board of Zoning Appeals (via email and mail)
Mr. Bradley G. Bryant, Board of Zoning Appeals (via email and mail)
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May 30, 2018

Via US Mail and Email

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Re: Chilton-Belloni Variance Application

Dear John and Victor,

I tried to call you this morning and had hoped to speak with you about a number of issues in connection with the upcoming hearing. I understand that the City has posted a new advertisement in the newspaper for the upcoming public hearing. I would be grateful if you would send me a copy of that notice.

I would also be grateful if you would send me a copy of the notification sent to neighboring property owners. Of course, if there are any new or different briefing materials circulated to the board members, I would be grateful if you would provide me with those as well.

I have written letters on March 27and May 17 concerning the legal standard the City is asking the BZA to apply to Mrs. Chilton-Belloni's variance application and concerning certain briefing materials that were either omitted or which we have asked to have included in an updated set of briefing materials. After the first letter, you asked for a continuance so you could evaluate our position.

I have not received a response to either letter. It would be helpful, I think to both of us, if we knew the universe of issues in dispute. If the City agrees that the Board should apply the statutory standard for granting variances that was in existence on the date of Mrs. Chilton-Belloni's variance application, it would shorten any hearing and simplify the issues we are asking the BZA to decide.

Thank you for your assistance and attention to these matters.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/eis

cc: Mr. Paul Vames, Board of Zoning Appeals
Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Mr. Rodney Rhodes
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May 17, 2018

Via Email and US Mail

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Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Santos,

On Wednesday, March 28, I received a letter from Rodney Rhodes, the Senior Planner/Zoning Administrator for the City of Staunton along with the "agenda briefing materials" that Mr. Rhodes provided to members of the Board of Zoning Appeals before the then scheduled April appeal/variance hearing. I had understood from Mr. Wirth that you had requested a continuance of the April hearing in order for you and the City to consider the points I raised in my March 27, 2018 letter. Having heard nothing further as to the City's position on these issues, I wish to note my objections to the package of "agenda briefing materials" in multiple respects set forth below. Since the new date is approaching, it would be my hope that the City would update and correct these materials before the hearing.

- The "Agenda Briefing" contained at the front of the notebook along with Exhibits B, C, G and H all consistently refer the Board to erroneous statutory material and secondary sources. As was addressed in my letter of March 27, the City is now suggesting that the Board should apply the 2015 version of the statutes relating to variances. Ms. Chilton-Belloni filed her appeal/variance application more than a year before the 2015 amendments became effective. When the case was argued in the Supreme Court of Virginia (in writing and orally) in 2017, both the City and Ms. Chilton-Belloni were consistent in their references to and reliance upon the 2014 version of Virginia law as controlling. The 2015 amendments made wholesale changes to the law. Were the 2015 provisions to be applied, the standards contained therein would render it much more difficult for any property owner to secure approval of a variance. As more fully addressed on March 27, the retroactive application of the statutory changes is impermissible and would violate Ms. Chilton-Belloni's vested rights.

- In the event that you do not agree that the 2014 version of the variance statutes governs this application, please include both this letter and my letter

dated March 27, 2018, and the attachments thereto with the Briefing Materials distributed to the Board members.

- Exhibit I of the City's briefing materials is a copy of the Final Order of the Circuit Court Judge in reversing the grant of a variance by the Board of Zoning Appeals in connection with this property in 2008. The Order, by itself, provides little help or insight into the reasons for the reversal of the variance. The Order expressly incorporates the Court's January 14, 2009 letter, however, that letter is not included in the package provided to the Board by the Zoning Administrator. I have attached a copy of that Opinion letter and request its inclusion with the book of briefing materials distributed to the BZA members.

  The Opinion on page four makes it clear that the basis for the Court's ruling was that the law in 2008 required as a condition for granting a variance that the Board of Zoning Appeals must conclude that a zoning ordinance if enforced would interfere with "all reasonably beneficial uses of the property taken as a whole." The letter Opinion by Judge Irvine references the 2004 decision by the Virginia Supreme Court in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). There, the Supreme Court examined the then existing language of the statute authorizing the grant of a variance and pointed to the language defining "unnecessary hardship" and held that it applied "only in cases where application of zoning restrictions would appear to be constitutionally impermissible." That statutory language defining "unnecessary hardship" was the language that limited such hardships to those that are "approaching confiscation." Va. Code § 15.1-495(b)(1980). In 2009, the General Assembly removed that limitation from the code by deleting the words "approaching confiscation" from the variance statute. Following 2009 (until the 2015 amendment), variances could be granted in cases of hardship that did not rise to the level of those "approaching confiscation."

  Accordingly, it is clear that the Circuit Court would have reached a very different conclusion in 2009 if the Board of Zoning Appeals had authority to grant a variance in cases where the hardship was significant, but which did not rise to the level of depriving an owner of property of "all reasonable beneficial uses of the property." For the Board's information, I am enclosing a copy of a 2009 article published in the University of Richmond Public Interest Law Review addressing the effect of the 2009 amendment to Virginia Code § 15.2-2309. The author concludes as follows:

  > The new legislative changes to section 15.2-2309(2) suggest that BZAs should no longer inquire whether a zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole." Instead, BZAs should apply a less restrictive threshold question, adopting a standard which reflects the General Assembly's

decision to remove "approaching confiscation" from section 15.2-2309(2) and scrutinize variance petitions less. Virginia courts should also recognize the departure from a high hurdle of hardship and find more factors and circumstances deserving of an area variance. The hardship required to satisfy variance petitions no longer requires the deprivation of all reasonable use. A demonstration short of the *Cochran* test should now satisfy law.

It is certainly our contention that Ms. Chilton-Belloni's variance application, when judged under the standard in place at the time of her appeal/variance application clearly meets the hardship standard in law at the time and that it justifies the grant of a variance.

- Exhibit K is a copy of my December 13, 2017 letter to the Board reciting the history of this case and requesting a hearing on Ms. Chilton-Belloni's variance application. Attached to that letter should be a copy of the Supreme Court decision. Please provide a copy of that opinion with the revised briefing materials.

  It is clear from the Opinion issued by the Supreme Court of Virginia and from the briefs of both parties that everyone understood that the law as it existed in 2014 would be applied to Ms. Chilton-Belloni's variance request. Neither the City nor Ms. Chilton-Belloni have ever argued that the 2015 amendments would apply. On page 30 of the City's brief to the Supreme Court, it argued that the law as it existed at the time of the filing of its lawsuit – 2014 – should be applied. The Supreme Court made reference to the 2009 change in the statute that deleted "approaching confiscation" requirement. This was the focus of both the City and Ms. Chilton-Belloni throughout. Indeed, the Supreme Court noted that when the 2009 change was raised by Ms. Chilton-Belloni, the City argued then that the amendments "suggested no retroactive intent." *Chilton-Belloni*, 294 Va. at 333. It would be entirely inconsistent for the City to now contend that the 2015 amendments do suggest "a retroactive intent." The first time the City has ever suggested the application of the 2015 language was after the Supreme Court sent the case back for the Board of Zoning Appeals to consider the variance requests. The City should not and indeed cannot again unilaterally change the rules that apply to Ms. Chilton-Belloni.

I am also attaching the following additional documents for inclusion in the revised briefing materials to be provided to the members of the Board of Zoning Appeals:

- Petition and letters signed in 2007 and 2008 and submitted in support of a variance
- Traffic count and crash analysis compiled from VDOT and DMV data
- Letters in support of variance application (2018)

- Staunton News Leader Article "A couple, a city and the wall that divided them" (Nov. 4, 2016)
- Wall construction expenditures (2007)

The items listed above and identified as being attached are being transmitted by email only. Should you or any recipient desire a paper copy of any or all of these listed materials, please let me know and I will send it right away.

It remains my hope that the City will reconsider and abandon its opposition to Ms. Chilton-Belloni's variance request.

Respectfully yours,

Mark D. Obenshain

MDO/eis
Attachments

cc: Mr. Paul Vames, Board of Zoning Appeals
Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Mr. Rodney Rhodes
Ms. Debra Chilton-Belloni

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March 27, 2018

Via Email and US Mail

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401
ppv@verizon.net

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I write this letter in anticipation of the upcoming April 3 hearing on the variance request submitted by Debra Chilton-Belloni on June 5, 2014, with respect to 1403 North Augusta Street.

I have carefully reviewed the guidance submitted to the Board by Mr. Santos and by the City's new Senior Planner and Zoning Administrator, Rodney Rhodes. I write in order to point out that the materials they provided and the guidance offered by each is just plain wrong. That same erroneous guidance also is reflected in the published public hearing notice.

Mr. Santos and Mr. Rhodes both cite statutory language that was added by amendment and which did not become effective until more than a year after Ms. Chilton-Belloni's variance request was filed. Ms. Chilton-Belloni's right to request a variance is a substantive right, which vested at the time at the time the request was made in June of 2014. The statutory amendments cited by Mr. Rhodes and Mr. Santos were not passed by the General Assembly until its 2015 Session, and they did not become effective until July 1, 2015. Had the variance request been taken up in 2014, as the Supreme Court of Virginia held should have occurred, the variance would have been decided under the then existing law and long before the 2015 amendments.

The 2015 amendments cannot be retroactively applied to Ms. Chilton-Belloni's 2014 request. I have taken the worksheet that both Mr. Rhodes and Mr. Santos have provided you and have added in the right column notes concerning when the referenced provisions were added. As you will see, virtually every single one of the requirements cited by the City in these letters and in the public hearing notice are requirements that were added in the 2015 amendments.

This application for a variance must be decided in accordance with the law as it existed in 2014. I have enclosed a copy of Virginia Code § 15.2-2309 as it existed in 2014. Virginia law empowered the Board of Zoning Appeals to authorize a variance provided that:

1. The variance will not be contrary to the public interest, and
2. Literal enforcement of the provisions will result in unnecessary hardship; and
3. The property owner can show that his property was acquired in good faith; and
4. The Board is satisfied, upon the evidence heard by it, that the granting of a variance will alleviate a clearly demonstrable hardship
    a. as distinguished from a special privilege or convenience sought by the applicant; and
    b. the variance shall be in harmony with the intended spirit and purpose of the ordinance.
5. The hardship is not shared generally by other properties in the same zoning district and the same vicinity; and
6. The authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

See Virginia Code § 15.2-2309(2014).

In Mr. Santos' letter, he refers to the 2008 variance hearing. In that hearing, the BZA members were clearly moved by the hardship the City sought to impose by strict enforcement of the zoning ordinance. The particular hardship arose from the Bellonis' reliance upon the advice provided by City officials. Mr. Santos correctly cites Virginia law in pointing out that the Bellonis could not claim that the erroneous advice provided by the building official could bind the City. The Bellonis never argued that the City was bound, only that they built the wall in reliance upon the erroneous advice, and that it was a sufficient demonstration of hardship to permit a variance. The Board of Zoning Appeals members agreed in 2008 and granted the variance. The City's attorney argued that while the Bellonis had endured a hardship, perhaps even an undue hardship, it was not one that "approached confiscation." The Board simply thought in 2008 that it was unfair of the City to strictly enforce the zoning ordinance and it granted the variance. Mr. Santos is correct in his assertion that in 2009 the Circuit Court overturned the BZA's decision. However, a significant change in circumstance occurred shortly thereafter.

The change of circumstance that in 2014 led Ms. Chilton-Belloni to request a new variance is that in 2009 the General Assembly of Virginia removed the requirement that an undue hardship be one that "approached confiscation." Therefore, the hardship no longer has to be one that deprives the owner of all use of the property. It is clear that had there been no "approaching confiscation" language in the statute in 2008, Ms. Chilton-Belloni's variance would have been perfectly proper and the Board would have been within its rights to uphold her request and it would have been upheld on appeal. The Supreme Court of Virginia in its 2017 ruling clearly expressed that the amendment of the statute in 2009 was a change of circumstance that entitled Ms. Chilton-Belloni to make the variance request that she filed in 2014.

It had certainly been Ms. Chilton-Belloni's hope that after 10 years, after the death of her husband, after a failed criminal prosecution, and after a trip to the Supreme Court, the City would at long last drop its opposition to her variance request, bring an end to this ordeal, stop spending taxpayers' money and move on to address other issues that will make a meaningful difference in the citizens of the City of Staunton.

Thank you for your consideration of Ms. Chilton-Belloni's variance request. I look forward to seeing you on April 3.

Respectfully yours,

Mark D. Obenshain

MDO/cis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Ms. Debra Chilton-Belloni

BOARD OF ZONING APPEALS - VARIANCE REQUIREMENTS		
Specific Requirments	**Va. Code Section**	
The burden of proof is on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria set out in § 15.2-2309, and specifically § 15.2-2309(2).	§ 15.2-2309	Added by amendement in 2015
The zoning administrator shall transmit a copy of the application for variances to the local planning commission which may send a recommendation to the BZA or appear as a party at the BZA hearing.	§ 15.2-2310	
"Variance" means, in the application of a zoning ordinance, -- a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure. -- when the strict application of the ordinance would; -- unreasonably restrict the utilization of the property, -- **and** such need for a variance would not be shared generally by other properties, -- **and** provided such variance is not contrary to the purpose of the zoning ordinance "Variance" shall not include a changed in use, which change shall be accomplished by a rezoning or by a conditional zoning.	§ 15.2-2201	changed in 2018 from unnecessary or unreasonable hardship "and spirit" deleted in 2015
Notwithstanding any other provision of law, general or special, a variance shall be granted -- if the evidence shows that the strict application of the terms of the ordinance would unreasonably restirct the utilization of the property -- or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, **and**	§ 15.2-2309(2)	Added 2015 Added 2015

-- (i) **and** the property interest for which the variance is being requested was acquired in good faith -- **and** any hardship was not created by the applicant for the variance;	§ 15.2-2309(2)	Added 2015
-- (ii) **and** the granting of the variance will not be of substantial detriment to the adjacent property and nearby properties in the proximity of that geographical area;	§ 15.2-2309(2)	Added 2015
-- (iii) **and** the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendement to the ordinance;	§ 15.2-2309(2)	Added 2015
-- (iv) **and** the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property;	§ 15.2-2309(2)	Added 2015

2014 Va. Code Ann. § 15.2-2309

2014 Virginia Code Archive

CODE OF VIRGINIA > TITLE 15.2. COUNTIES, CITIES AND TOWNS > SUBTITLE II. POWERS OF LOCAL GOVERNMENT > CHAPTER 22. PLANNING, SUBDIVISION OF LAND AND ZONING > ARTICLE 7. ZONING

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision.

2. To authorize upon appeal or original application in specific cases such variance as defined in § 15.2-2201 from the terms of the ordinance as will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done, as follows:

   When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;

b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

No variance shall be authorized except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of

abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.

In authorizing a variance the board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the

property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

History

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555; 1997, c. 587; 2000, c. 1050; 2002, c. 546; 2003, c. 403; 2006, c. 264; 2008, c. 318; 2009, c. 206.

CODE OF VIRGINIA
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Commonwealth of Virginia

JUDGES
TWENTY-FIFTH JUDICIAL CIRCUIT

HUMES J. FRANKLIN, JR., CHIEF JUDGE
MALFOURD W. TRUMBO
MICHAEL S. IRVINE
VICTOR V. LUDWIG

ROCKBRIDGE COUNTY CIRCUIT COURT
JUDGE'S OFFICE
2 SOUTH MAIN STREET
LEXINGTON, VIRGINIA 24450
(540) 463-4758

CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF STAUNTON
CITY OF WAYNESBORO

January 14, 2009

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Christopher P. Lowery
Brandy Pierce Lowery
100 Wetherwood Street
Staunton, Virginia 24401

Frank Belloni
161 Seclusion Manor
Mineral, Virginia 23117

Re: John W. Glover, et al v. Board of Zoning Appeals of the City of Staunton, Virginia et al

Dear Ladies and Gentlemen,

These matters arise as the result of Petitions for Certiorari (Petitions) filed by the City of Staunton and its zoning administrator (Glover) challenging the Staunton Board of Zoning Appeals' (BZA) decisions to grant the property owners certain variances. It is important to note that although the BZA may have taken other action at its meetings involving the same property and certain decisions or interpretations of the zoning

administrator, the record shows that if in fact those decisions were final they were not appealed and are not before this Court. A hearing was held on December 4, 2008 at which time all parties were given the opportunity to present testimony or other evidence which they deemed necessary for proper disposition of the cases. Thereafter, the parties were given the opportunity to present additional written legal argument. The Court has received and considered the additional written argument submitted by Counsel for the BZA, Counsel for the City and Dr. Belloni, *pro se.*

Issue of Standing

The first question to be decided is that of "standing" which was raised by the BZA. This issue was fully argued and briefed and therefore the Court will not repeat here the positions of the parties. Suffice it to say that the BZA believes that the decisions of the Supreme Court of Virginia in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, et al.*, 268 Va. 441 (2004) and *Miller, et al. v Highland County, et al.*, 274 Va. 355 (2007), when read together, stand for the proposition that the Petitions were required to be brought in the name of the Staunton City Council, not the City of Staunton, and therefore the Petitions must be dismissed. After a careful reading those cases, the Court does not agree that those cases impose such a requirement in the cases now before the Court.

In *Miller* the Supreme Court of Virginia said that when contesting the decision of a "*governing body*" pursuant to §15.2-2285(F) of the Code of Virginia the "*governing body*" is a required (necessary) party and must be indicated as such within the time specified in the statute. It makes sense that one should not be allowed to challenge the decision of a "*local governing body*" without making that "*body*" a party to the challenge. However, that is not the situation now before this Court. This case is not a challenge of a decision pursuant to §15.2-2285(F). It is a petition filed pursuant to §15.2-2314 and the "*local governing body*" that made the decision (in this case the BZA) has been made a party. Accordingly, the only question as to "standing" is whether the City of Staunton is an aggrieved "*person*" who is permitted to file the Petitions.

As noted above, §15.2-2314 states, "*Any person or persons... or any officer, department, board, or bureau of the locality, may file...*" In the case of *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, supra,* relied upon by the BZA in this case, the Supreme Court held that the Board of Supervisors had standing to challenge the decision of the Fairfax BZA. However, it did not rule that the Board was the only entity that had standing to challenge. In fact, the decision cites many examples from other states where cities (notably not city councils) were recognized as having standing to challenge the decision of a BZA. The question then is whether under Virginia law the City is a "*person*" that has standing to challenge the decision of the BZA. §1-230 (formerly §1-13.19) of the Code of Virginia specifically says, " '*person' includes any individual, corporation... government, political subdivision, or any other legal or commercial entity...* " Certainly, the legislature was aware of that definition when it included the word "person" in §15.2-2314. There is no argument that

the City of Staunton is not a municipal corporation. Furthermore, §15.2-1404 states that a locality may sue and be sued in its own name. Filing a Petition for Certiorari is certainly a type of "legal suit".[1]

Finally, the BZA argues that §15.2-1401 supports its contention that City Council is the necessary moving party. That section states, "*unless otherwise clearly indicated by the context in which the provisions relating thereto are set forth, all powers granted to localities shall be vested in their respective governing bodies.*" This argument may have been compelling if filing of the Petitions had not been specifically authorized by the City Council. However, the evidence presented by the City (Exhibit #31 attached to Mr. Guynn's letter of December 5, 2008) in this case clearly proves that City Council exercised its power when its members voted in open sessions of Council to not only authorize but also direct the filing of the Petitions. Those Motions "*authorize and direct the filing of petitions and any other papers and take such other actions as legal counsel deems appropriate or necessary to obtain judicial review including by, but not limited to, means of certiorari of decision(s) by the Staunton Board of Zoning Appeals rendered on ..., and that the City Attorney, City Manager and the Zoning Administrator and the City Manager's staff are authorized and directed to proceed in accordance with this authorization and direction on behalf of the City.*"[2] Thus, the power that was granted to the City (locality) was exercised by City Council in whom the power was vested as required by §15.2-1401.

In addition, the Court finds that Glover, the zoning administrator, is an "officer" as stated in §15.2-2314. Moreover, the action of City Council in passing the foregoing Motion in open session properly clothed Glover with the authority to file the Petitions with this Court. The Motions passed by City Council therefore satisfy the requirement set forth in *Wolf, et al v. Board of Zoning Appeals of Fairfax County, et al*, 260 Va. 7 (2000) that the zoning administrator actually has authority to act on behalf of the governing body. It is clear that Glover was acting pursuant to and at the direction of the Staunton City Council as mandated by the duly adopted Motions of City Council. As noted by Counsel for the BZA, all three Petitions list "John W. Glover, in his separate capacity as Zoning Administrator of the City of Staunton, Virginia" as a separate petitioner. Therefore, even if this Court's reasoning is wrong and the City of Staunton is not a proper petitioner, the Court finds that Glover is a permitted petitioner under the statute and, when filing the Petition in his "separate capacity as Zoning Administrator of the City of Staunton, he was acting with due authority on behalf of the Staunton City Council and as directed by the Council. Accordingly, the BZA's request that the Petitions be dismissed for lack of standing is denied.

[1] Although this section was rejected by the Supreme Court in *Miller, supra*, as authority for naming Highland County as defendant instead of the Board of Supervisors, the Court stated that the reason §15.2-1404 was not controlling was because of the nature of the challenge and the specific language of the statute authorizing the challenge, i.e. questioning the decision of the "governing body" itself.

[2] Two separate Motions were adopted by City Council on different dates. However, the Motions are identical except for referring to the granting separate variances on different dates.

Substantive Issues

As noted earlier, although many arguments have been made regarding the applicability of the zoning restrictions to the properties involved, and the nature and extent of administrative decisions and interpretations that may have been made by the zoning administrator, there are no appeals or Petitions for Certiorari now before the Court regarding any such decisions or interpretations. Certainly any persons aggrieved by such decisions, if in fact there were final decisions, could have filed Petitions for Certiorari. Furthermore, there is no Motion for Declaratory Judgment or any other type of Complaint properly before the Court addressing such matters. The only matters before the Court concern whether or not the variances granted by the BZA were done so in accordance with existing law. A review of the record shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). Although the property owners argued then, and now, that the effect of the zoning ordinance if applied to their property interferes with "*all reasonable beneficial uses of the property, taken as a whole*," the Court finds that the BZA did not reach such a conclusion based upon the evidence before it, nor is there evidence in the record of the BZA to support such a conclusion. Furthermore, the additional evidence that has been submitted to this Court does not support such a conclusion. In fact, the BZA acknowledges that it applied erroneous principles of law in granting the variances but did so because of its disagreement with the law. The BZA and the property owners now urge the Court to review the zoning restrictions and make a determination as to whether the restrictions are even applicable to the properties involved. However, the Court is restrained from doing so because those matters are not properly before the Court at this time.

The statute provides that upon review of the matter, "*the court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.*" §15.2-2314 The only "decision" brought up for review was the BZA's decision to grant the variances. Either the variances were granted in accordance with correct principles of law or not. It has been conceded that they were not. If the variances had been correctly granted perhaps the Court could modify the decision to grant the variances by adding additional conditions or stipulations. However, if the variances were improperly granted what is there to modify? Again the evidence does not contain facts that would support granting the variances under *Cochran;* and although the BZA's decision is presumed to be correct, there is an acknowledgment by the BZA and the other respondents (the property owners) that the decision to grant the variances was incorrect. Applying the correct legal principles, there is no evidence that would have permitted the BZA then, or the Court now to grant variances in these cases. That being the case there is nothing further that the Court can do at this time except to reverse the BZA's decision to grant the variances.

In essence the BZA and the Respondents are requesting the Court to provide a binding opinion as to whether the zoning restrictions are even applicable to the properties involved in this litigation. There may be ways for such questions to be resolved by the courts but that question is not properly before this Court at this time.

One of the property owners, Frank Belloni, argues that he has been denied due process because the BZA never voted on his appeal of the administrative decision of the zoning administrator. Again, there may be ways to litigate that issue but the appeal of the zoning administrator's decision (or his interpretation) is not before the court at this time.

It is requested that Mr. Guynn prepare an Order in conformity with this opinion and after giving the Respondents an opportunity to endorse same with whatever objections they deem appropriate, the Order should be presented to the Court for entry.

Sincerely,

Michael S. Irvine

cc: Tom Roberts, Clerk
Staunton Circuit Court

Richmond Public Interest Law Review

Volume 12 | Issue 4 Article 11

1-1-2009

House Bill 2326 and Its Effect on Cochran v. Board of Zoning Appeal's Chill: How Variances in Virginia May Thaw after Code Revision

Michael Keoni Medici

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Recommended Citation

Michael K. Medici, *House Bill 2326 and Its Effect on Cochran v. Board of Zoning Appeal's Chill: How Variances in Virginia May Thaw after Code Revision*, 12 RICH. J.L. & PUB. INT. 369 (2008).
Available at: http://scholarship.richmond.edu/pilr/vol12/iss4/11

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HOUSE BILL 2326 AND ITS EFFECT ON *COCHRAN V. BOARD OF ZONING APPEALS*'S CHILL: HOW VARIANCES IN VIRGINIA MAY THAW AFTER CODE REVISION

Michael Keoni Medici·

I. INTRODUCTION

"It was the best of times, it was the worst of times . . . ."[1] Depending upon which side one fell—whether petitioning landowner, Board of Zoning Appeals board member, or Board of Supervisors/City Council—these words rang true. The legal application of variances in Virginia law and other jurisdictions have traveled down a winding road.[2] A variance is a tool that a delegated body may use to permit a deviation from the local ordinance.[3] In Virginia, variances may only be granted for dimensional or area deviations.[4] Commonly referred to as an "escape

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1. CHARLES DICKENS, A TALE OF TWO CITIES 1 (Andrew Sander ed., Oxford University Press 1988) (1853).

2. *Cf.* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004) (stating that variances may only be granted in narrow circumstances to avoid an unconstitutional result); J. Elliott Drinard, *Municipal Corporations*, 46 VA. L. REV. 1638, 1640–42 (1960) (discussing changes in the law respecting variances in zoning regulations); David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295–99 (2004) (discussing how variances have been used widely in practice despite the law). For a quick summary of the *Cochran* case, *see* Brian R. Marron, *Real Estate and Land Use Law*, 39 U. RICH. L. REV. 357, 398–400 (2004).

3. STANDARD STATE ZONING ENABLING ACT § 7 (1926). This standard act provides limitations for variances "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." *Id.*; *see also* Brent Ellis Dickson, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398, 398 (1967) (stating that a variance should be distinguished from a special exception, which permits "property to be used for purposes which, although contrary to the specific zoning classification for the area in which the property is located, are expressly authorized by the ordinance as contingent upon board approval.").

4. VA. CODE ANN. § 15.2-2201 (Repl. Vol. 2008). A zoning ordinance variance is defined as:

> a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or

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hatch" or "escape valve,"[5] a variance provides localities with the ability to prevent unconstitutional takings that violate either the Constitution of the United States or the Constitution of Virginia.[6] As stated in an early Virginia variance case:

> there will arise from time to time exceptional situations which will justly call for the granting of individual variances within the prescribed legislative conditions and standards and in harmony with the intended spirit and purpose of zoning ordinances, thereby providing a safeguard from unreasonable restrictions on the use of property.[7]

For quite some time, those who applied for variances enjoyed a likelihood of realizing their efforts.[8] Since 2004, however, Virginia has experienced heightened judicial scrutiny over the administration of variances.[9] The 2009 General Assembly of Virginia reviewed relevant sections of the Code of Virginia and amended the law concerning variances.[10] The effect of the General Assembly's seemingly slight revision presents the purpose of this comment.

Part II of this comment presents the General Assembly's enactment. Part III discusses the development of the relevant area of variance law that has fostered dissent. This part also presents *Cochran v. Fairfax*

> unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done. It shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning.

Id. Virginia does not permit a use variance, which allows a jurisdiction to permit a property use prohibited by a zoning ordinance. *See* Dickson, *supra* note 3. One commentator notes that jurisdictions try to harmonize variance practice and statutory commands by applying less stringent tests to increase the availability of variances. Owens, *supra* note 2, at 289–90 (noting that jurisdictions apply less stringent standards for area variances than use variances because area variances are less harmful).

5. *See* Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980).

6. *See* U.S. CONST. amend. V; VA. CONST. art. I § 11.

7. Azalea Corp. v. City of Richmond, 201 Va. 636, 640, 112 S.E.2d 862, 865 (1960).

8. *See* Owens, *supra* note 2, at 295–96 ("Studies confirmed that variance approval rates in the 70%–80% range continued to be common throughout the 1960–1990 period in a wide variety of settings, including urban, small town, and rural jurisdictions.").

9. *See* Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004); Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004) (holding that a Board of Zoning Appeals has no authority to grant a variance unless the effect of the ordinance would represent an unconstitutional taking); *see also* Goyonaga v. Bd. of Zoning Appeals, 275 Va. 232, 657 S.E.2d 153 (2008); Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91 (2005); Aesy v. Bd. of Zoning Appeals, 66 Va. Cir. 382 (2005).

10. H.B. 2326, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206, 2009 Va. Acts ___).

County Board of Zoning Appeals[11] as a landmark case in Virginia variance law and examines subsequent developments, which are all likely targets for revision. Part IV brings the previous parts to bear addressing and discussing the impact of House Bill 2326 on variance law.[12] Part of this discussion revisits case law for facts that exemplify and temper the Code revision. As this comment will demonstrate, the General Assembly has a legislative desire to decrease the scrutiny of the variance test.

II. HOUSE BILL 2326

The General Assembly amended section 15.2-2309 of the Virginia Code, which delegates authority to Boards of Zoning Appeals ("BZA") to grant variances.[13] Section 15.2-2309 provides the procedure, standards, and notice requirements for variances.[14] The General Assembly's revision deleted two words from the code provision:

> When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship ~~approaching confiscation~~, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.[15]

Therefore, what does removing "approaching confiscation" accomplish? To understand this question, one should be informed of contemporary Virginia variance practice and the importance of "approaching confiscation."

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11. 267 Va. 756, 594 S.E.2d 571 (2004).
12. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).
13. VA. CODE ANN. § 15.2-2309 (Repl. Vol. 2008); H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206); *see also* E.A. Prichard, *The Fundamental of Zoning Law*, 46 VA. L. REV. 362, 364–66 (1960) (discussing the form and function of Virginia Boards of Zoning Appeals).
14. VA. CODE. ANN. § 15.2-2309 (Repl. Vol. 2008).
15. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

III. THE "UNNECESSARY HARDSHIP" HURDLE—VIRGINIA VARIANCE PRACTICE SINCE 2004

The originally conceived notion of permitting a variance from an ordinance contained language requiring a demonstration of "unnecessary hardship" before permitting deviation from legislatively enabled ordinances.[16] The "unnecessary hardship" provision, possibly the most challenging aspect of a variance application,[17] permeates state codes and common law.[18] "Unnecessary hardship" is an elusive term requiring BZAs and courts to determine the definition.[19] In Virginia, courts interpret the language of section 15.2-2309 when a BZA's application is appealed.[20] In 2004, the Supreme Court of Virginia settled any controversy concerning "unnecessary hardship" interpretation and explicated the proper standard and analysis.[21]

A. *Cochran v. Fairfax County Board of Zoning Appeals*

1. The Facts and Procedure of *Cochran*

In *Cochran*, the Supreme Court of Virginia consolidated three cases from Fairfax County, the Town of Pulaski, and the City of Virginia Beach involving variance applications.[22] Each case involved a landowner petitioning its respective BZA for an area variance pursuant to section 15.2-2309.[23] Discussion of the three cases will aid in understanding the court's analysis.

The Fairfax County case involved a landowner's petition for a variance from front yard setbacks to posture their proposed house and utilize a side garage.[24] The Fairfax County BZA granted the front yard setback variance and three other requested variances over neighborhood dissent.[25] The circuit court affirmed the BZA's decision.[26]

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16. *See* STANDARD STATE ZONING ENABLING ACT § 7(3) (1926); Owens, *supra* note 2, at 282–84 (discussing zoning laws that predated the Standard State Zoning Enabling Act).
17. Owens, *supra* note 2, at 288.
18. *Id.* at 286–87.
19. *Id.* at 287 (noting that the term "unnecessary hardship" was left "to the judiciary and the good judgment of board of adjustment to fill in the details of just what situations qualify for a variance").
20. *See* Packer v. Hornsby, 221 Va. 117, 121–22, 267 S.E.2d 140, 142 (1980).
21. *See* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004) (holding that a BZA has authority to grant variances only to avoid an unconstitutional result).
22. *Id.* at 759–64, 594 S.E.2d at 573–76.
23. *Id.* at 759, 594 S.E.2d at 573.
24. *Id.* at 759–60, 594 S.E.2d at 573–74.
25. *Id.* at 761, 594 S.E.2d at 574.
26. *Id.*

The variance case from the Town of Pulaski also involved a landowner desiring to construct a garage.[27] The landowner planned to place the garage adjacent to a roadway within a setback.[28] The topography of their lot made building the garage in accordance with the ordinance nearly impossible.[29] The Pulaski BZA granted a modified variance permitting construction of a garage within the setbacks.[30] The circuit court affirmed the BZA's decision.[31]

The City of Virginia Beach variance case arose from an application to construct a shed.[32] Virginia Beach ordinances concerning accessory structures prohibited the landowners from constructing a shed at the landowner's desired height.[33] The landowner also petitioned to bring a previously constructed garage into conformity by seeking a variance for the twenty-eight feet by which the existing garage exceeded the limitations imposed by the zoning ordinance.[34] The Virginia Beach BZA granted the garage variance but denied the shed variance on the grounds that "no hardship" existed.[35] The landowner appealed, and the circuit court overruled the BZA's decision, thereby granting the shed variance.[36]

2. The Virginia Supreme Court's Analysis and Decision in *Cochran*

Before analyzing the merits of the three variance cases, the Virginia Supreme Court discussed precedent and the basis for the government's authority to decide such controversies.[37] The government's authority to grant variances comes from the section of the Constitution of Virginia that prohibits the government from depriving citizens from the use of their property without just compensation.[38] The court then restated the following proposition:

Because a facially valid zoning ordinance may prove unconstitutional in application to a particular landowner, some device is needed to

27. *Id.* at 761–62, 594 S.E.2d at 575.
28. *Id.*
29. *Id.* at 762, 594 S.E.2d at 575.
30. *Id.*
31. *Id.*
32. *Id.* at 763, 594 S.E.2d at 575.
33. *Id.* at 762–63, 594 S.E.2d at 575.
34. *Id.*
35. *Id.* at 763, 594 S.E.2d at 576.
36. *Id.* at 763–64, 594 S.E.2d at 576.
37. *Id.* at 764, 594 S.E.2d at 576.
38. *Id.* (citing VA CONST. art. I § 11(III)(C)).

protect landowners' rights without destroying the viability of zoning ordinances. The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch" or "escape valve." A statute may, of course, authorize variance in where an ordinance's application to a particular property is not unconstitutional. However, the language used in Code § 15.1-495(b) [now § 15.2-2309(2)] to define "unnecessary hardship" clearly indicates that the General Assembly intended that variances be granted *only in cases where application of zoning restrictions would appear to be constitutionally impermissible.*[39]

Applying the precedent of *Packer v. Hornsby*,[40] the court concluded that the BZA could only grant variances to circumvent "an unconstitutional result."[41] Finally, the court discussed the General Assembly's delegation of power to administrative bodies and quoted pertinent sections of the Virginia Code.[42]

The Virginia Supreme Court applied the cited Code and precedent to analyze the three individual cases in *Cochran*.[43] In each of the cases, the court evaluated the record to determine whether the applicants demonstrated "unnecessary hardship," and in each case, the court found the landowners failed to show "unnecessary hardship."[44]

In each of the three cases, the court remodeled and reconfigured the variance petitions. In the Fairfax County case, the court determined that the ordinance did not create an "unnecessary hardship" because the house could be moved two feet to satisfy the ordinance and creating "curb appeal" was not a proper justification for a variance.[45] In the Pulaski case, the court suggested that the garage could be moved or abandoned without denying the landowner reasonable use of his property.[46] Finally, in the Virginia Beach case, the court determined that the shed could be built as an adjoining home addition or abandoned

39. *Id.* (quoting Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

40. 221 Va. 117, 267 S.E.2d 140 (1980).

41. *Cochran*, 267 Va. at 764, 594 S.E.2d at 576.

42. *Id.* at 765–66, 594 S.E.2d at 577 (quoting Commonwealth *ex rel.* State Water Control Bd. v. County Utilities Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)). The court also addressed an argument raised in *Natrella v. Board of Zoning Apppeals*, 231 Va. 451, 345 S.E.2d 295 (1986), which involved an apartment conversion project where the court permitted a variance because the statute authorized a variance for an instance "where an ordinance's application to particular property is not unconstitutional." *Cochran*, 267 Va. at 766 n.3, 594 S.E.2d at 577 n.3 (citing *Packer*, 221 Va. at 122, 267 S.E.2d at 142).

43. *Cochran*, 267 Va. at 766–67, 594 S.E.2d at 577–78.

44. *Id.*

45. *Id.*

46. *Id.*

without interfering with all reasonable beneficial uses of the property.[47] The court recognized that the landowners still maintained "reasonable beneficial uses of the property, taken as a whole."[48] The final decision vacated variances granted in Fairfax County and the Town of Pulaski and reinstated the BZA's denial of a variance in Virginia Beach..[49] The landowners did not receive variances to construct and encroach upon setsbacks..[50]

B. Variance Administration and Review since *Cochran*

1. Supreme Court of Virginia Cases Applying *Cochran*

The Supreme Court of Virginia revisited the precedent of *Cochran* in two cases.[51] Only five months after *Cochran*, the court decided one case involving similar issues.[52] In *Board of Supervisors v. Board of Zoning Appeals*,[53] a landowner sought a variance to encroach the minimum lot width to subdivide and construct two homes on his property.[54] The BZA granted the landowner a variance conditioned on the landowner satisfying other requirements of the Code.[55] The circuit court affirmed the BZA's decision.[56] The Supreme Court of Virginia reversed the circuit court and vacated the BZA's variance grant.[57]

The Supreme Court of Virginia based its decision in *Board of Supervisors v. Board of Zoning Appeals* upon *Cochran*.[58] Unlike in *Cochran*, the court in *Board of Supervisors* first restated the important facts for variance review.[59] The court cited *Cochran* and *Packer* to

47. *Id.*

48. *Id.*

49. *Id.* at 767, 594 S.E.2d at 578.

50. *Id.*

51. *See* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 628 S.E.2d 324 (2006); Bd. of Supervisorsv. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004).

52. *Compare* Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004), *with* Cochran v. Fairfax County Bd. of Zoning Appeals,267 Va. 756, 594 S.E.2d 571 (2004).

53. 268 Va. 441, 604 S.E.2d 7 (2004).

54. *Id.* at 444, 604 S.E.2d at 8. This case focuses more upon an issue of standing than variance administration. *See id.* at 445–51, 604 S.E.2d at 8–12.

55. *Id.* at 444, 604 S.E.2d at 8.

56. *Id.*

57. *Id.* at 453, 604 S.E.2d at 13.

58. *Id.*

59. *Compare id.* at 451–52, 604 S.E.2d at 12, *with* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). The court resolved two issues in *Board of Supervisors*, whereas in *Cochran* the court reviewed only the variance issue. *Compare Board of Supervisors*, 268 Va. at 450–51, 604 S.E.2d at 12, *with Cochran*, 267 Va. at 764–66, 594 S.E.2d at 576–77.

support its finding that the ordinance did not deprive the landowner of "all reasonable beneficial uses" or create an "undue hardship."[60] According to the court, "undue hardship" could not be satisfied when an ordinance prohibited the subdividing of property and construction of newer homes.[61] Because the landowner owned and enjoyed the use of his home, the court decided the landowner did not incur an "undue hardship" warranting a section 15.2-2309 variance.[62]

The second case decided by the Virginia Supreme Court presented a more complex issue of variance administration because of overlapping setbacks.[63] In *Cherrystone Inlet*, the landowner sought a variance to construct four homes on four recently subdivided lots.[64] The overlap of ordinances establishing setbacks came from local road setbacks and locally adopted state Chesapeake Bay Preservation laws.[65] The BZA unanimously denied the landowners variance application.[66] The circuit court affirmed the BZA's decision.[67] The Supreme Court of Virginia affirmed the circuit court's decision.[68]

The Virginia Supreme Court first reasoned that variances were improper because the lots were not recorded before the Chesapeake Bay laws became effective.[69] Second, the court relied on *Cochran* and held that the landowner failed to demonstrate that the ordinances deprived him of "all reasonable beneficial uses."[70] Before affirming the BZA's variance denial, the court noted that the landowner could have built one house on six and a half acres of land resting on an inlet.[71]

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60. *Bd. of Supervisors*, 268 Va. at 452, 604 S.E.2d at 12–13 (quoting *Cochran*, 267 Va. at 766, 594 S.E.2d at 577–78). The court also cited the facts of *Board of Zoning Appeals v. Nowak*, 227 Va. 201, 315 S.E.2d 221 (1984), to show an ordinance that prevents the construction of a home in setback areas does not constitute a hardship. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13 (quoting *Nowak*, 227 Va. at 205, 315 S.E.2d at 223).

61. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13.

62. *See id.* at 453, 604 S.E.2d at 12–13.

63. *See* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 672, 628 S.E.2d 324, 324 (2006).

64. *Id.* at 672–73, 628 S.E.2d at 325.

65. *Id.*

66. *Id.* at 673–74, 628 S.E.2d at 325.

67. *Id.* at 674, 628 S.E.2d at 325–26.

68. *Id.* at 675, 628 S.E.2d at 326.

69. *Id.* The Chesapeake Bay Preservation Act only allows variances for intrusions under "very restricted circumstances." *See id.* at 673 n.2, 628 S.E.2d at 325 n.2.

70. *Id.* at 675, 628 S.E.2d at 326.

71. *Id.*

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2. Circuit Court Cases Applying Cochran

Since 2004, two Virginia circuit courts have reviewed BZA decisions and have applied the *Cochran* rule.[72] In *Aesy v. Board of Zoning Appeals*,[73] a landowner purchased property with an accessory structure—a barn—that pre-dated the local zoning ordinances.[74] The barn became an issue after the landowner built and attempted to occupy a home.[75] To remedy the zoning violation and occupy his home, the landowner sought a variance for the seventy-five year old barn.[76] The BZA denied the variance application.[77] When the circuit court reviewed the variance denial, the court relied on *Cochran* and stated, "if any reasonable beneficial use of the property can be made in accordance with the existing zoning ordinance, then the BZA has no authority to grant a variance, and an unnecessary hardship as contemplated by statute [section 15.2-2309] does not exist."[78] The court reasoned that no undue hardship existed because the landowner could remove the barn and enjoy a reasonable use of his property.[79] The circuit court affirmed the BZA's denial.[80]

In the second circuit court case applying the standard of *Cochran*, the court reviewed a request for a sign to encroach upon a height limitation.[81] In *Amherst County Board of Supervisors*, the landowner operated a John Deere tractor retail operation.[82] Franchise rules and state regulations required the retail store to erect a sign.[83] Local law limited the sign to ten feet in height, while the landowner desired the sign to be twenty feet in height.[84] The landowner sought a variance to construct a twenty-foot sign, because a ten-foot sign would be nearly obstructed on one side and fully obstructed on the other side.[85] The

72. Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91 (2005); Aesy v. Bd. of Zoning Appeals, 66 Va. Cir. 382 (2005).
73. 66 Va. Cir. 382 (2005).
74. *Id.* at 382.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 383–84.
79. *Id.* at 384. The landowner pleaded to the court that he could not afford demolition. *Id.* at 382.
80. *Id.* at 382.
81. Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91, 91 (2005).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 91–92.

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BZA granted the variance.[86] In a letter opinion, the circuit court reversed and vacated the variance grant.[87] The court cited the standard given in *Cochran* and held that unnecessary and undue hardship only exists when an ordinance "interfere[s] with all reasonable beneficial uses of the property, taken as a whole."[88] The court explained that variances are only permitted when "zoning restrictions are so constitutionally impermissible that there is a hardship approaching confiscation."[89]

IV. HOUSE BILL 2326'S EFFECT ON *COCHRAN*

In response to this strict interpretation of "unnecessary hardship," the General Assembly amended the language of the statute governing BZAs evaluation of variance petitions.[90] The Supreme Court of Virginia relied upon the previous code section to evaluate variance decisions in *Cochran*.[91] The impact of deleting two words from the Code has profound implications for the administration and review of variances. Alternatively, the various bodies that make zoning appeals decisions may nullify the impact of removing these two words. The following discussion argues that deleting the words "approaching confiscation" impacts variance administration and review by decreasing the degree of hardship applicants must show.

A. Does House Bill 2326 Revert Variance Practice to Pre-*Cochran*?

For most of the twentieth century, petitioning landowners received variances without much difficulty, aside from presenting their case.[92] In Virginia, the Virginia Supreme Court ended variance abuse with the *Cochran* case.[93] The court's heightened standard in *Cochran*, however,

86. *Id.* at 91.

87. *Id.*

88. *Id.* at 92 (citing Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004)).

89. *Id.* at 93 (citing Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

90. *See* H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

91. *See Cochran*, 267 Va. 756, 594 S.E.2d 571; *see also* Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 271 Va. 670, 628 S.E.2d 324 (2006); Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004).

92. *See, e.g.*, Roderick M. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287, 292–94 (1966); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 320–21 (1961); Owens, *supra* note 2, at 295–96. The approval rate raised concern that the merits of each individual case may not satisfy the purpose of variances. *Id.* at 297–98.

93. *Cf Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

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may have gone too far.[94] The General Assembly's amendment removed an important phrase:[95] two words that make variance hardship less stringent.

Removing the phrase "approaching confiscation" alters the *Cochran* analysis directly because it undermines *Cochran*'s rule of law. The *Cochran* court demanded that the threshold question of BZA variance petitions be whether the zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole."[96] The court arrived at that proposition because the language of the statute commanded demonstration of an "unnecessary hardship" by showing how a variance would "alleviate a clearly demonstrable hardship *approaching confiscation*."[97] Virginia courts and BZAs should now recognize the legislative intent in removing these two crucial words. If takings jurisprudence is no longer the fall line,[98] then the statutory command of "unnecessary hardship" must be something short of the "no reasonable use" test.[99]

B. The New Meaning of "Unnecessary Hardship"

In the near future, the Supreme Court of Virginia and Virginia circuit courts will be forced to interpret the new meaning of "unnecessary hardship." Before that review, BZAs will apply the revised law. When courts review variance cases concerning whether the landowner demonstrated "unnecessary hardship," the *Cochran* standard should be considered too restrictive. Because of the recent legislative changes, courts should move toward a definition of "unnecessary hardship" that is less stringent than *Cochran*'s rule.

94. *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (borrowing Oliver Wendell Holmes's famous phrase "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

95. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

96. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

97. *Id.* at 765–66, 594 S.E.2d at 577 (emphasis added).

98. The line of cases decided by the Supreme Court of the United States includes: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

99. The *Cochran* court cited to *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to support the takings test of interference "with all reasonable beneficial uses of the property, taken as a whole." *Cochran*, 276 Va. at 764–65, 594 S.E.2d at 576 (citing Commonwealth v. County Utils., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)) (emphasis removed).

Before *Cochran*, the Virginia Supreme Court recognized the use of a variance as a flexible tool to avoid constitutional issues.[100] In *Azalea Corp. v. City of Richmond*,[101] a landowner sought a variance to construct roadways across residentially zoned property for its commercial operation.[102] The City of Richmond denied the landowner a variance because the city thought the requested roads would violate the zoning ordinance.[103] The BZA and circuit court affirmed the variance denial.[104] The Virginia Supreme Court reversed and issued a variance for the road construction.[105] The court recognized that without commercially supportable road access, the landowner's property would lose substantial real estate value and the grant of road access to the landowner would not damage the value of residences in the surrounding area.[106] For these reasons, the Virginia Supreme Court found the grant of a variance "would do substantial justice."[107]

The court's language in *Azalea* is unlike that of *Cochran*. But the issues faced, between a substantial loss in value in *Azalea* and a major inconvenience in *Cochran*, are similar. *Azalea* demonstrates the court's desire to recognize certain factors as important in a variance request and appreciate those factors as an "unnecessary hardship."

Packer followed *Azalea* by twenty years, but forms a bridge between the reasoning and language of *Azalea* and *Cochran*.[108] *Packer* involved a landowner wishing to build an addition within a setback area.[109] The BZA granted the landowner's variance.[110] The circuit court reversed the BZA and denied the variance.[111] The Virginia Supreme Court affirmed, finding that the BZA abused its discretion and the landowner failed to demonstrate the required hardship.[112] *Packer*'s significance comes more from its recognition that "[a] statute may... authorize variances in cases where an ordinance's application to particular property is not

100. Drinard, *supra* note 2. A granted variance would not stand if the record was devoid of evidence or the decision was arbitrary and capricious. *Id.* at 1640.

101. 201 Va. 636, 112 S.E.2d 862 (1960).

102. *Id.* at 637, 112 S.E.2d at 863. The property in question was both in Henrico County and the City of Richmond. *Id.*

103. *Id.*

104. *Id.* at 638, 112 S.E.2d at 864.

105. *Id.* at 643–44, 112 S.E.2d at 867–68.

106. *Id.* Without road access, the value of the property would decline from $729,000 to $202,000, or a 72% decrease. *Id.* at 643, 112 S.E.2d at 867.

107. *Id.* at 644, 112 S.E.2d at 867.

108. *See* Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980).

109. *Id.* at 119–20, 267 S.E.2d at 141.

110. *Id.* at 120, 267 S.E.2d at 141.

111. *Id.*

112. *Id.* at 120, 123, 267 S.E.2d at 141, 143.

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unconstitutional."[113] This finding recognizes that the language of the statute, specifically "approaching confiscation," was commensurate with takings jurisprudence. While the landowner's variance petition in *Packer* would likely still fail today for other reasons, a court could not discount all hardship because some hardship existed.[114] In other words, section 15.2-2309(2)'s "unnecessary hardship" is not the same degree as before.

The Virginia Supreme Court's language used in the *Azalea* and *Packer* decisions suggests that some law exists to consider section 15.2-2309(2)'s "unnecessary hardship" as less than *Cochran*'s "no reasonable use" standard. In fact, some jurisdictions do not use the language "unnecessary hardship," using instead the language "practical difficulties" to evaluate granting a variance.[115] "Practical difficulties" is clearly not the standard in Virginia, but this standard helps realize the boundaries of "unnecessary hardship." Jurisdictions using the "practical difficulties" standard apply the test by asking whether an "affected property or structure cannot, as a practical matter, be used for a permitted purpose under the applicable zoning classification."[116] An affirmative answer to the "practical difficulties" inquiry warrants a variance.[117]

The General Assembly's revision of section 15.2-2309(2) reflects a move to decrease scrutiny and evaluate hardship less stringently.[118] A less stringent approach to variance administration promotes fairness and flexibility.[119] Variances prove more cost-effective than either amending ordinances upon request or through rezoning.[120]

Even *Cochran* assists in determining what the court views or should view as demonstrated hardships satisfying section 15.2-2309(2).[121] In

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113. *Id.* at 122, 267 S.E.2d at 142.

114. *Id.* "[T]he Packers do not face a 'hardship ~~approaching confiscation~~,' nor has their use of their land been effectively prohibited or unreasonably restricted." *Id.* at 122, 267 S.E.2d at 142–43 (language stricken to reflect the H.B. 2326 revision). This statement loses its value with the removal of "approaching confiscation." *Packer* is not the best example case because the landowners spoke about, and the court grasped onto, a desire to expand their home for better views and because everyone else was encroaching setbacks. *Id.* at 119–22, 267 S.E.2d at 141–43.

115. *See* Bryden, *supra* note 92, at 323.

116. 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.14[1][b] (2008); *see also* Bryden, *supra* note 92, at 324.

117. *See* POWELL, *supra* note 116; *see also* Bryden, *supra* note 92, at 324.

118. *See* Owens, *supra* note 2, at 290 (citing Simplex Tech., Inc. v. Town of Newington, 766 A.2d 713, 717 (N.H. 2001)).

119. *See* Dickson, *supra* note 3, at 411.

120. *See* Owens, *supra* note 2, at 317.

121. Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 767, 594 S.E.2d 571, 578 (2004).

Cochran, the court mentioned the following facts of the three cases as providing compelling reasons: taxes, aesthetic improvements, landowner planning to mitigate effects, neighbor support and/or opposition, landowner expense, and personal need.[122] The court did not classify these factors as hardships but commented on them as deserving of attention.[123] Although *Cochran*'s main proposition no longer guides variance decisions, these factors help to decipher the requirements necessary to satisfy "unnecessary hardship."

C. What Cases Should Pass the New "Unnecessary Hardship" Test?

When considering the impact of the new hardship standard, it will help to review a set of facts and determine whether the landowner demonstrated "a clearly demonstrable hardship" satisfying "unnecessary hardship." The Virginia Beach and Pulaski cases from *Cochran* may have turned out differently if the revised section 15.2-2309 applied.[124] The Pulaski case involved a garage siting with various factors posing a hardship, but not enough for an undue hardship approaching confiscation.[125] Based upon the court's opinion, the landowner may have satisfied the new hardship standard because it would be more expensive to build the garage to code, the topography of the property justifies its location, and alternative placement would most likely weaken or destroy a retaining wall.[126] An ordinance prohibiting a landowner from building a garage may satisfy an "unnecessary hardship" requirement short of the no reasonable use determination. Requiring an individual to construct a garage that costs more, creates other issues, and presents a design conflict would most likely constitute a hardship that a variance could alleviate.

The Virginia Beach case involved the desire to build a storage shed.[127] The landowner's desired shed was only a few hundred square feet in excess of the limitation.[128] The purpose of the shed was to hold belongings so that a family member could assist a seriously ill and

122. *Id.* Other factors considered include: "reasonable return, inability to sell, financial loss, the effect of adjacent uses, the effect of heavy traffic, or the shape, size, or grade of the property." POWELL, *supra* note 116.

123. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

124. *Id.* at 761–64, 594 S.E.2d at 574–76. The Fairfax case, doomed by the statement "curb appeal," should still fail "unnecessary hardship." *Id.* at 759–61, 594 S.E.2d at 573–74.

125. *Id.* at 761–62, 594 S.E.2d at 574–75.

126. *Id.* at 762, 594 S.E.2d at 575.

127. *Id.* at 762–64, 594 S.E.2d at 575–76.

128. *Id.*

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disabled family member.[129] The personal needs of this family alone might not constitute an "unnecessary hardship," but considering the lack of community opposition, these facts could be classified as a hardship that a variance could alleviate.[130]

D. Jurisdictions, Administrators, and Neighbors Should Welcome the New "Unnecessary Hardship" Standard

The General Assembly revised only two words in Virginia Code section 15.2-2309;[131] the majority of the statute remains intact with established judicial interpretations and precedent.[132] Petitioners still are required to satisfy other factors.[133] The statute commands BZAs to make three findings.[134] The standards require the BZA to record its findings based upon the applicant's presentation, and the BZA's report creates a record for courts to consider and ensures that variance power is not abused.[135] This change will not cause variance petitions to run rampant, but now petitioning landowners will no longer have to meet the standard of takings—the "no reasonable use" test—to justify their area variance.

E. What Cases Should Fail?

To address the community concerns of possible arbitrary and capricious variance administration, revisiting some case law should calm interested parties. The Fairfax County case in *Cochran* would still be denied by the BZA and the judiciary.[136] The landowner's frivolous desire to construct a home may not constitute a satisfactory hardship, but it does conflict with the language of section 15.2-2309, which prohibits

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129. *Id.* at 763–64, 594 S.E.2s at 576.

130. *See id.*

131. *See* H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

132. *See id.* ; *see also* Steele v. Fluvanna County Bd. of Zoning Appeals, 246 Va. 502, 507, 436 S.E.2d 453, 457 (1993) (holding that a landowner cannot create their own hardship).

133. *See* VA. CODE ANN. § 15.2-2309(2).

134. *Id.* § 15.2-2309(2)(a)–(c) ("That the strict application of the ordinance would produce undue hardship relating to the property; that the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and that the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.").

135. *See* Drinard, *supra* note 2, at 1641.

136. *See* Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 759–61, 594 S.E.2d 571, 573–74 (2004).

variances for special privilege.[137] In *Packer*, the issue of consistency extinguishes the landowner's chance of variance.[138] The landowner attempted to show a hardship by virtue of other properties not satisfying setbacks along the waterfront, which the BZA accepted.[139] Even where facts point to other violations, no BZA should grant, nor should a court affirm, a variance because the hardship is generally shared.[140] House Bill 2326's revisions do not grant BZAs unfettered discretion. The rule of law developed by the Virginia Supreme Court will still guide BZAs and judicial variance review.

V. CONCLUSION

The new legislative changes to section 15.2-2309(2) suggest that BZAs should no longer inquire whether a zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole." Instead, BZAs should apply a less restrictive threshold question, adopting a standard which reflects the General Assembly's decision to remove "approaching confiscation" from section 15.2-2309(2) and scrutinize variance petitions less. Virginia courts should also recognize the departure from a high hurdle of hardship and find more factors and circumstances deserving of an area variance. The hardship required to satisfy variance petitions no longer requires the deprivation of all reasonable use. A demonstration short of the *Cochran* test should now satisfy law.

137. *See* VA. CODE ANN. § 15.2-2309(2); *Cochran*, 267 Va. at 760, 594 S.E.2d at 574.
138. *See* Packer v. Hornsby, 221 Va. 117, 119–20, 267 S.E.2d 140, 141 (1980).
139. *Id.* at 122, 267 S.E.2d at 143.
140. *See* VA. CODE ANN. § 15.2-2309(2)(b).

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December 13, 2017

Mr. Paul Vames
V-K Properties, Apartments and Condos
1600 North Coalter Street, Suite 19
Staunton, VA 24401

Re: Appeal, 1403 North Augusta Street, Staunton, VA

Dear Mr. Vames,

I represent Debra Chilton-Belloni and write this letter to you in your capacity as Chairman of the Staunton City Board of Zoning Appeals in order to request a hearing on Mrs. Chilton-Belloni's June 5, 2014 appeal to the Board of Zoning Appeals (BZA) following the issuance of a Supreme Court of Virginia Opinion in this matter on November 9, 2017.

Because of the long history involved in this matter, I will provide some historical background. In 2006, Dr. and Mrs. Chilton-Belloni bought a historic home at 1403 North Augusta Street in Staunton. Because of heavy traffic they wanted to build a wall in front to block the road noise. There was no application process for the approval of such a wall and no permit to issue, but the Bellonis nonetheless consulted city zoning officials and after a site visit they were told that the wall they planned to build would comply with the City's zoning ordinances.

After the wall was nearly complete, on September 20, 2007, the City Zoning office issued a notice to the Bellonis telling them that the wall actually violated the zoning ordinances. In response, the Bellonis citing hardship, asked the City's BZA to grant a variance. After considering the circumstances, on February 20, 2008, the BZA voted unanimously in favor of the variance.

The City then appealed the variance, arguing that the BZA had exceeded its authority. The City cited *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004), in which this Court held that the only hardships sufficient to justify the grant of a variance are those that are Constitutional in dimension—those that approach confiscation. The Staunton City Circuit Court agreed and reversed the BZA's grant of a variance.

After those proceedings, nothing happened for 2 years. The City took no action and the Bellonis took no steps to remove the wall. In 2011, the City filed criminal charges against Dr. Belloni citing the wall as violating its zoning ordinances. That case was dismissed at trial for the City's failure to take action within the period allowed by the statute of limitations.

Once again, nothing happened for two more years. The Bellonis reasonably believed that the City had exhausted its efforts. Then in late 2013, after a truck damaged a part of the wall, the City once again renewed its efforts to secure the removal of the wall. It sent a letter stating that the repair of the damage to the wall would be viewed as a new violation of the zoning ordinances and the City again demanded the removal of the wall.

Since the beginning of this process, and after the reversal of the 2008 variance by the Circuit Court, the Code of Virginia provisions defining a hardship sufficient to justify the award of a variance had been changed. The 2009 statutory amendment eliminated the *Cochran* requirement that hardship justifying a variance must be one that is confiscatory in favor of language allowing a variance if it will "alleviate a clearly demonstrable hardship." Va. Code § 15.2-2309. Given that the BZA had voted unanimously in favor of the variance in 2007 and that it would have stood but for the *Cochran* requirement, Mrs. Chilton-Belloni made her new 2014 request for a variance citing the code change as a significant change of circumstance.

The City Zoning Administrator summarily rejected the 2014 variance request and Mrs. Chilton-Belloni again appealed that ruling to the BZA. It is that variance request that remains pending and upon which Mrs. Chilton-Belloni is now requesting a hearing.

As you will recall, before a hearing was scheduled on Mrs. Chilton-Belloni's appeal, she was sued by the Zoning Administrator. Although Mrs. Chilton-Belloni asked for the Circuit Court proceeding to be stayed pending the BZA proceedings, the Staunton City Circuit Court refused and ruled that because Mrs. Chilton-Belloni had requested a variance in 2009, she was "not entitled to relitigate, or have additional review of the matter." As a consequence, when a BZA meeting was scheduled, the attorney for the Zoning Administrator shared the ruling of the Circuit Court and argued that it could take no action on Mrs. Chilton-Belloni's appeal. The BZA then declined to take any action at all on Mrs. Chilton-Belloni's request for a variance, which remains pending. The Circuit Court proceeded to enter an injunction requiring Mrs. Chilton-Belloni to tear down the wall that had been constructed in front of her property and which was the subject of her request for a variance.

Mrs. Chilton-Belloni appealed to the Supreme Court of Virginia which issued a November 9, 2017 Opinion and Order reversing the ruling of the Staunton City Circuit Court and remanding the case for further proceedings. I enclose a full copy of the Opinion.

In the Opinion, the Supreme Court of Virginia absolutely rejected the City's position – that the legal doctrine of *res judicata* should be applied to prevent a subsequent variance request, especially where circumstances and the law have changed. The Supreme Court of Virginia expressly ruled as follows:

> Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a

> property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a land owner from potential benefits to his or her property merely because he or she, or a previous owner had engaged in a prior appeal of the matter under different law.
>
> In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error.

The Supreme Court ruled that the circuit court should have delayed taking any action and that it should have allowed the Board of Zoning Appeals to proceed with the consideration of Mrs. Chilton-Belloni's appeal given that the BZA has taken no action to grant or deny the variance.

I respectfully request a hearing by the Board of Zoning Appeals to consider the rezoning request and that such hearing be scheduled as soon as possible.

Thank you for your consideration of this request and the ruling of the Supreme Court of Virginia.

With best regards,

Very truly yours,

Mark D. Obenshain

MDO/eis

Cc: Mr. Hal Sharp, Board of Zoning Appeals
Mr. Willard H. Keeling, Board of Zoning Appeals
Ms. Judith Wiegand, Board of Zoning Appeals
Mr. Bradley G. Bryant, Board of Zoning Appeals
Victor M. Santos, Esquire
John C. Wirth, Esquire
Mrs. Debra Chilton-Belloni

PRESENT: Lemons, C.J., Goodwyn, Mims, Powell, Kelsey, and McCullough, JJ., and Millette, S.J.

DEBRA CHILTON-BELLONI

v. Record No. 160612

SHARON E. ANGLE, ZONING ADMINISTRATOR FOR AND ON BEHALF OF THE CITY OF STAUNTON, ET AL.

OPINION BY
SENIOR JUSTICE LEROY F. MILLETTE, JR.
November 9, 2017

FROM THE CIRCUIT COURT OF THE CITY OF STAUNTON
Charles L. Ricketts III, Judge

In this appeal of two related zoning actions tried together, we address whether a circuit court properly relied on principles of res judicata to refuse to stay an injunction brought by the City of Staunton's Zoning Administrator against the landowner pending further proceedings before the City's Board of Zoning Appeals, and whether the circuit court properly granted the injunction against the landowner. For the reasons stated herein, we conclude that the circuit court erred, and we will reverse and remand as to the injunction. We decline to address the accompanying appeal from the denial of the landowner's petition for a writ of mandamus.

I. FACTS AND PROCEEDINGS

In 2006, a building official from the City of Staunton visited the home of Frank Belloni (now deceased) and Debra Chilton-Belloni to review the site and plans to build a wall. Their historic home was located on a now-busy street, and the purpose of the wall was primarily for sound proofing and privacy. The building official informed them they could legally build the wall, and the Bellonis began construction of the wall consistent with those plans.

In 2007, John Glover, then Zoning Administrator for the City of Staunton, advised the Bellonis that the nearly completed wall in fact violated a Staunton zoning ordinance. The

essence of the violation included obstruction of the line of sight at an intersection and wall height exceeding the permitted three and a half feet. He acknowledged that "there may have been a miscommunication with my staff, but that does not change the fact that the wall is in violation of Section 18.120.010(2) of the City of Staunton Code."

The Bellonis sought a variance from the Board of Zoning Appeals, which was granted in February 2008. Glover and the City then appealed the variance to the circuit court, arguing that the BZA lacked the authority under current law to issue the variance. The relevant statute at the time required a "clearly demonstrable hardship approaching confiscation" in order to grant a variance. Code § 15.2-2309 (2007). Agreeing with the City, the circuit court reversed the decision granting the variance by a final order entered June 17, 2009.

The Bellonis did not take down or alter the wall, and the City did not immediately pursue action to ensure that they did so. In July of 2009, the statute was changed so as to delete the "approaching confiscation" language. 2009 Acts ch. 206. In 2011, the City filed criminal charges against the Bellonis for failure to remove the wall, but the prosecution was found time-barred.

In 2013, the wall was damaged by a third party. In September 2013, Chilton-Belloni, now the sole owner of the property due to her husband's recent passing, received a letter from the new Zoning Administrator, Sharon Angle. The letter advised her that the City had observed "some missing pieces [of the wall]," and Chilton-Belloni should "be advised that any action to do any work on the wall, other than to bring the entire wall into compliance, will be considered yet another violation."

In the subsequent months, numerous letters were exchanged between Angle and Chilton-Belloni. On May 9, 2014, in response to demands that Chilton-Belloni demolish the wall,

Chilton-Belloni requested a modification or variance from the zoning ordinance, citing hardship. She noted that the BZA had agreed that the original "misunderstanding" had constituted undue hardship, but that the state of the law at the time resulted in the circuit court reversing the ruling. However, in light of the 2009 change in the statute, deleting the "approaching confiscation" requirement, Chilton-Belloni requested a modification or variance at this time.

On May 30, 2014, Angle replied in a letter she did not have that power to authorize a modification or variance and that the issue was already fully adjudicated. Additionally, while she expressed no view on the changes to Code § 15.2-2309, she stated the provisions suggested no retroactive intent.

On June 5, 2014, Chilton-Belloni filed an appeal of Angle's decision to the BZA. She sought a variance, acknowledging that she had sought one previously, prior to the statutory change. Chilton-Belloni contends that Angle refused to convene the BZA for a hearing on the matter following her filing.

On July 10, 2014, pursuant to Code §§ 15.2-2208(A) and 15.2-2286(A), Angle sought an injunction compelling Chilton-Belloni's compliance with the City Code and removal and remediation of the wall. Chilton-Belloni moved to stay the circuit court proceedings to allow the BZA to consider her request for a variance. The circuit court denied the stay based on the doctrine of res judicata.

On March 24, 2015, following the denial of the stay, Chilton-Belloni filed a petition for a writ of mandamus against the BZA, demanding that it convene and hold a hearing on her case as such action was a nondiscretionary statutory duty. Sharon Angle and the City of Staunton then filed a motion to intervene as defendant-intervenors in the mandamus action, which was granted.

The circuit court tried and ruled on the actions together, issuing a shared letter opinion but separate orders. The court denied the petition for the writ of mandamus on the basis of res judicata and granted the injunction because Chilton-Belloni had "exhausted her administrative remedies" in the proceedings "concluded by the Order of the Staunton Circuit Court entered on June 17, 2009"; "the Court has already ruled that she is not entitled to re-litigate, or have additional review of the matter"; and the circuit court engaged in its own determination that a violation occurred. We granted Chilton-Belloni this appeal.

II. DISCUSSION

The mandamus action and the injunction application were tried together due to the related underlying facts, and counsel initially attempted to combine the two actions for the purposes of appeal. However, the BZA, an indispensable party to the mandamus action, was not noticed on the notice of appeal. This ordinarily results in our dismissal of that appeal. *Asch v. Friends of Mt. Vernon Yacht Club*, 251 Va. 89, 92-93, 465 S.E.2d 817, 819 (1996); *Butler v. Butler*, 219 Va. 164, 167, 247 S.E.2d 353, 355 (1978). When asked to address the mandamus appeal, specifically the notice issue, at oral argument, Chilton-Belloni's counsel stated, "I would respectfully submit that the proceedings are self-contained in the injunction proceedings,"* and provided substantive argument on the injunction issue alone. We treat this as an abandonment of the mandamus argument and accept his invitation to address the issues as contained within the injunction proceedings.

The circuit court's 2015 denial of the stay was clearly and unequivocally based on the doctrine of res judicata and the conclusion that a change in the law is not a change in circumstance permitting Chilton-Belloni to revisit the BZA. This same reasoning became

* Oral argument at 11:40.

inextricably linked to the final order granting the injunction, as the final order rested in part on the conclusion that Chilton-Belloni had "exhausted her administrative remedies" and was not entitled to re-litigate them. We therefore examine the underlying denial of the stay and its reliance on res judicata.

"A judicially-created doctrine, res judicata rests upon considerations of public policy which favor certainty in establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties." *Bates v. Devers*, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974) (internal citations omitted). The doctrine of res judicata includes principles of claim preclusion and issue preclusion. *Lee v. Spoden*, 290 Va. 235, 245, 776 S.E.2d 798, 803 (2015). As the circuit court used the term res judicata generally, we consider whether either principle could have been a valid basis for the circuit court's ruling. Both preclusion doctrines impose the same burden: the party asserting the preclusion must show by a preponderance of the evidence that litigation of the claim or issue should be precluded by the prior judgment. *Bates*, 214 Va. at 671, 202 S.E.2d at 921. Whether preclusion is applicable at all, however, generally represents a question of law to be reviewed de novo. *Rhoten v. Commonwealth*, 286 Va. 262, 267, 750 S.E.2d 110, 112 (2013).

In invoking res judicata in its 2015 denial of the stay, the circuit court could only have relied on a single prior proceeding with two distinct phases and rulings: one administrative appeal and one judicial appeal. We look at the potential res judicata effects of each.

A. The 2009 Circuit Court Ruling

Because there is no doubt that res judicata is applicable to findings and judgments in judicial proceedings, we first examine the ruling in the prior appeal by the City to the circuit court which resulted in the 2009 reversal of the BZA's variance. *Grose v. Cohen*, 406 F.2d 823,

824 (4th Cir. 1969). Issue preclusion bars "successive litigation of an issue of fact or law *actually litigated and resolved* in a valid court determination essential to the prior judgment." *Lee*, 290 Va. at 246, 776 S.E.2d at 803 (internal citation omitted) (emphasis added). We therefore look to the issue appealed and ruled upon by the circuit court, to what was adjudicated by that court at that time. In reviewing the final order from the 2009 proceeding, the incorporated letter opinion, and the testimony as to the scope of the proceeding, *see Bernau v. Nealon*, 219 Va. 1039, 1041, 254 S.E.2d 82, 84 (1979) (discussing elements of the record cognizable in ruling on preclusion claims), it is clear that the appeal and holding were narrowly tailored to a single issue: whether the BZA had exceeded its authority to grant a variance by improperly applying the law as it existed at that time. Specifically, the incorporated letter opinion observes:

> As noted earlier, although many arguments have been made regarding the applicability of the zoning restrictions to the properties involved, and the nature and the extent of administrative decisions and interpretations that may have been made by the zoning administrator, there are no appeals or Petitions for Certiorari now before the Court regarding any such decisions or interpretations. . . . The only matters before the Court concern whether or not the variances granted by the BZA were done so in accordance with existing law. A review of the record shows that at the time the BZA made its decision it recognized that it was not doing so in accordance with the requirements of *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756[, 594 S.E.2d 571] (2004). . . . The BZA and the property owners now urge the Court to review the zoning restrictions and make a determination as to whether the restrictions are even applicable to the properties involved. However, the Court is restrained from doing so because those matters are not properly before the Court at this time.
>
> . . . .
>
> That being the case there is nothing further that the Court can do at this time except reverse the BZA's decision to grant the variances.

The narrow nature of this ruling is insufficient to provide a basis to preclude Chilton-Belloni's 2014 appeal to the BZA seeking a variance under subsequent law. The circuit court did not issue a general ruling that the Bellonis were not entitled to a variance, or even adjudicate

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whether the wall was in fact in violation in the first place, much less whether the owner's use of the property should be enjoined pursuant to Code § 15.2-2309 (2007). The court simply held, as a matter of law, that the BZA had erred.

B. The 2007-2008 Administrative Appeal

We therefore turn to the original administrative appeal before the BZA. Here, Angle relies on the argument that the Bellonis had previously sought a variance for their wall, and Chilton-Belloni is now seeking another based on the same wall, which should be barred as res judicata. We need not reach the issue of whether res judicata applies to administrative proceedings generally, because even if it can apply in some contexts, we find its application in the realm of zoning appeals for this variance request to be improper.

As a judicial doctrine, we must be cautious about the appropriate use of res judicata in administrative settings in which actions may not always be truly adjudicative. "Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata." *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 534, 201 S.E.2d 758, 766 (1974). Accordingly, "[a]n adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication," including, among other requirements, "[a] formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status." Restatement (Second) of Judgments § 83 (1982). We require a level of formality to adjudication akin to that of a court of competent jurisdiction. *See Simmons v. Commonwealth*, 252 Va. 118, 120-21, 475 S.E.2d 806, 807 (1996) ("[T]he establishment of a prior judgment rendered by a court of competent jurisdiction is a condition precedent to the allowance of any plea in bar asserting [the

doctrine of res judicata]. Yet, by no stretch of the imagination can it be said that an administrative suspension of an operator's license for failure to take a blood or breath test is a judgment rendered by a court of competent jurisdiction. What is involved is neither more nor less than the term administrative suspension implies, an administrative act, not a judgment by a court of competent jurisdiction."); *see also Plotkin v. Fairfax County Dep't of Family Servs.*, Record No. 0085-98-4, 1998 Va. App. LEXIS 535 (Oct. 13, 1998) (unpublished) (declining to apply the doctrine of res judicata to Division of Social Services administrative hearings at the Division of Social Services because a "DSS administrative hearing, which lacks due process guarantees, enforcement power or even an impartial adjudicator, is not a court").

With this high standard in mind, we turn to whether a BZA, in issuing variances, operated in a manner equivalent to a court of competent jurisdiction. We find that it clearly did not. The incarnation of Code § 15.2-2309 applicable at the time of the Belloni's original appeal set forth a base standard for the "power" to "authorize" a variance. However, the language of the statute did not clearly require the granting of a variance if the base requirements were met; beyond the statutory floor, the essence of a variance was essentially a discretionary opportunity for the BZA to accommodate an exception to existing law and so cannot be a true "adjudication" akin to that of a court of competent jurisdiction. Furthermore, in this case in particular, as the circuit court ruled and the BZA itself admitted, the BZA neglected to follow any prescribed formula on issues of law.

Our inquiry is further framed with the acknowledgment that "[r]es judicata of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings." *Grose*, 406 F.2d at 824. The Fourth Circuit provides a helpful framework for considering the application of res judicata to a particular form of administrative law:

> Application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, *e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940); but practical reasons may exist for refusing to apply it, *e.g.*, *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927). And in any event, when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, § 18.03 (1958).

Id. at 824-25.

In the context of a government agency responsible for continuing administration of a body of law affecting the public generally, a change in applicable legal context can produce disparate results over time, resulting in an inequity that is in tension with the principles of res judicata. Restatement (Second) of Judgments § 28 cmt. c. In such circumstances, the refusal to apply a preclusive effect may be justified if the effect of applying preclusion would be to favor or disfavor similarly situated parties based on the timing of the administration of the law. *Id.* In regards to zoning, the Supreme Court of Rhode Island said it well:

> [A] strict rule of res adjudicata in zoning matters could have unfortunate consequences such as denying a landowner once refused relief the right to a reconsideration of an application based upon intervening circumstances resulting in a deprivation of all beneficial use of his property. Such an undesirable result could have serious constitutional implications and would do violence to the expressed legislative will authorizing zoning boards to vary the terms of zoning ordinances in hardship cases.

Marks v. Zoning Bd. of Review, 203 A.2d 761, 763 (R.I. 1964).

Local zoning offers a unique administrative challenge in that property remains held over time in changing neighborhoods, inevitably producing changes in the law, including in zoning ordinances themselves and applicable statutes. These reflect the changing desires of the locality as to the direction of development of the neighborhood and, in the case of statutes from the General Assembly, of the scope of authority provided to accommodate such changing circumstances.

As a result, in the case of administration of local zoning ordinances and exceptions thereto, the interests in finality and judicial economy may at times give way to the interest in treating various landowners fairly and equally at a given time. Restatement (Second) of Judgments § 28 cmt. c. & illus. 4. Examining the question of administration of variances in particular, we see no reason that either claim or issue preclusion would be required to apply.

In the context of zoning law, it is in the interest of finality and administrative economy for the BZA to enjoy the freedom to invoke principles of res judicata to decline to constantly rehear the same cause of action absent the allegation of changed circumstances. That is not the case here, however. Here, a superior judicial body has found that, as a matter of law and despite a change in the law, the BZA is categorically precluded from rehearing an appeal. We disagree. Use of a property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property. It should be allowed to evolve along with the zoning standards of the locality. There are ample reasons to permit property owners and zoning appeals boards to revisit a zoning question when the relevant ordinances or statutes have changed, and utterly unjust to bar a landowner from potential benefits to his or her property merely because he or she, or a previous owner, had engaged in a prior appeal of the matter under different law.

In sum, the doctrine of res judicata that the circuit court explicitly relied on in 2015 was not a proper basis to deny the stay based on the prior administrative or circuit court proceedings. We therefore find the 2015 denial of the stay to be in error. As a result, the final order granting an injunction, when Chilton-Belloni had not in fact been afforded the opportunity to exhaust her administrative remedies, was also in error.

III. CONCLUSION

As to the mandamus action, for the reasons stated, the appeal is dismissed. As to the stay and the injunctive relief sought, for the reasons stated, we will reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Dismissed in part,
reversed in part,
and remanded.

Chilton Hall Wall
1403 N. Augusta Street, Staunton

Wall Construction Expenditures-2007

26,561.00	Total consisting of the following documented expenditures:
1,961.00	Ck#1995: Guy C. Eavers Excavating: Trenching/Jimmy Harper
999.00	Check #1970: Casey-Jeff LaPort/Footer Installation
1,562.00	Ck#11962: Transit Mixed Concrete
4,156.00	Ck#622:Suntrust EL: Fauber Masonry, Labor for wall
6,118.00	Ck#2008: Fauber Masonry/ Labor for 12 Brick Columns
7,845.00	Ck#1999 and VISA: August Block /Materials: 2,100 Blocks, 230 Caps and 6 Lintels to span tree roots
1,787.00	Ck#1994 ($153) & Visa Charges ($1,387 & $146) & MC ($101): Augusta Paint/ wall painting materials
250.00	Ck#1997 ($110) & Ck#1825 ($140): Julian Carter, painting wall
989.00	Ck#1972 ($633): Ferguson/Gate fabrication; MC charge ($223))/Virginia Framers, treated lumber; MC charge ($38) & Ck#1823 ($87)/Ferguson, gate bolts and plates, Visa ($8), Young's Hardware
519.00	Visa charges ($214 & $305): Village Garden Center/Landscape material for wall: 4 Japanese and Nellie Stevens Holly, 2 Pyracantha, 4 Laurel
175.00	Ck#2003: Augusta Lumber/Mulch
200.00	Ck#2010: Mike Peeden & Gavin Anderson/backfill dirt and general clean-up

SUMMARY - TRAFFIC VOLUME AND CRASH DATA

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Annual Avg. Daily Traffic Volume - North Augusta Street between Edgewood Rd. and Lambert St. Intersections (Approx. .28 of a mile, which includes Ridgeview Rd.)*	9900	10000	9600	9100	9200	9300	8900	9300	9400	8800	9000	Not available
Annual Traffic Crash Count - North Augusta Street between Edgewood Road and Lambert St. Intersections**	Not available	Not available	Not available	Not available	1	3	8***	7	6	2	3	1
Annual Traffic Crash Count - North Augusta Street at Intersection with Ridgeview Road**	Not available	Not available	Not available	Not available	1	0	0	0	0	0	0	0

*Source: VDOT Traffic Engineering Divison - Daily Traffic Volume Estimates - Special Locality Report - City of Staunton/Augusta County

**Source: DMV and TREDS Crash Data by Jurisdiction

***Note: This number may be too high because DMV included a little more than just Edgewood to Lambert St. and no plot map to compare locations.

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
The Stauter Brothers	By - Philip E. Bell	1409 N. Augusta St.	12/20/07
Scott MacMillan	Scott MacMillan	1417 N. Augusta St.	14 JAN 08
Tom Alderdice		1320 North Augusta	1-18-08
[illegible] Coleman		27 Ridgewood Dr.	1/12/08
Bruce Frank	Bruce D Frank	1310 N. Augusta St	1-19-08
Jennifer Frank	Jennifer Frank	1310 N. Augusta St.	1-19-08
Moira Coleman-Leigh	Moira Coleman-Leigh	10 Crescent Drive	1-20-08
Joseph Leigh	Joseph Leigh	10 Crescent DR	1-20-08
Penelope Ferguson	Penelope E Ferguson	52 Ridgeview Rd	20 Jan 08
Gaylord Newell	Gaylord Newell	1422 Dogwood	1-20-08
Stephanie T Brooks	Stephanie T Brooks	30 Ridgeview	2/16/08
Jack R. Coulard		1315 N. Augusta St.	2/17/08 - See original
Elizabeth H. Campbell		1431 Dogwood Rd.	2/17/08 See original

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
R. Fontaine McPherson, for	[illegible]	1403 N. Augusta	12-19-07
[illegible]	[illegible]	[illegible]	[illegible]
Woody Dixon	Woody Dixon	1323 N. Aug St.	12-21-07
Caroline N Ball		38 Ridgeview Rd.	12/21/07
Marvin Ball	"	"	"
William Stevens		45 Ridgeview Rd	12/21/07
Amy Cash	Amy Cash	1403 North Augusta Street	12/21/07
[illegible]	[illegible]	[illegible]	[illegible]
NANCY S. ALLISON	Nancy S Allison	1417 N. Augusta St. Staunton Va 24401	12-22-07
Mary Patterson O'Brien MD		50 Ridgeview Rd Staunton Va 24401	
Page E. Kable		50 Ridgeview Rd. Staunton, Va. 24401	

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N Augusta Street and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to abate traffic noise and thereby renders the front garden of Chilton Hall, 1403 N Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Kevin Sweeney	Kevin Sweeney	78 Emerald Heights Dr Fishersville, VA 22939	1/23/08
[illegible]	[illegible]	[illegible]	[illegible]
Judy C. Cook	Judy C. Cook	1311 N Augusta St	1/24/08
Harold T. Holden		25 Crescent Dr	1/23/08
Ruth Bugas		2937 Shuttleworth Mill Rd Staunton, VA 24401	1/23/08
Jaimee L. Renne		1027 Selma Blvd Staunton VA	01/24/08
Teresa Fitzgerald		51 Rolling Acres Mt. Sidney	1-24-08
Linda F. Holden		25 Crescent Drive Staunton VA 24401	1/25/08
Karen D. Hanna		22 Crescent Dr Staunton, VA	1/24/08
Rochelle St. Clair		805 Randolph St Staunton VA	24401 1/24/08

SAVE THE WALL AT CHILTON HALL

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Amanda DiMeo	Amanda DiMeo	8 Waverley Green Staunton	12.6.07
Paula Homes	Paula Homes	31 Homes Lane Staunton Va	12.6.07
Mark Baffin		1757 Churchville Ave Staunton	12/6/07
SHARON PAXTON	Sharon Paxton	1705 VINSON ST, STN.	12/6/07
Brenda Canning		109 Stonewood St Staunton VA	12/6/07
Cheryl McDowell	Cheryl McDowell	435 Berkeley Staunton VA	24401 12/7/07
Tom Metz		804 Winkle Rd Staunton, VA	
[illegible]		41 Frederick St. Apt #101, Staunton Va. 24401	12-14-07
Lesley R. Nesmith		902 Richmond Rd Staunton, VA 24401	12-14-07
Baldwin Spencer		332 SHARON LE Staunton	17 Dec 07
John E Major		10 CYPRESSWOOD Dr Churchville VA	Dec 21-07
Nancy Spahn		234 W Frederick St 24401	Dec 21 2007
Joan T. Hoffman	Joan T. Hoffman	68 Globe Schoolhouse Rd Staunton Va	12-08-
Rhonda Ward		29 N. Augusta St. Staunton, Va. 24401 410 Audubon St. Staunton, Va 24401	

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
KITTY BRAUN	Kitty Braun	133 Crompton Waynesboro	11/15/08
Linda Perkins	Linda Perkins	108 Tiffany Dr. W'boro	11/15/08
NANCY BOYERS	Nancy Boyers	218 Hunton Farm Lane Wboro, VA	1/15/08
Dana Craun	Dana J Craun	408 Waynesboro Hill Dr. Fishersville, VA.	1/18/08
Katie Bosserman	Katie Bosser	1804 Orange St Staunton VA 24401	1/18/08
Darren Bowles		836 Washington Ave Waynesboro 22980	1/18/08
Carolyn Morris	Carolyn D Morris	177 Long Ridge Lane Staunton VA	1/18/08
Melvin E. Sweeney	Melvin E Sweeney	1527 Dogwood Rd STAUNTON	1/18/08
Jeanne T. Huffman		120 Inn Hill Mill Rd 24479	1/18/08
FRANK PERRENOT	Frank Perrenot	355 Livick Road P.O. Box 5 SWOOPE, VA. 24479	
Carla Perrenot	Carla N Perrenot	355 Livick Rd Swoope VA 24479	
JOHN FOSTER	John Foster	828 EIDSON CREEK RD VA 24401	
HARRIET	Groesbeck	572 Eidson Creek Rd STAUNTON 24401	
Pete Groesbeck		572 Eidson Creek Rd, Staunton, Va 24401	
Donald Bradder Tracey Bradder	Donald P. Bradder	57 Glebe School Rd, Staunton, Va	

S 538-4174

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N Augusta Street and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to abate traffic noise and thereby renders the front garden of Chilton Hall, 1403 N Augusta Street, Staunton, liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
Angela Ham		637 Parkview Ave	1/25/08
Jean S. Bazzani		1323 Blandford St.	1/25/08
Libby Lewis		929 Nelson St	1-25-08
Elizabeth N.		Staunton Va	
Mary Jane Cason		809 Lamplighter Dr.	1-25-08
[illegible] Hoyle		520 Robin Street Staunton, VA 2401	1-25-08
Joseph A. Miska		211 Church St Staunton	2/8/08
Jimmy Borzelleca		910 W. Beverley St.	2/13/08
[illegible]		2 Wesley Lane Swope	2/8/08
Donald Middleton		105 Clifford St Staunton	2/8/08
[illegible]		426 Windermere Dr	2/15/08

The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly constructed masonry and brick wall at the corner of N. Augusta St. and Ridgeview Road. Said wall, which is being landscaped to blend in with the existing hedge, serves to block traffic noise and thereby renders the garden of 1403 N. Augusta Street liveable for its owners.

NAME (printed)	SIGNATURE	ADDRESS	DATE
William J Ferguson		765 Middlebrook Dr	1/14/08
Ashton Reed		1221 Jackson	1/17/08
Jane Gnali	Jane Gnali	117 Austin Ave	1-18-08
Giancarlo Gnali		117 Austin Ave	1-18-08

[10.] Note: Names/addresses of Petitioners (81) typed for clarity

Petition: The undersigned hereby respectfully request the Board of Zoning Appeals to allow and grant its official and definitive permission for the newly-constructed masonry and brick wall at the corner of N. Augusta Street and Ridgeview Road. Said wall, which is landscaped to blend in with the existing hedge, serves to block traffic noise, and thereby renders the garden of Chilton Hall liveable for its owners.

Judy C Cook, 1311 N AUGUSTA ST, Staunton [886-3800]

✓ Kenneth Monroe, 1319, N AUGUSTA ST, Staunton [886-3858]

Sara Monroe, 1319,k N AUGUSTA ST, Staunton [886-3858]

Rhonda and Sid Ward, 29 N AUGUSTA ST, Staunton [540 213-0606]

Fontaine McPherson, 1403 N AUGUSTA ST, Staunton [886-1429]

Rebecca Allison, 1411 N AUGUSTA ST, Staunton [885-5117]

Nancy Allison, 1411 N AUGUSTA ST, Staunton

Woody Dixon, 1327 N AUGUSTA ST, Staunton [885-0346]

Amy Cash, 1403 N AUGUSTA ST, Staunton [886-5080]

The Statler Brothers, 1409 AUGUSTA ST, Staunton [885-7297]

Scott MacMillan, 1417 N AUGUSTA ST, Staunton

Tom Aldridge, 1320 N AUGUSTA ST, Staunton [885-5656]

Bruce Frank, 1310 N AUGUSTA ST, Staunton [885-3438]

Jennifer Frank, 1310 N AUGUSTA ST, Staunton [885-3438]

✓ Caroline Bell, 38 RIDGEVIEW RD, Staunton [885-2146]

✓ Dr. Mardre Bell, 38 RIDGEVIEW RD, Staunton [885-2146]

Dr. William Sowers, 45 RIDGEVIEW RD, Staunton [885-2087]

Dr. Mary O'Brien, 50 RIDGEVIEW RD, Staunton [886-1791]

Page Kahle, 50 RIDGEVIEW RD, Staunton

Penelope Ferguson, 52 RIDGEVIEW RD, Staunton [886-6384]

✓ Dr. Stephanie T. Brooks, RIDGEVIEW RD, Staunton 886-4053 886-5775

✓ Karen D. Hanna, 22 CRESCENT DR, Staunton [~~886-7612~~]

Linda F. Holden, 25 CRESCENT DR, Staunton [885-2720]

Jack Cowherd, 1315 N. Augusta St, Staunton [885-8578]

Note: All persons contacted signed the petition - save for two attorneys citing potential conflicts of interest

Moira Coleman-Leigh, 10 CRESCENT DR, Staunton [887-7301]

Joseph Leigh, 10 CRESCENT DR, Staunton [887-7201]

Howard Holden, 25 CRESCENT DR, Staunton [885-2720]

Wayt Timberlake, 29 CRESCENT DR, Staunton [885-0738]

Garland Newell, 1422 DOGWOOD RD, Staunton [885-4479]

Melvin Sweeney, 1527 DOGWOOD RD, Staunton [885-8390

Lee Cochran, 24 RIDGEWOOD DR, Staunton [886-0188]

Linda D Hanna, 39 EDGEWOOD RD, Staunton [885-8363]

Nancy Spahr, 234 FREDERICK ST, Staunton [887-2345]

Patsy S. Wilson, 41 FREDERICK ST, Staunton [885-7575]

Rochelle St. Claire, 805 RANDOLPH ST, Stainton

Kevin Sweeney, 58 EMERALD HEIGHTS DR, Fisherville [942-5544]

Ruth Burgas, 2937 SHUTTERLEE MILL RD, Staunton

Amanda DiMea 8 WAVERLEY GREEN, Staunton

Paula Homes, 37 HOMES LANE, Staunton [885-6617]

Mark Battin, 1759 CHURCHVILLE AVE, Staunton [886-6332]

Jaimee L Renne, 1027 SELMA BLVD, Staunton

Kitty Braun, 133 CROMPTON, Waynesboro

Linda Perkins, 108 TIFFANY DR, Waynesboro

Nancy Boyers, 218 HESTON FARM LANE. Waynesboro

Dana Craun, 408 WYNDHAM HILL DR, Fisherville

Katie Bosserman, 1804 ORANGE ST, Staunton

Darren Bowles, 836 WASHINGTON AVE, Waynesboro

Carolyn Morris, 177 LONG RIDGE LN, Staunton [337-3888]

Sharen Paxton, 1705 VINSON ST. Staunton [886-1750]

Brenda Canning, 109 OAKENWOLD ST, Staunton [[885-3865]

Cheryl McDowell, 428 BENSON ST, Staunton

Elizabeth Campbell, 1431 Dogwood Rd, Staunton [~~885-3770~~]

Kim Metje, 80A WOODLEE RD, Staunton [294-2161]

Lesley, Merritt, 902 RICHMOND RD, Staunton

Baldwin Jennings, 3325 SHARON LA, Staunton

John E Mozian, 10 CRESTWOOD DR, CHURCHVILLE [886-0103]

Jean T Hoffman, 68 GLEBE SCHOOL RD, Staunton [886-1985]

Jeanne T. Hoffman, 120 TRIMBLERS MILL RD, Swoope [885-9593

Frank Perrenot, 355 LIVICK RD, Swoope [887-6959]

Carla Perrenot, 355 LIVICK RD, Swoope [887-6959]

Teresa Fitzgerald, 51 ROLLER AVE, Mt Sidney

John Foster, 828 EIDSON CREEK RD, Staunton [885-3047]

Harriet Groeschel, 572 EIDSON CREEK RD, Staunton [886-3758]

Pete Groeschel, 572 EIDSON CREEK RD, Staunton [886-3758]

David Bredder, 57 GLEBE SCHOOL RD, Staunton [885-2545]

Tracey Bredder, 57 GLEBE SCHOOL RD, Staunton [885-2545]

William Ferguson, 765 MIDDLEBROOK AVE, Staunton [8 85-5658]

Ashton Reed, 1221 JACKSON, Staunton

Jane Gnali, 117 Austin Ave, Staunton [886-1403]

Giancarlo Gnali, 117 Austin Ave, Staunton [886-1403]

Ginger Ham, 637 Parkview Ave, Staunton

Jean Bazzrea, 1323 Blanford St, Staunton [886-1401]

Elizabeth N. Swik, 929 Nelson Street, Staunton

Dwight & Mary Faye Cason, 809 Lammermoor Dr, Staunton [886-7737]

James T O'Hare 520 Robin St, Staunton [886-2250]

Joseph Miska, 211 Church St, Staunton

C Borzellaca, 510 W Beverly St, Staunton [885-1828]

David Schwartz, 1 Beverly St, Staunton [886-3915]

Donnie Middleton, 105 Clifford St, Staunton [886-1828]

J.S. Juke, 56 Lowery Lane, Swope

'8 FEBRUARY 2008

To the Board of Zoning Appeals,

The wall at Chilton Hall, 1403 N. Augusta St. was constructed after permission was granted by the Board of Zoning. Why is it now in violation of code?

Aesthetically, it appears to be in good taste.

We are in support for the wall to remain.

Jane Gnau

Francis Gnau

Staunton Board of Zoning Appeals

Regarding: Intersection North Augusta Street and Ridgeview Road

17 February 2008

Dear Zoning Board Members,

I am a 15 year resident of 52 Ridgeview Road, here in Staunton. I use the intersection of Ridgeview Road and North Augusta Street daily (some days multiple times). The Bellamy's have recently erected an architecturally stately wall inside the already well-established shrub hedge on their property. This wall is aesthetically pleasing, as it frames the existing hedge, the wall color blends in with the natural vegetation making it a nice backdrop. Since this wall is inside the established hedge line it does not hinder nor impact any part of line-of-vision for safe driving.

I was amazed when the Bellamy's contacted me that someone had filed a complaint regarding the construction of the wall. This couple has artfully increased the aesthetics of their home, added value to their home and perhaps even the street. Since being contacted by them, each time I (daily) use this intersection, I stop and think, "Is this creating a hazard? Is my line-of-vision impaired?" Each time the answer is "NO", there is no impediment, and there is no reasonable explanation for someone to complain.

I very willingly signed the petition to 'allow the wall to remain' and I will continue to support the Bellamy's to keep the wall as is. Please allow this letter to their support. The Appeals Board is welcomed to contact me as needed.

Sincerely,

for file

Penelope E. Ferguson
52 Ridgeview Road (Staunton)
886.6384

March 24, 2018

Dear Board Members,

We are writing as residents of 1403 N. Augusta St, Unit 1, in the City of Staunton. We have lived at this residence for the last eight months. In relocating to Staunton and seeking to find a home in the City, we were drawn to the property by the beautiful architecture of the home and the privacy of the home afforded by the masonry wall that surrounds the front and side of the property.

As the property is located on a busy street, the wall acts as a buffer for the road noise and provides a sense of privacy.

In exiting the property from the front driveway onto Augusta St, the wall does not pose a hazard or block our line of sight in either direction.

We support the efforts of the owner to preserve the wall is it stands.

Best regards,

Deborah Elkins

Teresa Elkins

Dr. John McCarty
1403 North Augusta Street #5
Staunton, VA 24401
515.371.8350

29 March 2018

Board of Zoning Appeals
City of Staunton
116 West Beverley Street
Staunton, VA 24401

Re: North Augusta St. and Ridgeview Road Intersection

Dear Zoning Board Members,

As a six-year resident of 1403 North Augusta Street in Staunton, I drive through the intersection of North Augusta and Ridgeview Road at least once a day. The wall on Debra Belloni's property has never impeded my vision or hindered my ability to safely drive through that intersection. The wall is located behind a row of hedges and is painted to blend into the vegetation. In fact when I heard that there had been complaints about the wall making the intersection dangerous, I had to make a point to notice the wall as I drove through the intersection the next day, because it simply does not impact my daily drives through that intersection. In addition, I am sure that the wall serves as an important noise barrier blocking the residents of 1403 North Augusta from the sounds of traffic on this portion of North Augusta.

As someone who regularly drives through and has made all possible turns through the intersection of North Augusta and Ridgeview Road, I can say with certainty that the wall on Debra Belloni's property does not impact my daily travels through this intersection. The wall also provides me, as a resident at 1403 North Augusta Street, an important buffer from the traffic sounds coming from North Augusta. For the reasons explained above, I am happy to write this letter in support of allowing Debra Belloni to keep the wall on her property as is.

Please feel free to contact me with any additional questions.

Sincerely,

John McCarty

John McCarty

March 31, 2018

Dear Staunton Board of Zoning Appeals,

I am writing to you with regards to the wall bordering Chilton Hall on the property of Ms. Debra Belloni. I have been a tenant at Chilton Hall for seven years. The wall has never been the cause of any concern for me. Rather, I have appreciated its provision of a sense of security and privacy, especially considering that the property borders the busy road of N. Augusta St. I believe that the wall is well designed to blend into its natural surroundings of hedge and other foliage. Thus it does its job of providing the above mentioned safety features without removing aesthetic appeal from the property.

I have never begrudged the wall as an impairment of vision while driving from Ridgeview Rd. onto N. Augusta St. Visibility is impaired at that intersection with the presence of a hill. Were the wall, the hedge, the tree and all electric poles to be removed from that area, it would still be a challenging intersection to cross. I know this to be true, as I often cross to Chilton Hall from the opposite side of the street, on foot, when returning from a walk. The hill is the cause of any visual challenges I have experienced at that intersection. In conclusion, I request that you allow the wall to remain as a positive feature of the property.

Sincerely,

Kelly Mansoor
Resident of Chilton Hall
1403 N. Augusta St.

Staunton Board of Zoning Appeals

Regarding: Wall at 1403 North Augusta Street, which intersects with Ridgeview Road

April 2, 2018

Dear Zoning Board Members,

From January, 2010 to March, 2013, I resided at 1403 N. Augusta Street also known as "Chilton Hall". During this time I used the intersection at Ridgeview Road and North Augusta Street many times and continue to use this intersection frequently. I have never experienced any issues with impaired vision or navigating this intersection due to the wall on the property of 1403 N. Augusta Street. Considering that Staunton is notorious for odd shaped intersections that crisscross, transect in sharp angular corners, fork in V and Y shapes, I would conformably state that the intersection at Ridgeview Road and N. Augusta Street is unexceptional to dozens of other intersections.

During the time I lived at 1403 North Augusta (Chilton Hall), I found the wall to be essential as a sound barrier to the very busy traffic on North Augusta Street. North Augusta Street (US 11) is the main feed to Downtown Staunton from Interstate 81, exit 225. It also is the main thoroughfare for the high population of residents north of town. Traffic is continuous to and from these areas. The US Post Office, which has a 24 hour a day operation (consisting of multiple trucks and tractor trailer transportation), is three blocks north of Chilton Hall. This operation generates traffic by employee vehicles, mail delivery vehicles, and customer vehicles. Directly across the street is The Legacy, a high volume senior living complex, and Kings Daughter Nursing Home. This also generates twenty four hours of traffic and constant noise triggered by emergency responders, fire trucks and rescue squads en route to The Legacy.

The Wall, at 1403 N. Augusta Street (Chilton Hall), which is constructed inside of well-established hedging, is aesthetically pleasing and conforms to the stately ambiance of the property. The owners, Frank and Debra Belloni, went to great lengths to involve the neighbors prior to and even during the construction of the wall. Neighbors were even included when design and color were considered. The wall color is a shade of green that blends nicely with the surrounding vegetation. The columns are very becoming, constructed of traditional style bricks and capped with the ORIGINAL Chilton Hall wall column caps, which are over 118 years old.

In conclusion, I affirm that the wall, located at 1403 N. Augusta Street (Chilton Hall), is NOT a hazard. It does not create any issues or obstacles which impair vision at the intersection of North Augusta and Ridgeview Road. It is tastefully constructed, aesthetically pleasing, and enhances the stately integrity of the neighborhood. It is my opinion, Ms. Belloni should be granted any variance or special use to ensure that the Wall remains. I am requesting to speak at any public hearings or meetings concerning this matter. The Board members are welcome to contact me at any time.

Sincerely,

Sonny L. Cubbage
2618 N. Augusta Street
Staunton VA 24401 (540-383-6090)

Dear Board of Zoning Members, 03 April 2018

I am a resident of Chilton Hall located at 1403 N Augusta St and am writing this letter in support of keeping the wall that was erected inside the hedge-line that runs along N Augusta St. The wall provides additional separation and privacy from the frequent street traffic, which as a resident I value greatly. It also adds to the overall aesthetics of the property.

As I understand, there have been claims of "impaired line-of-sight" due to the proximity of the wall to the street. Again, the wall is inside the hedge-line and is a very suitable distance from the street. I use the intersection at Ridgeview Rd an N Augusta St on a daily basis and the only challenge to seeing traffic is a hill on N Augusta St that crests just north of Ridgeview Rd. The wall in question does not block the view of traffic from the intersection or affect the surrounding properties in any way. Destruction of the wall would be an unnecessary waste of time and resources and would take away from the stately beauty of the Chilton Hall property.

Please weigh the benefits of the wall remaining as-is on the property against the fact that it does not cause any hinderance or impairment to traffic or surrounding properties.

I thank you for your time and consideration.

Kind Regards,

Chandra M. Clarke
1403 N Augusta St #4
Staunton, Va 24401
(765) 656-7271

Karen Wilkins

From: Mark Obenshain
Sent: Wednesday, April 11, 2018 5:44 AM
To: Karen Wilkins
Subject: Fwd: letter to Staunton Board of Zoning Appeals re: 1403 N. Augusta St Wall

Sent from my iPad

Begin forwarded message:

From: Brian McDermott <bgmcd222@outlook.com>
Date: April 11, 2018 at 7:36:41 AM EDT
To: "mdo@Obenshainlaw.com" <mdo@Obenshainlaw.com>
Cc: Brian McDermott <bgmcd222@outlook.com>
Subject: letter to Staunton Board of Zoning Appeals re: 1403 N. Augusta St Wall

Dear Mr. Obenshain,
Please accept the letter below as our support for Debra Chilton-Belloni's request to the Board of Zoning Appeals. Thank You.
Brian

****

Brian G. McDermott
525 Glass Hollow Road.
Afton, VA 22920
978-505-0662
bgmcd222@outlook.com

April 9, 2018

From:
Brian G McDermott
525 Glass Hollow Road
Afton, VA 22920

To:
City of Staunton Board of Zoning Appeals
Staunton, VA, 24401

Dear Members of the Board of Zoning Appeals,

I am writing to offer my support of the request of Ms. Debra Chilton-Belloni of 1403 N. Augusta St. Staunton, Virginia, for a variance to sections 18.120.010(2) and 18.120.010(3)(b) and 18.120.010(3)(d) Yard, Building Setback, and Open Space Exceptions, of the Code of the City of Staunton, to allow a wall over 3 and ½ feet in the front yard and over 2 and ½ feet at the intersection of N. Augusta St. and Ridgeview Rd.

My wife and I are previous tenants of the first floor apartment at 1403 N. Augusta Street (Apt A). We lived at this address from August 2016 through July 2017. We thoroughly enjoyed our stay at this location while we looked for a house to purchase in the area.. One of the main reasons we enjoyed living in this apartment is because of how the hedge and wall provides not only a sight and sound barrier between the front yard and the busy N. Augusta Street traffic, it also provides an entrance into one of Staunton's admired and well kept neighborhoods.

We understand that concerns have been raised regarding traffic safety because of the wall. During our entire stay at this location, we did not find any issues with traffic safety due to the wall. In fact, in our experiences entering and exiting N. Augusta Street either from the driveway or Ridgeview Road it is the crest of the hill and/or the hedge that caused any traffic difficulty. The wall itself does not obstruct any view or cause any safety concerns in our opinion.

Sincerely,
Brian McDermott

A couple, a city and the wall that divided them

Gabe Cavallaro, gcavallaro@newsleader.com 6:40 p.m. EDT November 4, 2016

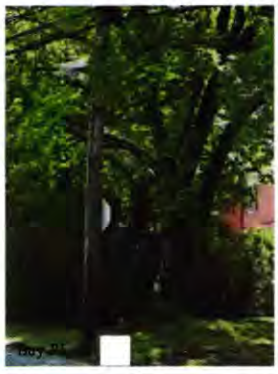
(Photo: Holly Marcus/Special to The News Leader)

STAUNTON - The Bellonis moved to Staunton in 2006. They built a wall around their property. The city said the wall violated the zoning code and needed to be torn down. They refused. A 10-year legal battle ensued.

It all started when Debra and Frank Belloni decided they wanted to block out noise at their Augusta Street property and the best way to do that was to build a wall. They didn't just go and build it though — they got permission from a city zoning official first — which is a big reason why Debra Belloni can't believe this ordeal is still dragging on.

"We were very well aware of zoning, that's why we went to the city to ask," she said.

Earl Thompson, who was an authorized official of the zoning office at the time, told them they could build the wall and what the Bellonis constructed was what he expected them to, they didn't mislead him, according to his testimony from 2011 Staunton District Court. Yet, the city says the wall violates the zoning code, as it's greater than 3 feet high and sits on a street corner where it obstructs the line of sight for turning vehicles — this law needs to be enforced so as not to set a precedent, city officials say.



Debra Chilton-Belloni has been fighting to keep a wall that she and her husband had built around a 19th century house they bought 10 years ago to help reduce traffic noise along N. Augusta Street in Staunton in this photo taken on July 27, 2016. The city of Staunton said the wall was not built in accordance to the zoning regulations for a corner lot. (Photo: Holly Marcus/Special to The News Leader)

"All we're asking her to do is what any other citizen is required to do, which is comply with the law," said Victor Santos, the private attorney the city has hired on retainer to handle this case. "You can't selectively enforce."

Santos said the way the law is written is black and white and the Bellonis' wall violates that law and so if they don't agree with that, they should tell their representatives in the Virginia General Assembly to change the law.

"Laws need to be enforced and if the law's not a good law, then it needs to be changed — that's how you do it," he said.

That's not how Debra Belloni see things though — she said since they did everything they could as citizens to make sure they were following the rules and then chose to make the investment of building the wall, why should they have to tear it down?

"I just think that government has certain obligations and that citizens ought to be able to rely on them, they ought to be able to within reason use their own property as they see fit and particularly if government tells them that they can do something with their property, they ought to be able to rely on it," said Mark Obenshain, Belloni's lawyer.

Belloni said she thinks if the city of Staunton can succeed in having her tear down the wall, the real precedent that would be set is that a citizen can't get advice from the city and expect to rely on it.

Buy Photo

Debra Chilton-Belloni points out a wall that was built 10 years ago behind a hedge row to help reduce traffic noise at her 19th century home along N. Augusta Street in Staunton on July 27, 2016. The city of Staunton said the wall was not built in accordance to the zoning regulations for a corner lot. (Photo: Holly Marcus/Special to The News Leader)

When this mindset has met the city's steadfastness in enforcing the code as written, the result has been a seemingly never-ending saga that started with the Staunton Board of Zoning Appeals, made its way to Staunton District Court and will soon be heard in the Virginia Supreme Court, after Belloni's appeal was accepted last week.

"It's been a huge disappointment and I try to stay positive and hope that common sense will prevail and that right will somehow come out of all this, but I have to say it's been very disappointing," Belloni said. "Who wins? It just seems like what they want is very destructive without any benefit for anybody — it's costly and it's destructive."

Santos for his part agreed that after 10 years, this case has cost the city too much.

"It appears as if somehow we're beating up on her, but all we're asking is for her to comply with what the law is and it's not fair to the city to frankly spend resources on me, when they could be using it for other purposes that benefit the community as a whole," he said. "The cost of appealing to the Supreme Court of Virginia, you know attorneys' fees, is not cheap, the city's paying my bill."

He insists the city has no vendetta against Belloni and that they've been very patient, even offering compromises to the couple over the years, saying they would be amenable if they deconstructed the wall to a specified level that was still technically in violation of the code.

Yet time has passed and no agreement was ever reached. Debra Belloni lost her husband, Frank, in 2013 within days of a truck crashing into it, which has left the wall in its current state of disrepair. If Belloni were to repair it, the city has notified her that this would be considered a fresh violation.

And so this battle marches on, to the Supreme Court of Virginia.

"If it goes long enough, I won't be here either anymore," Belloni said.

Former News Leader reporter Claire Cooper contributed reporting to this article.

THE NEWS LEADER

Navigating regulation tricky for evolving Staunton Airbnb economy

(http://www.newsleader.com/story/news/local/2016/11/03/navigating-regulation-tricky-airbnb-economy-stauntont/92768020/?from=global&sessionKey=&autologin=)

Read or Share this story: http://www.newsleader.com/story/news/local/2016/11/04/couple-city-and-wall-divided-them/93247538/

BOARD OF ZONING APPEALS
City of Staunton, Virginia
June 12, 2018
2:00 P.M.

BZA MEMBERS PRESENT:	Paul Vames, Chair Bradley Bryant, Vice Chair Willard Keeling Hal Sharp Judith Wiegand
CITY OFFICIALS PRESENT:	Rodney Rhodes, Zoning Administrator Timothy Hartless, City Planner Linda Nesselrodt, Zoning Technician Suzanne F. Simmons, Clerk of Council

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Call to Order

Mr. Vames called the meeting to order at 2:00 p.m. and asked that a moment of silence be observed at that time.

Approval of Minutes

Mr. Vames moved for approval of the minutes of the February 13, 2018 meeting.

Ms. Wiegand requested that the phrase "CLOSED MEETING" on the second page of the heading be either deleted or changed as there never was a closed meeting and she stated she felt very uncomfortable if the minutes reflected that there was a closed meeting. Ms. Wiegand stated there was discussion of having a closed meeting, but the board decided against having a closed meeting. Mr. Vames replied that was correct and to add the word "discussion" to amend the minutes. He then noted to delete the words "CLOSED MEETING" from the heading.

Mr. Keeling moved for approval of the minutes of the February 13, 2018, meeting with the deletion as indicated above.

The motion was seconded by Ms. Wiegand and carried 5-0.

NEW BUSINESS:

a) A request by Ms. Debra Chilton-Belloni of 1403 N. Augusta St., Staunton, Virginia, for a variance to sections 18.120.010(2) and 18.120.010(3)(b), and 18.120.010(3)(d) Yard, Building Setback, and Open Space Exceptions, of the Code of the City of Staunton, to allow a wall over 3 and ½ feet in the front yard

and over 2 and ½ feet at the intersection of N. Augusta St. and Ridgeview Rd.

Mr. Vames stated he would like to begin the meeting by setting the platform of how the meeting would be handled. He asked Mark Obenshain, Victor Santos, and Rodney Rhodes to approach the dais for a discussion on how the meeting would be handled.

Mr. Vames read the following statement: "On June 5, 2014 the Belloni's filed an appeal of the zoning violation notice. The Board of Zoning Appeals is here this afternoon to decide that appeal. Specifically, we will decide whether the City Zoning Official made a correct interpretation and application of the City zoning ordinance in issuing the zoning violation notice to the Belloni's. The zoning violation notice ___ and issued to Mrs. Belloni by the City and lists at least 3 of the 5 members of the Board of Zoning Appeals vote to overturn it. Our decision was made on the evidence we hear today and we have been advised not to have any discussions with anyone about this appeal outside of this hearing today. As required by law, the board members received a copy of the City's file on this matter and a duplicate copy was provided to Mrs. Belloni's legal counsel. The City of Staunton Zoning Administrator, Mr. Rodney Rhodes, shall first explain the basis for his decision, the attorneys for both the City of Staunton and Mrs. Belloni have already sent many materials for and against their respective positions to each member of the Board. So, I believe the Board understands the controversy and we have just completed an on-site view of the subject property. In light of that, I suggest that Mr. Rhodes' explanation for the basis of his decision can be done in under 5 minutes. In fact, the suggestion is 3 minutes, but I'm going to say that Mr. Rhodes needed a little bit more time so we're going to limit him to 5 minutes." Mr. Vames stated that was the opening statement.

Mr. Vames continued reading "that next Mrs. Belloni and her legal counsel will proceed to make their case in favor of overturning the zoning violation notice and would have the opportunity to present facts and evidence in support of their position including calling witnesses. After completion of Mrs. Belloni's presentation, the City and its legal counsel will then have the opportunity to make its case and may also call witnesses. During each of these presentations, there will be no cross talk or cross examination and no questions. Each side will be given the chance to introduce the evidence into the records without interpretation or interruption. As noted above and in advance of the hearing, each side has already submitted a great amount of material to the Board. I propose that we set a time limit to each side's presentation". Mr. Vames stated each side would have 1 hour, 15 minutes each to present. "There is no limit on the number of witnesses that can be called, there will be no objections or interruptions by one side of the other's presentation and I believe each side is comfortable that the Board can decide what is relevant, important or credible. After the City has presented its case, the Board members will have the opportunity to ask questions of both parties and any witnesses if the Board desires clarification or additional information." Mr. Vames stated he advised the Board members to take notes during the presentations of questions they want to ask once the presentations are over. "Once the Board members questions are answered, Mrs. Belloni and the City will each be given 3 minutes to make a closing statement to the Board." Mr. Vames stated that he believed the procedure that he outlined gives each side the opportunity to

introduce all of the evidence it desires for the Board's consideration. He asked that everyone there respect the process set forth and that all presenters were to be treated with dignity and respect.

Mr. Santos stated that what was before the Board today was not the correctness of the decision of the Zoning Administrator as to whether there was a violation or not and felt that was established. He felt the issue before the Board is whether under the statute a variance should be granted to Mrs. Belloni. He stated initially Mr. Vames was talking about the correctness of the position of the Zoning Administrator. Mr. Vames replied that was correct.

Mr. Obenschain stated that he thought the decision of the Zoning Administrator is that he denied the variance request and that was the decision that is being appealed and is before the Board.

Mr. Santos stated there is technically a violation.

Mr. Rhodes stated he agreed that the wall is taller than three and one-half feet and as Zoning Administrator he did not have the authority to approve a variance.

Mr. Obenshain stated the only issue he had with the proposed rules is that they basically go first and have the opportunity to put their case on and then Mr. Santos puts on the City's case for an hour, but then he would only have three minutes to respond in closing, he wouldn't really have an opportunity to address points that the City may raise.

Mr. Vames stated he wanted to have a motion on setting that procedure that was outlined be adopted for today's meeting only.

Mr. Sharp moved that the Board receive the instructions that the Chair stated. Seconded by Ms. Wiegand, the motion carried unanimously.

Rodney Rhodes, Zoning Administrator, reintroduced himself to the Board. He noted he has been a Certified Zoning Administrator for over a decade and has nearly twenty-three years of experience as a Zoning Administrator and principle staff member for BZA's in Virginia. Staunton is the fourth jurisdiction he has served in that capacity as well as ten years serving Williamsburg in that capacity. He stated he has reviewed hundreds of applications over the course of his career that went before the BZA.

Mr. Rhodes stated the application filed by Mrs. Belloni is an after-the-fact variance for a wall that was constructed ten years ago in violation of the zoning ordinance at 1403 N. Augusta Street. The application seeks variances to three code sections noted in the April, 2018 agenda briefing for a wall that exceeds three and one-half feet in the front yard, a wall that exceeds a three and one-half feet requirement in the secondary front yard, and a wall that exceeds two and one-half feet in a sight triangle at an intersection. Mr. Rhodes stated the application did not provide any specifics on the variance request and the application seeks a variance from the maximum height restrictions; however, no

particular height limits are specified. He noted the BZA application form requires a ___ material, such a site plan or building elevation map. Mr. Rhodes stated the application only includes a Googled street view of the wall. He noted if he had been employed by the City in 2014, he would have considered the application incomplete. He stated the Board should know exactly what type of variance is being applied for.

Mr. Rhodes stated through photos, measurements, and a survey, staff has determined that the wall ranges in height from approximately six feet to in excess of eight feet, especially at the brick pillars noted at the site visit. As the Chair noted, over the past few months there has been a lot of correspondence between the attorneys and the Board regarding what Virginia codes this should be reviewed under – either the 2014 Code or the current Code. Mr. Rhodes noted for the purpose of argument, without waving his prior position, his comments today are based on the Virginia Code of 2014 and the variance standards under the 2014 Code were outlined in his supplemental briefing and also shown in Exhibit O in the Board members packet.

Mr. Rhodes stated the subject property has no unique physical condition (shape, size, slope, etc.) that restricts it use more so that other lots in the same zoning district or in the neighborhood. It has no "exceptional narrowness, shallowness, size or shape" or any "exceptional topographic conditions" as referenced in the 2014 statute. He noted none of the applicant's arguments can change the reality that the lot is rectangular, nearly 1.3 acres, and relatively level with a front yard depth of approximately 100 feet when the zoning ordinance only requires a 25-foot setback in the P-1, Professional District.

Mr. Rhodes stated in the language of the old 2014 Virginia statute, there is no "condition, situation, or development of property immediately adjacent thereto" that "effectively prohibits or unreasonably restricts the use of the property". He noted all of the adjoining properties are zoned P-1, Professional District, and most of those have been developed with residential uses. Mr. Rhodes stated those uses do not prevent the reasonable use of the subject property.

Mr. Rhodes stated in this situation, a variance is not needed to reach parity with other lots in the district and, actually, to grant a variance in this instance would be affording the property and its owner a "special privilege or convenience" which the 2014 statute specifically prohibited.

Mr. Rhodes stated strict application of the zoning regulations does not "effectively prohibit or unreasonably restrict" the applicant's use of her property. The property has been utilized as a residence for over 100 years and is still residential today. He noted it has apparently been converted into multiple apartments at this time and the property may continue to be used for this purpose without a variance.

Mr. Vames interrupts Mr. Rhodes stating he's had his 5 minutes to speak and asks him to sum it up quickly.

Mr. Rhodes states the Virginia Code notes the applicant must meet all requirements for a

variance and he believed through his review that the applicant does not meet those requirements. He noted whether before or after adoption of the 2015 amendments to the Virginia Code, the applicant fails to establish that her application meets the standard for a variance as defined in Va. Code Section 15.2-2201 and the criteria set out in Va. Code Section 15.2-2309. A variance issued for a lesser reason or simply because the BZA feels it is doing "justice" or following its "heart" would constitute a disregard of the law, plainly wrong decision-making, and a failure apply the law as written, whether under the old law or current law. Mr. Rhodes stated that staff continues to recommend denial.

Mr. Santos states just a matter of housekeeping on behalf of the City, he asked that both the agenda briefing and the supplement to the agenda briefing be made part of the record of these proceedings today. Mr. Vames replied that was fine.

Mr. Mark Obenshain introduced himself as an attorney in Harrisonburg and is representing Debra Chilton-Belloni in this matter. He stated he appreciated the briefing that Mr. Rhodes provided to the Board and his extensive experience. He pointed out that Mr. Rhodes had not been present for the 12 years that this dispute has been ongoing and might be perplexed as to what type of variance is being requested, he did not think there was a single person in the city of Staunton who doesn't understand the nature of the variance that is being requested and the nature of the dispute that dates back to 2006. Mr. Obenshain stated he wanted to provide BZA members with something that very often in legal proceedings is presented to a judge, proposed findings of fact and conclusions of law (Exhibit A attached hereto). He stated he had what they would submit were their proposed findings that they would ask the BZA to adopt. He noted the BZA was free to make its own determination to accept or reject any of the proposed findings, but that it may be helpful in understanding their presentation if given to the members then as they considered the testimony of witnesses and his presentation.

Mr. Santos informed Mr. Vames that it was with the understanding that is not established fact, it simply does propose to be the facts by Mr. Obenshain.

Mr. Obenshain noted, as it had been pointed out, that the Board had received considerable materials and he knew that the Board had reviewed them. He stated, at its heart, is a property rights issue. He stated this case and this variance request involves a duly authorized zoning official of the City of Staunton who was acting within the scope of his authority and told Dr. and Mrs. Belloni, the property owners in this case, that they could build the wall that is today in front of their property and that he intended for them to rely on that. Mr. Obenshain stated that he knew and told them that there was no written application process, there was no permit to be issued, and he understood what they were going to build. Mr. Obenshain noted they built what they told the zoning official they were going to build and they relied upon the permission that was given by this duly authorized City official. Mr. Obenshain stated to make the owners go back and tear the wall down is a clearly demonstrable hardship that would be imposed upon Ms. Chilton-Belloni. He stated for literary critics this bore certain similarities to Dickens' *Bleak House* and that this case has gone on since 2006. Mr. Obenshain stated he hoped, that notwithstanding the correspondence from the City's attorney, there may be an

opportunity to bring an end this dispute today. He stated the Chilton-Belloni's did everything that could be expected. They built a wall in front of their property and he noted it is behind a hedge that is clearly much taller than the wall and not visible because of the hedge. Mr. Obenshain stated they built the wall after asking for permission and being given permission by the City zoning official. He noted the Belloni's purchased the property in 2006, asked for permission in 2006, and they built the wall in 2007. Mr. Obenshain stated as the wall was being completed, the layers of block were finished, but the columns had not been completed, a City official stepped over through the wall and served the Chilton-Belloni's with a notice that they were in violation of the zoning ordinances which they had been told they would not be in violation of if they built this wall. He stated in 2007, after being served with this notice of violation, they appealed. Mr. Obenshain stated they appealed to the Board of Zoning Appeals and sought a ruling that there was no violation by virtue of being grandfathered as also asked for a variance. Mr. Obenshain noted the BZA unanimously granted the variance request, but the City objected because of language in the code that had been interpreted by the Supreme Court of Virginia to prevent the granting of a variance in all but a few cases which involved a hardship that the statute said approached confiscation. He stated the interpretation by the Supreme Court of Virginia as meaning a constitutional taking – the inability to make any reasonably practicable use of one's property.

Mr. Obenshain stated in 2009, after the decision by the BZA, the General Assembly of Virginia removed that approaching confiscation language from the statute. He noted in 2009 the law differed from the law that existed at the time that the owners asked for a variance. Mr. Obenshain stated the BZA granted the variance and then being told to tear it down constituted an undue hardship. He noted the City appealed to the Circuit court stating the variance should not have been granted because it was not permitted to as it was not a hardship approaching confiscation. Mr. Obenshain stated the circuit court agreed with the City and cited the *Cochran* case which said it had to be essentially a hardship that involved a constitutional impairment upon the owner's right to use that property. Following that decision, he noted it simply reversed the BZA's decision granting the variance. Mr. Obenshain stated after that decision, the City never asked for an injunction; therefore, the owners continued to believe they were in the right and should not be compelled to take that wall down.

Mr. Obenshain stated in 2011 the City filed criminal charges against the owners with the General District court judge dismissing the charges. He noted after that decision he became involved with the owners after receiving a call from them.

Mr. Obenshain stated in 2013 a heavy truck ran off of N. Augusta Street and hit the telephone pole in front of the property and then struck the north section of the wall and gate. He noted the City's zoning administrator sent a letter to the owners stating if repairs were made to the wall it would be considered a violation of the zoning ordinance. Mr. Obenshain stated Mrs. Chilton-Belloni received a letter from the City stating she continued to be in violation of the zoning ordinance. He stated on June 11, 2014 he filed a request for a variance seeking permission for the wall to continue to stand and seek relief. He noted the grounds for seeking the variance was that in the interim between

2007, when the first variance was requested, and 2014, the law had changed. He stated the General Assembly of Virginia removed those words "approaching confiscation" from the statute. He noted it didn't have to be a constitutional burden upon the property in order to permit this body to grant a variance. Mr. Obenshain stated the City filed an injunction action in Circuit court compelling the owner to tear down the wall. He noted they asked the Circuit court for a stay allowing the BZA to decide whether or not to grant a variance. Mr. Obenshain stated the Circuit court, at the City's urging, denied the stay stating the issue of whether or not the owner was entitled to a variance had been decided once and she could not seek another variance even if the law had changed. He noted the court concluded an injunction should be issued since the wall was taller than three and one-half feet and there was no basis for it to grant a variance. Mr. Obenshain noted they appealed that to the Supreme Court of Virginia which ruled the Circuit court should have granted a stay. Mr. Obenshain stated the City argued in the Supreme Court of Virginia that the change in the law did not permit the owner to get a variance.

Mr. Obenshain states the City is saying the variance should be denied for a variety of reasons. He noted the first reason is there is no hardship related to the property. He said the owner's response was it clearly related to the property. He then referred to page 2 of the chart provided by the City's Zoning Administrator referencing BZA – Variance Provisions of 2014 Statutes. He noted it did address "by reason of narrowness, shallowness, size of a specific piece of property", but then stated it had the word "**or"** and it was in the alternative, "where the board is satisfied, upon the evidence heard by it, the granting of the variance will alleviate a clearly demonstrable hardship". He stated they were asking the board to grant the variance on the basis of the clearly demonstrable hardship that was the permission which was given and relied upon and requiring that the owners remove that wall. Mr. Obenshain stated this was the same argument that was made to the Supreme Court of Virginia. He noted the City has argued in written submissions that the law governing the BZA's decision is an amendment to the statute which was made about 16 months after the application for a variance was filed by the owner. He stated this was first time anyone has suggested that the 2015 amendments to the state code should be applied to the decision-making paradigm applied by this board. He noted the City did not argue this to the Circuit court stating the trial took place the day before the new law took effect, but that the argument in the Supreme Court was more than a year after the 2015 amendments took effect and not argued then. Mr. Obenshain stated they would respectfully submit that the City should not be entitled to refuse to allow the BZA to consider a variance request for four years and then be allowed to say that the law has changed in the interim and they should apply the new law.

Mr. Obenshain noted the City's efforts in this matter are far out of proportion to the issue at hand. He noted from 2013 through 2017, the City had spent nearly $70,000 in seeking to have the owner remove the wall. He then stated he had not been charging the owner for some time because he was fighting for what was right. Mr. Obenschain stated this was an issue that needs to come to an end and it was his hope that it would come to an end today. He noted, in their view, it was a contest between what was right and what was wrong.

Mr. Obenshain read portions of the transcript from Dr. Belloni's testimony where he received a visit from Earl Thompson, Zoning Official. Mr. Obenschain then read a portion of Dr. Belloni's testimony regarding a visit with Tim Hartless on September 27, 2007 with Mr. Hartless delivering a notice of violation.

Mr. Obenshain read portions of the transcript from Earl Thompson's testimony of October 12, 2011. Mr. Obenschain then read portions of the transcript from Tim Hartless' testimony.

Mr. Obenshain stated this testimony is the nub of the case and is what the Supreme Court of Virginia heard. He noted the City's attorney is asserting that the owners brought all of this upon themselves. Mr. Obenshain stated it would be an undue hardship related to the property for the City to come back after the fact and instruct the owner to tear down the wall. He stated in walking through each of the components of the decision-making matrix, there is no question that this is such an application that falls within the discretion and obligation of the BZA to grant the owner a variance.

Mr. Obenschain called on Debra Chilton-Belloni to speak. She stated they purchased the property in August, 2006 with intentions of retiring in Staunton. Due to traffic noise, she noted they approached the City with their plans to build a wall. Ms. Chilton-Belloni stated Earl Thompson made a site visit prior to construction starting in the spring of 2007. She noted Tim Hartless served them with a notice of violation. She stated John Glover informed them that a complaint had been made and informed them they could appeal to the BZA by way of a variance. She stated she had sought compromise in any legal way with the City to be able to maintain the wall. She noted they obtained bids on what it would cost to tear the wall down and were fully intending to comply with the law, both before they built it and after the court made its ruling.

In his closing remarks, Mr. Obenshain referred the BZA members to the chart provided by the Zoning Administrator to the BZA members referencing reasonable deviation from those provisions relating to the size and location of a structure. Secondly, he stated the BZA has to find that strict application of the zoning ordinance would result in unnecessary or unreasonable hardship to the property owner. He stated the need for the variance should not be generally shared by other properties. He noted this was a unique situation and that the variance would result in substantial justice being done. He stated the variance would alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the owner. He stated in this instance if the Belloni's had built the wall and then asked for permission after it had been built and found that it was in violation and asked for the variance then….(Mr. Sharp leaves Council chambers)

Mr. Obenshain asks Mr. Vames if he should stop while Mr. Sharp is gone? (Mr. Sharp left Council chambers for approximately 2-3 minutes) Mr. Vames tells Mr. Obenshain to go ahead.

Mr. Obenshain then continues stating in that circumstance that would be a special

privilege. He states this is not asking for a special privilege, it's simply asking that a variance be granted to alleviate the hardship and to have the City bound by the guidance that it provided. He states it also needed to find that the strict application of the ordinance would produce an undue hardship relating to the property. He states some of these components, elements, and findings are in multiple statutes and the task of the board is not simple. He states he does not believe there is any evidence, or there's ever been, any evidence of any substantial detriment to other property or that the character of the district was going to be changed.

Mr. Vames noted Mr. Obenshain had used 1 hour, 15 minutes of his allotted time with 25 minutes remaining.

Mr. Victor Santos introduced himself and states he represents the Zoning Administrator as well as the City of Staunton. He notes he was retained by the City to enforce the violation and much of what took place occurred before he was involved. Mr. Santos stated they were here because of the ordinance which prohibits a wall in excess of three and one-half feet in height and there is a triangle issue on the corner that is also in violation although slight. He notes this is an emotional case which has gone on for a long time, but because of that there is an element of fairness wanting to creep in. He pointed out that the BZA members had taken an oath when they were appointed and were in effect quasi-judicial judges. Mr. Santos then explained that the members could be interested in the case, but that they must be disinterested in the outcome of the case.

Mr. Santos stated most of what was heard from Mr. Obenshain had been irrelevant. He questioned why Mr. Obenshain would bring up a 2017 change in the law and that it did not pertain to the case being presented today. Mr. Santos stated the BZA members needed to base their decisions on the statutes that were in effect at the time. He noted there is a disagreement about whether that would be the 2015 or the 2014 amendment. He stated he would be directing all of his argument to the 2014 amendment.

Mr. Santos noted how Mr. Obenshain had gone into great detail about the testimony from Earl Thompson and Dr. Belloni. Mr. Santos stated how Tim Hartless would state without equivocation that he met with Dr. Belloni at the site before any construction started and told them they could not build the wall higher than three and one-half feet. Mr. Santos read from transcript of Earl Thompson's testimony at the BZA hearing relating to his initial response was that the existing zoning code would not permit that, but that the existing hedge might be a nonconforming condition which would allow the wall to be built behind the hedge if it was lower than the hedge. Mr. Santos stated Earl Thompson said "you may be able to do it".

Mr. Santos stated Mr. Vames was the only current member on the BZA at that time. He noted the secretary in the Zoning office at that time, Sherry Burke, testified that when Tim Hartless returned to the office from the site visit that she asked him what had taken place. Mr. Santos then read a portion of Ms. Burke's testimony from the transcript.

Mr. Santos stated this shows the Belloni's received two different answers and it was

incumbent upon the owners to get further details. Mr. Santos noted no City official can grant permission to a citizen to violate an ordinance and that the law is very clear. He stated he wanted to emphasize that permission has nothing to do with the case and that the board needs to look at the 2014 ordinance.

Mr. Santos stated he wanted to respond to several of Mr. Obenshain's comments. One, why was the City spending so much money on this case? Mr. Santos pointed out there were three people in violation of the zoning ordinance and the City appealed all of them to the Circuit court in which all three were denied. He stated the other two property owners came quickly into compliance. Mr. Santos stated he had eight separate letters from the City asking the Belloni's to come into compliance to avoid litigation all of which were ignored by the owner (Exhibit B attached hereto). Mr. Santos noted he was authorized by the City, and did propose to the owner and Mr. Obenshain, that the City would agree that the owner could lower the wall down to the closest grout line to three and one-half feet. He stated the City offered to provide equipment and haul the debris to the landfill at the City's expense. Mr. Santos noted there was no response from the owner other than they wanted to keep the wall as it was.

Mr. Santos stated Mr. Obenshain had suggested the Supreme Court of Virginia gave some indication that this was the type of case that required a variance. He noted the court only ruled that this was not *res judicata* and that the owner was entitled to another hearing before the BZA to obtain a variance if she could and never addressed the merits of whether or not the variance should be granted.

Mr. Santos stated the burden is on the owner to show that she's entitled to the variance. He noted her hardship could not be classified as topographical or her adjoining neighbors. Mr. Santos stated what the owner is claiming is economic hardship. He noted economic hardship alone is not grounds for granting a variance and an emotional appeal is irrelevant.

Mr. Santos asked Tim Hartless to testify and prefaced that his testimony, like the testimony of Earl Thompson, is irrelevant to the board's decision making. Mr. Santos asked Mr. Hartless what his specific role is for the City and what was his capacity for the City when the issue of the Belloni wall came up. Mr. Hartless gave a description of his job duties at that time. He stated he received a message from Sherry Burke, department secretary, stating Dr. Belloni had called. Mr. Hartless stated he returned the call the next morning. He stated Dr. Belloni informed him he was interested in building a wall that would serve as a sound barrier. Mr. Hartless stated he noted it was a corner lot and the practice with the Zoning Department involved meeting with the owner on site so that regulations are explained thoroughly. Mr. Hartless stated he met with Dr. Belloni and his wife that afternoon. He noted Dr. Belloni explained to him what type of wall he wanted to build, where he wanted to build it, as well as the height. Mr. Hartless stated he walked around the property with Dr. Belloni and his wife. He noted Dr. Belloni explained that he wanted to build a masonry wall and was not quite sure about the height and assumed it would be six to seven feet tall to act as a sound barrier for traffic noise on North Augusta Street. Mr. Hartless stated he explained to the owner the zoning code requirements which

limited the height of walls to three and one-half feet to which Dr. Belloni stated he did not think a wall of that height would serve as a very good sound barrier. Mr. Hartless stated he suggested to him that he think about some type of vegetative plantings. Mr. Hartless noted the ordinance at that time did control the height of hedges, but not trees or other types of shrubs. He noted in the department's experience living plants tend to do a better job of absorbing sound rather than a solid masonry wall would.

Mr. Santos questioned Mr. Hartless if he had in any suggest to the owners that there might be a possibility that this would be a non-conforming use and that the wall could be built because of the hedge that would be in front of it. Mr. Hartless stated he did not say that and that they had not really spoken about the hedge and whether it would be conforming or not. He noted that a hedge is not a structure so it cannot be given that same non-conforming status that a structure would. Mr. Hartless stated he was very clear with Dr. Belloni that any wall that they built could not exceed three and one-half feet. Mr. Hartless stated at that visit there was no construction going on nor any materials on site. Mr. Hartless noted the owners were not happy with the requirement that the wall was not to exceed three and one-half feet and again said it would not function very well as a sound barrier.

Mr. Santos questioned Mr. Hartless if the City monitors whether construction goes on or not or is the violation complaint driven. Mr. Hartless stated that violations are always complaint driven. He then clarified they would only enforce the zoning code when they have an active complaint. He noted they did not go out and explore or patrol the city looking for violations and that they only act when someone calls or comes into the office and specifically gives them an address and a specific complaint.

Mr. Santos questioned Mr. Hartless if there was inaction by the City after the wall was built, it would not have made a difference unless someone complained. Mr. Hartless stated that was correct.

Mr. Hartless stated he came back with Mr. Thompson later when they hand delivered the notice of violation. Mr. Hartless noted that segments of the wall on the North Augusta Street side had been constructed and was not sure if they were completed, but stated they were definitely more than three and one-half feet tall. Mr. Hartless stated on the Ridgeview Road side of the property, very little, if any, of the wall had been constructed. He noted they parked on Ridgeview Road, walked up a little bank directly into the front yard with there being no wall there to obstruct them. Mr. Hartless stated the columns had not been constructed yet. Mr. Santos stated he had no further questions for Mr. Hartless.

Mr. Santos gave a PowerPoint presentation showing the definitions of a variance. He stated it indicates that the wall is still not in compliance with the three and one-half foot requirement. Mr. Santos referred to photographs from January which did not hide the wall at that time of year and was very much visible. He noted there is a definitional section which is the definition of a variance. He stated a variance can only be granted as it is defined. He further addressed in detail the definition of "unreasonable hardship". He stated it is not the wall that creates the hardship, it is the land that may or may not

create the hardship. He noted it is not the variance's job to correct a hardship that has been created. Mr. Santos stated the property, as defined by the variance, would not be restricted by utilization nor has the owner shown a demonstrable hardship. He stated it is a special privilege or convenience for the owner to maintain the wall. Mr. Santos noted if all property owners on N. Augusta Street were permitted to construct walls of that same height, it would create a problem in the sense of the character of the neighborhood, but it also poses a danger to the citizens of the city as far as public safety. He stated that this did not matter because it is not a hardship for which a variance can be granted.

Mr. Santos gave an example of a case pointing it out to differentiate between approaching confiscation and a Supreme Court case that didn't address approaching confiscation. He noted it was a city ordinance about undue hardship. Mr. Santos stated other than the financial hardship that the owner may suffer by having to take down part of the wall, what other hardship does she have.

Mr. Santos called on Chief Williams, Staunton Police Department, to testify. Chief Williams stated he had an opportunity to look at the wall on N. Augusta Street and it was of his opinion that there were public safety concerns regarding structures of that height and solid masonry construction.

Mr. Vames stated that he remembered Chief Williams' testimony from many years ago when he was one of two board members to hear that case. He noted his testimony was centered around the idea that when a car came up on Ridgeview Road that visibility was limited. Mr. Vames stated the hedge was causing the sight problem at that time.

Mr. Santos referred the BZA members to Exhibit N on the April 3, 2018 briefing. He asked them not to be misled by the view that they saw today of the hedge. Mr. Santos referred to photograph #4. Mr. Vames stated he drove by the property approximately a dozen time a week and it is very difficult, even in the middle of winter, to see the wall.

Mr. Santos called on John Glover to testify. He stated at the time of the first notice of violation his position with the City was that of Building Official, Deputy Fire Marshall, Zoning Administrator, and Erosion and Sediment Control Administrator. Mr. Glover stated he went to the Belloni property with Mr. Hartless. He noted a notice of violation had been sent to the property owners in September, 2007, but work continued on the wall. Mr. Glover stated sometime between September-October, 2007, he went back with Mr. Hartless and delivered a stop work order and advised Dr. and Mrs. Belloni to stop construction on the wall which had not yet been completed. Mr. Glover noted they parked on Ridgeview Road and were able to step over the wall. He stated it was only one course of block as they were able to step over it. Mr. Glover stated he handed the stop work order to the owners. He stated the N. Augusta Street construction was considerably more complete, but the Ridgeview side was not. Mr. Glover stated the owners did not stop construction and continued until the wall was completed. He stated at that point the owners had not sought a variance. Mr. Glover stated he met with the owners and sent them another letter dated November, 2007 after he had reviewed the matter and informed them it was indeed in violation and advised them of their rights of which they had been

advised on previously in the September notice of violation. Despite all of that notice, Mr. Glover stated construction continued until the wall was complete. Mr. Glover stated the stop work order was delivered September 20, 2007. He noted another phone call was received, of the multiple complaints received during the process, that construction was still ongoing. He believed it was around the end of September or beginning of October and could not recall the exact date.

Mr. Bryant stated if he referenced the original proceedings, it clearly states that Dr. Belloni stated that he came September 27, 2007 and brought the notice. Mr. Bryant noted the date on the paperwork was September 20, 2007, but he received it on September 27, 2007 per page 20 of the original proceedings.

Discussion ensued between Mr. Santos and Mr. Obenshain.

Mr. Vames stated he was going back by memory and recalled Dr. Belloni sitting there and Mr. Hartless made a statement about when he went to the house to visit and Dr. Belloni asked when he was at his house. Mr. Vames noted Mr. Hartless gave him a date to which Dr. Belloni again asked the date to which Dr. Belloni replied he was in Europe at that time. Mr. Vames stated at that time the dates ended up being changed and questioned if Mr. Glover remembered that happening. Mr. Glover replied he did not remember that happening and, in fact, he reviewed the transcript and did not recall anything like that being mentioned of anyone being in Europe. Mr. Glover stated there was a debate at one of the Circuit court hearings regarding someone's presence in the country, but that was not during the 2008 BZA hearing. Mr. Santos stated that was correct.

Mr. Santos stated he wanted to caution the board and that he had put the evidence on to show that there are two sides to this and not because he believed it was relevant. Mr. Santos stated he did not feel it was part of the proceedings whether or not Ms. Chilton-Belloni got permission from a city official. He noted it also shows, so that there's no question of fairness, that the City has its side to this also and it's not all one-sided. He stated the owners could have stopped construction and sought legal advice or could have sought a variance, but they chose to build, knowing that they were stop, and they chose to incur the expense.

Mr. Sharp asked Mr. Santos how strong a stop work order document if it's issued by the City, who enforces that, how quickly it's enforced, and who monitors it. Mr. Santos replied that the point is if he were to receive a notice from the City to stop, he would investigate it before he kept building. Mr. Glover responded to Mr. Sharp's question.

Mr. Vames questioned Mr. Obenshain and Mr. Santos about conducting a public hearing and noted it was standard procedure for the BZA to do. Discussion ensued regarding relevancy of the public hearing.

Mr. Vames states since Mr. Obenshain spoke first, was there anyone in the audience who would like to speak in favor of granting the variance to Ms. Chilton-Belloni. He notes

they can step up to the lectern one at a time and give their name and address.

Ms. Carol Kipp, 16 Church Street, stated she was in sympathy with the owner's cause and felt it was an empty argument regarding the hedge obstructing the view.

Ms. Stephanie Brooks, 30 Ridgeview Road, stated she saw no difference in visibility at the intersection since the wall was constructed and did not feel it was a hazard to public safety. She noted it would be detrimental to the property to have the owner take down the wall.

Mr. Sonny Cubbage, 2618 N. Augusta Street, stated he had rented an apartment from the owner. He referenced the noise coming from The Legacy and King's Daughters' Rehabilitation Center located across the street.

Mr. John ____, stated he had previously lived at Chilton Hall before and after construction of the wall. He stated he felt more secure with the wall being there.

Mr. Larry Beatty, of Fairfax, stated he was a friend of the owners. He referenced a variance issue he had experienced. He noted the BZA is to look out for the best welfare for the city. He felt if the wall were to be torn down, it would decrease the property value.

Ms. Jean Hoffman, friend, felt there was a lack of respect for the owners. She stated if she were a citizen of Staunton she would question the amount of money being spent.

There was no one in the audience to speak in opposition of the variance.

Mr. Obenshain stated he would like to call Ms. Chilton-Belloni to respond to testimony from the City's witnesses. He noted Mr. Hartless offered testimony about a meeting he says took place at the property before any construction took place. Ms. Chilton-Belloni stated Mr. Hartless did not meet with them before construction on the wall was started. She stated the only person who did a site analysis was Mr. Hartless, which she then changed to Earl Thompson. Ms. Chilton-Belloni stated she distinctly remembered answering the door to Mr. Glover and Mr. Thompson and that behind them she could see the masonry part of the wall constructed and the columns had not been constructed. She stated she had a canceled check for payment of the construction being completed prior to the City serving the notice of violation. Ms. Chilton-Belloni stated in March, 2018 she had the hedge severely trimmed to address concerns of residents on the ground floor of the property entering and leaving the drive of potentially obstructing sight. She noted the hedge is partially deciduous in wintertime. Ms. Chilton-Belloni stated it was not true that they ignored the City's letters sent to them and that her husband had addressed the City's letters. She stated Mr. Glover was very helpful and that they had appealed to him after the notice had been served. She noted Mr. Glover explained that someone had complained and the City could not ignore the complaint. She stated they asked Mr. Glover if there was some compromise that could brought about to the complaint. She noted he followed up and stated he was not able to resolve the matter and suggested to them that an alternative would be to file for a variance which they did.

Mr. Obenshain stated the hardship being asserted is not being required to take down the wall, but it's in being required to take down the wall after being told to build it. He noted that was the hardship that is at hand. Mr. Obenshain directs BZA members to the variance provisions chart referencing a clearly demonstrable hardship and that is what gives the board in this case the power to grant the variance. He states the owner has experienced a substantial hardship that will be imposed if she is required to remove that wall.

Mr. Santos stated he struggled before the hearing to present a lot of evidence as all of this has been a distraction. He opined whether the wall serves as a noise barrier, whether the hedge blocks the wall, whether or not there's a fairness issue about the owner loving her property and wanting to keep it preserved, those are not the elements for granting a variance. Mr. Santos noted the BZA members are not judges or lawyers, but the validity of their decision is based on their applications of the facts to the law and not irrelevant facts presented. He asked the board members to use the guiding principles of only the facts and the law.

A short break is taken.

Mr. Vames stated a board member would like to ask a few questions of the people who gave testimony.

Mr. Bryant asks Mr. Glover if the wall distance from the corner meet the specifications as in it needing to be a certain setback from the actual road. Mr. Glover responds that Mr. Hartless or Mr. Rhodes would be better able to answer as he is the current zoning administrator. Mr. Rhodes noted in the packet there was a survey which shows the wall off of the property line on N. Augusta Street by approximately eight feet and along Ridgeview Road by about five feet. Mr. Rhodes stated there is no setback requirement for a wall if it meets the height limit of three and one-half feet. Mr. Bryant asks if every fence has a setback from the highway. Mr. Rhodes replies a fence can be built up to the property line and to the right of way.

Mr. Bryant asks Mr. Glover, because they are not able to rule on something such as a bush or planted objects, are they considered semipermeable. He noted at today's site visit, he was not able to see anything, but once he pulled out to where he was within bush range, he could actually see motion through the bushes and could see whether vehicles were approaching or not. He noted in the original statements the bushes never came into question as they were being grandfathered in. Mr. Glover stated that it was in his opinion that the bushes were never a question due to the fact that they are not a structure by definition in the building code, Webster's dictionary or any other reference someone could find. He noted a hedge is a living thing and is not a structure; therefore, the non-conforming provisions of the ordinance do not apply to a hedge.

Mr. Bryant notes he has questions for Ms. Chilton-Belloni. He asks her if there were exchanges where the City did offer the financial help to bring the wall back into code.

Ms. Chilton-Belloni states the City did not offer financial help, and she is not claiming that this is a hardship based on financial consideration, but the City did offer, to her best recollection, was to provide City dump trucks to assist her contractor is tearing the wall down and the City offered to waive the landfill fees. She stated the City wanted the wall down to the nearest grout line closest to three and one-half feet and wanted the concrete caps replaced on top of the wall. She noted this would have been a demolition and reconstruction project for which she got bids on. She stated, apart from the costs, the hardship in tearing down the wall has been to ruin their hopes of living in Staunton. She wanted the board to know it was not strictly a financial hardship and that they had the highest respect for the law and never would have made that investment if they thought there would be a reason to ask for a variance.

Mr. Bryant asks Ms. Chilton-Belloni if she has resided for any length of time with the property as her primary residence. She states they lived there for three years. Mr. Bryant asks her if she does not recall meeting Mr. Hartless for the very first time when he came out and advised them that it would only be three and one-half feet and prior to Mr. Thompson's visit. She stated she remembered meeting Mr. Hartless for the first time and it was not on her property, but it was at the office at City Hall when they came to ask for a site analysis. She noted Mr. Thompson came to do the site analysis and Mr. Hartless never did a site analysis in their presence. Mr. Bryant asks if it is in agreement that the wall had not been completed when they were served with the stop work order notice. She states the brick columns had not been completed because the contractor had another job to go to, but otherwise they would have been completed.

Mr. Keeling asks Mr. Glover about the procedure where the owners were cited with the violation and issued the stop work order, but it wasn't enforced. Mr. Glover explained that once the notice of violation was issued and the stop work order was issued, as well as an additional letter from him after reviewing the matter, it was then turned over to the legal authority of the City, the City's attorney. Mr. Glover stated there were numerous letters back and forth during that time period and no resolution was met to his understanding. Mr. Glover notes he did not know when construction started, but on September 20, 2007 is when the notice of violation was given. Mr. Glover noted in his opinion and stating his integrity, the wall was not complete then and he stepped over the wall towards the end of September - beginning of October. He stated he did not walk between two sections through a column, he stepped over the wall. Mr. Glover states the avenue of seeking a variance is required by the code of Virginia to be offered when the notice of violation is issued and is stated on that document.

Mr. Bryant then reads from the section of the code and notes he had referenced it regarding the language from 2014 back to when the case would have been prevalent. He notes the reason he brings that point up is multiple time there was discussion about what the state of the wall and where was construction at when the stop work order was issued, as well as conversations about the financial status and the legality of it all. He notes that he is a general contractor and cites examples of the law being applied. He notes that the law is the law. He states that the BZA only gets the authority to apply the law. He notes that several BZA members were told when taking courses that they were to leave their

hearts outside of the door. He states they are sworn in by the judge and are given his power to do this job.

Mr. Obenshain replies in terms that even if construction was stopped, the block wall is already, according to the City, in violation and that is what they submit is through no fault of their own. He states even if they had stopped at that point, they very well may be at the same situation and asking for the same variance. He notes it's just a component of it that wasn't completed and would have been encompassed by the same variance at the same point. Mr. Bryant states there is plenty of gray area as dates are not easily recorded and it's from memory and witness testimony.

Mr. Santos replied Mr. Bryant had hit the nail on the head and if he is given a stop work order, he is going to stop and to the extent that he doesn't stop, it's on him. He states there's a big disagreement about what the evidence is as to what point of the construction that stop work order was issued to the owners. Mr. Santos states common sense is important and is not what drives the decision of a board, it is the facts and the law.

Mr. Vames stated the public hearing is closed.

Mr. Keeling stated he had been on this matter since the very beginning and felt he knew all of the facts. He stated he had carefully listened to all of the material, the evidence presented by both sides, and had listened to all of the arguments presented by both sides today. He moved to grant variances to Section 18.120.10 (2), Section 18.120.1010(3)(b), and Section 18.120.010(3)(d) for the property at N. Augusta Street and Ridgeview Road. His motion in variances are to leave the wall in place without modification and to allow for repairs to the damage to the entrance gate.

Seconded by Mr. Sharp, the motion carried as follows:

Ms. Wiegand – nay
Mr. Bryant – nay
Mr. Keeling – yes
Mr. Sharp – yes
Mr. Vames – yes

Motion carries 3-2.

OLD BUSINESS:

There was no old business.

OTHER BUSINESS:

There was no other business. Mr. Vames stated either party when they are on the losing side have thirty days to file an appeal.

There being no further business, the meeting adjourned at 5:07 p.m.

Suzanne F. Simmons
Clerk of Council

Debra Chilton Belloni respectfully tenders the following proposed findings to the Board that she asks it to adopt as its ruling:

- The BZA does hereby authorize a variance with respect to Staunton City Code Section 18.120.010 to permit the wall constructed on the Chilton-Belloni property located at 1403 North Augusta Street. The decision of the BZA is based upon the findings that follow.

- We find that the variance requested and granted is a **reasonable deviation from those provisions regulating the size and location of a structure as required in Va. Code Sec. 15.2-2201** -- specifically we find that after considering the presence and size of the hedge and vegetation outside the wall and further that the reasonableness of the deviation is evidenced by the advice and permission given to the property owners concerning the wall by a duly authorized and trained zoning official acting within the scope of his employment.

- We find that the strict application of **the ordinance would result in an unnecessary or unreasonable hardship to the property owner as required in Va. Code Sec. 15.2-2201** -- specifically we find that the owners followed established procedures before commencing the construction of a wall on the property, they were given permission and they built the wall in reliance upon that permission and to require its demolition would work an unreasonable hardship.

- We find that **the need for the variance is not shared generally by other properties as required in Va. Code Sec. 15.2-2201** -- specifically, we find that the city has acknowledged that it had miscommunicated to the property owners in a manner upon which they reasonably should have been able to rely and that this type of miscommunication does not occur with such frequency as to be shared generally with other properties.

- We find that **the variance is not contrary to and indeed is in harmony with the intended spirit and purpose of the zoning ordinance as required in Va. Code Sec. 15.2-2201 and 15.2-2309(2)** -- specifically we find that the wall does not materially impede the view of traffic or the property because of the hedge that exists and which existed at the time of the construction of the wall.
- We find that **the variance will result in substantial justice being done as required in Va. Code Sec. 15.2-2201** for the reasons set forth above.

- We find that there is no evidence or contention that **the property was acquired other than in good faith as required in Va. Code Sec. 15.2-2309(2)** and the testimony of Ms. Chilton-Belloni confirms this finding of good faith.

- We find that the granting of **the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant as required in Va. Code Sec. 15.2-2309(2)** -- specifically, we find that the applicants followed established policy and practice in asking and the evidence shows that they were given permission to embark on construction before they commenced construction; had they built the wall without asking and/or receiving permission, the result would not be the same.

- We find that **the strict application of the ordinance would produce an undue hardship relating to the property as required in Va. Code Sec. 15.2-2309(2)(a)** for the reasons set forth above and we further find that the City's contention that the hardship does not relate to the property is without merit.

- We find that **the hardship is not shared generally by other properties in the same zoning district and the same vicinity as required in Va. Code Sec. 15.2-2309(2)(b)** -- specifically we find that there is no indication of properties containing structures of similar character that have been erected in reliance upon permission properly given by duly authorized city officials.
- We find that the authorization of **the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by granting the variance as required in Va. Code Sec. 15.2-2309(2)(c)** -- we specifically base this finding upon our personal observations during our site visit and observations and upon our experience.

- We find that **the condition or situation of the property concerned here is not of so general or recurring nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance as required in Va. Code Sec. 15.2-2309(2)** -- specifically we find that the location and size of the vegetation raised reasonable questions as to whether or not the disputed structure would have been permitted notwithstanding the language of the ordinance and further that the permission given by an authorized City Zoning official renders the situation here one that could not reasonably be addressed by a general regulation or amendment to the ordinance.

8 LUTTER

CITY OF STAUNTON

VIRGINIA

P.O. Box 58, Staunton, VA 24402-0058

Planning and Inspection
Department

September 20, 2007

Frank Belloni & Debra Chilton
161 Seclusion Manor
Mineral, Virginia 23117

RE: 1403 N. Augusta St.
Staunton, Virginia

Notice of Violation

Dear Dr. Belloni & Ms. Chilton:

This letter is to serve as notification that after receiving complaints and making an on-site inspection, it appears that you are in violation of Chapter 18.120, Section 18.120.010, Item (2) of The City of Staunton Code. This section lists the regulations for walls and fences and reads as follows:

2) The following regulations provide for the maximum safety of persons using sidewalks and streets, and for the maximum enjoyment of the use of property:

(a) On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway, shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 25 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections.

(b) In any required front yard, except as provided in subsection (a) of this section, no fence, wall, hedge, or yard ornament shall be permitted which materially impedes vision across such yard above the height of three and one-half feet.

The wall which is being constructed on your property is in violation of these requirements and the violation needs to be corrected within 30 days of your receipt of this notice.

You do have the right to appeal this decision to the Zoning Board of Appeals. If you choose to do so, you must file an appeal **in writing within thirty (30) days of this notice.** If you do not file an appeal as noted, the decision becomes non-appealable.

If you have any questions please feel free to contact me at 540-332-3862.

Thank-you for your assistance with this matter.

Sincerely,

Earl Thompson, CBO
Deputy Building Official

Birthplace of the City Manager Form of Government

CITY OF STAUNTON

VIRGINIA

P.O. Box 58, Staunton, VA 24402-0058

Planning and Inspection
Department

November 21, 2007

Dr. Frank Belloni & Ms. Debra Chilton
161 Seclusion Manor
Mineral, VA 23117

RE: 1403 N. Augusta Street
Staunton, Virginia

Dr. Belloni & Ms. Chilton:

Please allow this letter to serve as a follow up to various conversations, which have occurred regarding the wall which you have constructed on your Augusta Street property. The wall, which is shown in the enclosed images, appears to violate provisions of Title 18 of the Staunton City Code. While I realize you believe that there was a misunderstanding with my staff, in any event, we are obliged to apply the following provisions of section 18.120 of the Code.

> "(2) The following regulations provide for the maximum safety of persons using sidewalks and streets, and for the maximum enjoyment of the use of property:
>
> (a) On any corner lot where a front and side yard is required, no wall, fence, sign, structure, or any plant growth which obstructs sight lines at elevations between two and one-half feet and 10 feet above the crown of the adjacent roadway, shall be placed or maintained within a triangle formed by measuring from the point of intersection of the front and exterior side lot lines a distance of 25 feet along the front and side lot lines and connecting the points so established to form a right triangle on the area of the lot adjacent to the street intersections.
>
> (b) In any required front yard, except as provided in subsection (a) of this section, no fence, wall, hedge, or yard ornament shall be permitted which materially impedes vision across such yard above the height of three and one-half feet."

Although at your request I have further reviewed the wall issue at 1403 N Augusta Street, I have concluded that the issued Notice of Violation dated September 20, 2007 was correct. The wall fails to meet the requirements of Section 18.120.010 because:

1. The wall appears to encroach on the required 25-foot right triangle at the intersection of North Augusta Street and Ridgeview Road.

2. The height of the wall exceeds three and one-half feet and therefore materially impedes vision across the front yard.

EXHIBIT
3

It is unfortunate that there may have been miscommunication with my staff, but that does not change the fact that the wall is in violation of Section 18.120.010 (2) of the City of Staunton Code. If you would like to review the City Code further, it is available online through the City's website at www.staunton.va.us.

Your possible options at this point are an appeal of this decision or a request for a variance, both being made to the Board of Zoning Appeals. I have attached the application for pursuit of these options, which will need to be returned to the Planning & Inspections Office of the City of Staunton, in addition to an application fee of $200.00. Please note that due to the Cochran ruling of the Virginia Supreme Court proving a hardship for a variance is very challenging. I enclose a copy of that Supreme Court decision.

Regards,

John W. Glover
Building Official / Zoning Administrator

Enclosure

STAUNTON™
VIRGINIA

February 9, 2009

Frank Belloni & Debra Chilton-Belloni
161 Seclusion Manor
Mineral, Virginia 23117

Mr. Belloni & Mrs. Chilton-Belloni:

I am writing in response to your letter dated January 17, 2009. I understand your desire to seek a resolution to your concerns.

In your letter, you state that I suggested you apply for a variance and an appeal; I would like to clarify that I informed you that it was your *right* to file for a variance and/or an appeal, however the variance would require you to show proof of a hardship (as detailed in Section § 15.2-2309 of the Code of Virginia). After researching the matter, I did advise you that I did not recommend that you file an appeal.

Your letter states that the Board of Zoning Appeals made two decisions; one relating to the "correctness of my interpretation of the zoning code" and the other on the variance request and that no decision was made on your appeal of the "administrative decision." Please be aware that according to the Code of Virginia the appeal of my "interpretation of the code" and the appeal of the "administrative decision" are essentially the same. Please refer to the Code of Virginia section I've noted below for your reference.

"§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision."

On February 20, 2008, the Board of Zoning Appeals voted on the appeal and the variance that you submitted. The Code of Virginia states that you had the right to appeal the decision of the Board of Zoning Appeals (refer to the Code section I've noted below)

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"§ 15.2-2314. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved within 30 days after the final decision of the board."

To my knowledge, an appeal was not filed with the Circuit Court within the thirty day time period as required by the Code of Virginia. Because no such appeal was filed within the required timeframe, the findings and conclusions of the Board of Zoning Appeals are final.

I am available to meet with you to discuss options that would make your wall/fence compliant with the City of Staunton's Zoning Code. If you have any additional questions or if I can be of further assistance, please feel free to contact me.

Sincerely,

John W. Glover

Building Official & Zoning Administrator

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VIRGINIA

October 2, 2009

Dr. Frank Belloni & Mrs. Debra Chilton-Belloni
161 Seclusion Manor
Mineral, VA 23117

Dr. Belloni & Mrs. Chilton-Belloni,

I write you regarding the property at 1403 N. Augusta St., Staunton, VA 24401. I ask for your cooperation, again.

As you know, you received a Notice of Violation dated September 20, 2007 regarding your construction of a masonry wall in violation of provisions of the Staunton City Code. You then sought relief from the Staunton Board of Zoning Appeals. The Circuit Court of the City of Staunton ultimately ruled that you were not entitled to any variance. The period for seeking an appeal of the Circuit Court's judgment in favor of the City expired several months ago. We had hoped that since that time you would have undertaken to bring matters into compliance or to provide assurance of doing so.

We ask that by October 15, 2009 you provide us with unconditional written assurance that you will bring your property into compliance, advising us of the proposed date yet this year by which you will have necessary changes completed. Absent receiving such assurance by October 15, 2009, we will conclude that you have no interest in resolving this matter cooperatively.

We do sincerely hope that you will cooperate with us. Again, October 15 is the time by which we must receive your unconditional written assurance.

If you have any questions regarding this matter, please feel free to contact me.

Sincerely,

John W. Glover
Building Official & Zoning Administrator

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STAUNTON
VIRGINIA

March 18, 2011

Frank & Debra Belloni
161 Seclusion Manor
Mineral, VA 23117

Re: 1403 N. Augusta Street

Dear Mr. & Mrs. Belloni:

It has been months since we last had communications from you regarding your intentions to bring your property into compliance as to the masonry wall for which you have been cited. With the passage of this extended time, it had been hoped you would ample opportunity to make arrangements to remedy this situation without further action. Instead, it now clearly appears evident that despite the previous determination of the circuit court you actually intend not to do what needs to be done. That's disappointing because you had left some impression that, with yet more time and forbearance by the City, you would be affirmatively undertaking to make the changes.

Under these circumstances, this matter now has been formally referred to the Commonwealth Attorney's office. We had hoped not to have to take this action, but your obvious intentions in continuing a violation of the City Code now appear to be unmistakable despite the impression you left and the patience that the City has demonstrated.

Sincerely,

John W. Glover

Cc: City Commonwealth Attorney's office

STAUNTON™
VIRGINIA

March 1, 2012

Dr. Frank Belloni
Debra Chilton-Belloni
161 Seclusion Manor
Mineral, VA 23117

Re: Property at 1403 N. Augusta Street, Staunton

Dear Dr. and Ms. Belloni:

I now serve as Zoning Administrator for the City of Staunton. I succeeded John Glover, who currently focuses on other matters for the City. As you may know, I'm also the Director of Planning and Inspections for the City of Staunton. I've worked in the land-use planning field for over 34 years and have served the City of Staunton for over 25 years as the Director of Planning and Inspections.

In my role as Zoning Administrator, I've taken the opportunity to review the status of your masonry wall located at your property on Augusta Street and Ridgeview Road. My current focus is solely on the civil aspect of this situation, hoping that through this added communication we can find resolution by working together, as Mr. Glover and others have tried before.

Based upon my review, it appears to me that you have not made any effort to bring the wall into compliance despite what seems like repeated indications from you that would do so after the circuit court ruled against you and denied any variance from wall restrictions contained in the City of Staunton Code's zoning provisions. Most specifically and significantly, your wall is almost double the height permitted by the Staunton City Code at the time that it was built. I realize you may want to argue that the wall fronting on Augusta Street, while in violation of the height restrictions, should not concern anyone because of the shrubbery in front of it. The wall, however, still can be seen at various points, depending somewhat on the time of year, but regardless, the wall height restriction is not just about being able to see the wall. Its presence is a continuing violation. The restriction, as well, beyond other considerations, reflects legitimate land-use concerns over the visual impact of a wall being much different than that of plantings, such as a hedge. A wall obviously is a permanent feature that lasts indefinitely. Plantings are living things that can be allowed to grow, be cut back and made smaller, or easily be removed,

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without the imposing change that a wall imposes. When, and if, the plantings were removed, the wall would still be intact, with the continuation of the impact of its presence where no other exists nearby. Moreover, it can be seen from Ridgeview Road.

The portion of your wall along Ridgeview Road is also of concern because it similarly violates and continues to violate the height restriction that applied when it was built. In addition, the purpose of the P-1, Professional District, is to allow uses that are compatible with the other uses in the district and should not be a detriment to the surrounding properties. One important purpose of the district is to increase the value of surrounding properties by maintaining attractive buildings with open spaces landscaped and all service entrances or unattractive areas screened. In the same vein, the purpose of the City's Code is promote the safety, health, morals, convenience, and general welfare; to encourage the use of lands and natural resources in the city in accordance with their character, adaptability, and suitability for particular purposes; to conserve social and economic stability, property values, and the general character and trend of community development. Your wall, in my judgment as Zoning Administrator, is counter to those purposes because it is not compatible with the general character of surrounding properties in its excessive height, construction with materials not in keeping with those of the neighborhood, and the overall effect this edifice has in permanently enclosing the open space with-permanent materials. From a land use and planning consideration, it has an impact on the neighborhood.

My understanding is that Mr. Glover, as Zoning Administrator, and Mr. Hartless, as Zoning Technician, actually came together to your property on November 21, 2007. At that time, according to them and as reflected in photographs taken at the time, a substantial part of your multi-sided masonry wall still had not been built. As of that time, you were apprised that the City of Staunton's Zoning Administrator considered you in continuing violation. Enclosed is a copy of the text of the letter hand-delivered that day by Mr. Glover and Mr. Hartless to you while on the property. Despite that letter and a previous letter, you unlawfully continued to construct and use the wall, as you do even today after all the time extended to you to correct or abate the matter and prior communications.

Unlike your lack of any progress at compliance, the other property owners with fences at the time that you lost the circuit court case have worked with us. Through their good-faith cooperative efforts, they are in compliance. It begs the question why you believe you are entitled to some exception.

The City retains the right civilly to pursue this matter regardless of any other avenue of relief. Under Virginia Code Section 15.2-2208, "[a]ny violation or attempted violation of this chapter or of any regulation adopted hereunder may be restrained, corrected, or abated as the case may be by injunction or other appropriate proceeding." As the Zoning Administrator, however, I would prefer that matters be resolved without the need for further action; yet, from everything I know, you have continued to be in violation, essentially refusing to follow through on what we were led to believe would be actions by you to bring the wall into compliance. Upon hindsight, the City arguably has shown patience to a fault.

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Please advise me in writing, by no later than March 15, 2012, of your position. By communicating with you yet again, we are endeavoring to find resolution, not confrontation. At this time, it seems straightforward with any response: either you are or are not going to get into compliance; and if you are, the date must be made certain soon.

Sincerely,

Sharon F. Angle

Sharon Angle
Director of Planning/Zoning Administrator

Enclosure

Cc: Stephen F. Owen, City Manager
Douglas L. Guynn, City Attorney

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September 9, 2013

Dr. Belloni and Ms. Chilton-Belloni
1403 North Augusta Street
Staunton, VA 24401

Dear Dr. and Mrs. Belloni: Re: 1403 North Augusta Street

One of our staff members noticed that the continuing illegal wall around your property, at the above referenced address, recently shows some missing pieces. So that you do not have any misunderstanding, even as the City has continued to be extraordinarily patient in affording you more than reasonable time to bring the wall into compliance, we provide you with this notice letter.

City staff previously have communicated with you about the illegal wall. Please be advised that any action to do any work on the wall, other than to bring the entire wall into compliance will be considered yet another violation. You also should disclose and make any contractor or other person aware of the City's position, including but not limited to any prospective purchaser or sales agent or firm.

Sincerely,

Sharon E. Angle
Director of Planning/Zoning Administrator

Cc: Douglas Guynn, City Attorney
Timothy Hartless, Zoning Technician

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STAUNTON

March 18, 2014

SENT VIA CERTIFIED & FIRST CLASS MAIL

Ms. Debra Chilton-Belloni
161 Seclusion Manor
Mineral, VA 23117

Re: Zoning Compliance—1403 North Augusta Street, Staunton, VA

Dear Ms. Belloni:

We only recently learned of Dr. Belloni's passing last summer. We extend our condolences. Although there was disagreement and the Circuit Court ruled in favor of the City, Dr. Belloni was clearly a gentleman and a scholar and he was vigorous in asserting a position.

As you know, the matter of zoning violation unfortunately remains unresolved even after the City's successful litigation in Circuit Court several years ago which invalidated the Board of Zoning Appeals' mistaken grant of a variance— and after all of the City's letters since then to Dr. Belloni and you as the owners of the property. Again, if anything, the City has been overly patient.

As the person who succeeded Mr. Glover as Zoning Administrator, I believe it necessary to move forward with expecting compliance with the zoning requirements as they pertain to your property at 1403 North Augusta Street. Accordingly, the City serves formal notice that the violations must be corrected by **May 14, 2014**, which affords you almost another two months to accomplish the needed changes for full compliance. If you choose not to do so, then the City will explore all of its options to take enforcement action, including the filing of necessary papers.

You remain in violation of City zoning requirements, and I respectfully urge you to take action now to achieve compliance before the deadline. In fairness to all citizens, the City should expect zoning compliance whether property is on the north end or the south end or elsewhere in the City. There has already been more than enough time to comply with respect to your property since the City prevailed in the Circuit Court.

This letter is being sent to you by both certified and first class mail so that we assure your receipt. A copy also has been posted on the front door of 1403 North Augusta Street.

Sincerely yours,

Sharon E. Angle
Director of Planning/Zoning Administrator

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BOARD OF ZONING APPEALS

Transcript of Proceedings

June 12, 2018

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BOARD OF ZONING APPEALS
Staunton, Virginia

SITE VISIT

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
Tuesday, June 12, 2018
1:20 p.m.
Pages 1 - 8
Reported by: Kay Trigilio, RPR

A P P E A R A N C E S

BOARD MEMBERS:
PAUL VAMES, Chairman
WILLARD KEELING
BRADLEY BRYANT
OTHER ATTENDEES:
RODNEY RHODES
TIMOTHY HARTLESS
DEBRA CHILTON-BELLONI
LINDA NESSELRODT

ON BEHALF OF THE ZONING COMMISSIONER:
VICTOR SANTOS, ESQUIRE
NELSON, McPHERSON, SUMMERS & SANTOS
12 North New Street
Staunton, Virginia 24401
(540) 885-0346
ON BEHALF OF DEBRA CHILTON-BELLONI:
MARK D. OBENSHAIN, ESQUIRE
OBENSHAIN LAW GROUP
420 Neff Avenue, Suite 130
Harrisonburg, Virginia 22801
(540) 208-0727
mdo@obenshainlaw.com

P R O C E E D I N G S

MR. VAMES: It's 20 after the hour. We're missing a couple board members. It's not a requirement that they be out here on-site, so I suggest we get started, use the applicant, and if there's anything you'd like to hear on-site about the wall.

MR. OBENSHAIN: Sure. Debra, why don't you do a little orientation here.

MS. CHILTON-BELLONI: All right. Well, we came up with the idea for the wall. We looked at a lot of walls in the area because we discovered the impact of the traffic noise, and we decided on the masonry wall with the brick columns. And we had had four of these old caps, and so we decided that we would use those as well. We came up with a plan for the wall interspersing the columns, the brick, to abate as much of the traffic noise as possible.

As you can see, the hedge has been here for many years, and we were told we could build it inside the hedge, which is exactly what we did.

You can come on the inside if you like and see the difference, but we stepped it down in stages as it went toward the corner.

MR. OBENSHAIN: Before we move, why don't you explain what happened here.

MS. CHILTON-BELLONI: Here, in 2013 a big commercial utility truck struck that pole, which was just struck this morning about an hour or so ago, and it obviously ran off the road as a result of having struck the pole, and it ran right through here and took out the matching column that stood there and part of the wall and also pretty much demolished those hedges.

We did clean the debris up, and shortly thereafter we got a notice from the City saying that we were not to make any repairs to this wall, that they would consider it another violation. So apart from cleaning up the debris, we left it as you see it right now.

MR. OBENSHAIN: Okay.

MS. CHILTON-BELLONI: The wall wraps this corner, the far corner, and goes partway down Ridgeview.

MR. OBENSHAIN: You want to take a walk?

MS. CHILTON-BELLONI: We decided to paint the masonry the same color as the hedge so it would blend in and the columns would stand out more. We also built the foundation wide enough to accommodate

brick-facing the wall, because at some point we thought we might like to do that. At the time we were also replacing the roof on the main house, and it just seemed a bit extravagant, so we left it at the block. We've since offered to replace the outside of the wall if that would make anybody happy aesthetically, but that hasn't been taken up, so we've left it as it is.

We also put in special seals with rebar to protect the tree roots so that the trees wouldn't be impacted by the foundation, which is a very deep foundation. The wall also has rebar construction in it, so it's a very solid wall and built well.

MR. OBENSHAIN: Was that the other entrance to the drive?

MS. CHILTON-BELLONI: Yes. The drive exited here, very close to Ridgeview, and it just didn't seem a very safe situation, so we decided to shut that off and not have the circular effect. It still provides us with parking in here, but we gave up that entrance.

MR. OBENSHAIN: And that, I think you talked to Mr. Thompson about that?

MS. CHILTON-BELLONI: Yes. We told him we would take it out, and he seemed to think that that would be fine. Behind that pole -- I don't know

how -- I guess it's a tree root.

So the old historic caps that are on the columns on the corners and the one that's -- the one that was on the column that was destroyed, we saved over there -- they were actually on cones that were already here at the entrance to the drive. I don't know if there was a fence or a wall prior to our having owned it or even the previous owners, but I do know the hedge was there. The hedge -- the man we bought it from, Bucky Goodloe, told us the hedge was there when he was a child, and he thinks it was there in the forties, so it's quite an old, well-established hedge. But it did nothing to abate the traffic noise.

MR. OBENSHAIN: The hedge?

MS. CHILTON-BELLONI: Yeah, the hedge.

MR. OBENSHAIN: How about the wall?

MS. CHILTON-BELLONI: The wall made a huge difference. To be out here sitting in the garden, you had to kind of shout, and heaven forbid you were out on the other side. And this, of course, for the downstairs is the only, like, backyard, because this property was redesigned in the forties with apartments upstairs that have an entrance on the back, and the people that live in the three units upstairs, they enter the back and that's their part of the yard. And

for the ground floor, this is the only yard that there is, so it made sitting out here less than desirable. Plus, I mean, a lot of these houses that front on the street, they have a backyard, but we felt like we didn't really have a backyard for that reason.

And, also, the house has no air conditioning, which a lot of houses don't. And it's beautiful inside. And, you know, in the summer we had the windows open, and even with the window unit it's like having an open window, so the sound comes right into your bedroom and into the house, and it has a negative impact.

Do you have any questions about how it was built or why?

MR. OBENSHAIN: Do the Board members have any questions, comments at this time? Any additional comments you'd like to make, anyone?

MR. SANTOS: Not here. We'll have plenty of say.

MR. OBENSHAIN: Just a reminder, the parking garage is closed, so you need to find a parking space on the street.

(Whereupon, the site visit concluded at 1:26 p.m.)

CERTIFICATE OF COURT REPORTER

I, Kay Trigilio, RPR, do hereby certify that I recorded verbatim the proceedings at the Board of Zoning Appeals for the City of Staunton in the captioned cause, on June 12, 2018.

I further certify that the foregoing pages, numbering 1 through 7 inclusive, constitute a true, accurate, and complete transcript of the proceedings.

Given under my hand this 5th day of July, 2018.

Kay Trigilio

KAY TRIGILIO NOTARY PUBLIC REG. #7507496 COMMONWEALTH OF VIRGINIA

Kay Trigilio, RPR

1

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2

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BOARD OF ZONING APPEALS

Transcript of Proceedings

June 12, 2018

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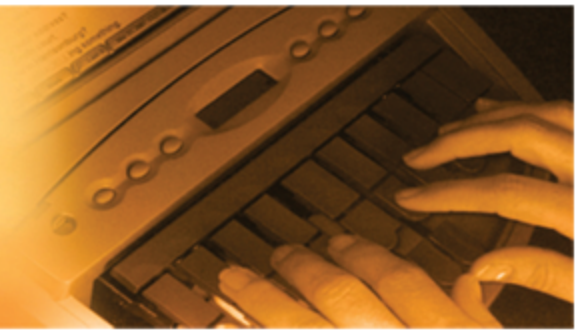

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BOARD OF ZONING APPEALS
Staunton, Virginia

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
Tuesday, June 12, 2018
2:00 p.m.
Pages 1 - 128
Reported by: Kay Trigilio, RPR

A P P E A R A N C E S

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P R O C E E D I N G S

MR. VAMES: Good afternoon. Welcome to the June 12, 2018 Board of Zoning Appeals meeting. Thank you for attending. We'll open with a moment of silence, please.

(Moment of silence)

MR. VAMES: Amen. Our first item is the approval of the minutes from the February 13, 2018 Board of Zoning Appeals meeting. All the members have received a copy of those minutes. Are there any deletions, corrections or additions that we need to be aware of?

MS. WIEGAND: Mr. Chairman, I would like to request that the phrase "closed meeting" on the second page of that heading be either deleted or changed because we never did have a closed meeting, and I feel very uncomfortable if the minutes reflect looking like that was a closed meeting.

MR. VAMES: Okay.

MS. WIEGAND: We talked about having one, but we decided against it.

MR. VAMES: That is correct. Why don't we just put the word "discussion" there to amend the minutes.

MR. KEELING: If you delete the "closed meeting," the paragraph beneath that says "discussion."

MR. VAMES: Okay.

MR. KEELING: So just delete those two words "closed meeting."

MR. VAMES: Okay. Delete the words "closed meeting."

MR. KEELING: I move the approval with the deletion that we indicated.

MS. WIEGAND: I'll second it.

MR. VAMES: The motion had been made to approve the minutes as submitted except with the change of the item referring to "closed meeting," and the motion has been seconded. Any further discussion? All in favor signify by saying "aye."

(Board members vote.)

MR. VAMES: Motion carries.

New business, we have one item before the board today, and I'll read this. A request by Ms. Debra Chilton-Belloni of 1403 North Augusta Street, Staunton, Virginia for a variance to Sections 18.120.010(2) and 18.120.201.0(3)(b) and 18.120.101(3)(d), yard, a building setback in open space exceptions of the code of the City of Staunton

to allow a wall over 3-1/2 feet in the front yard and over 2-1/2 feet at the intersection of North Augusta Street and Ridgeview Road. I would like to begin the meeting by having a little bit of a setting the platform here for how we're going to handle this today.

So, Mr. Obenshain, if you and Mr. Santos and Mr. Rhodes, if you all will come forward, I need to have a discussion with you all to see if we can reach some decisions here as to how this will be handled.

(Discussion off the record.)

MR. VAMES: Let me read this and see if it helps any. And I'm going to kind of set this stage for this right now.

On June the 5th, 2014 the Bellonis filed an appeal of a zoning violation notice. The Board of Zoning Appeals is here this afternoon to decide that appeal. Specifically, we will decide whether the City zoning official made a correct interpretation and application of the City zoning ordinance at issue in the zoning violation notice to the Bellonis. The zoning violation was standard and issued to Mrs. Belloni by the City and lists at least three of the five members of the Board of Zoning Appeals' vote

to overturn it. Our decision will be made on the evidence we hear today, and we have been advised not to have any discussion with anyone about this appeal outside of this hearing today.

As required by law, the Board members received a copy of the City's file on this matter and the distributed copy was provided to Mrs. Belloni's legal counsel. The City of Staunton Zoning Administration, Mr. Rodney Rhodes, shall first explain the basis for his decision. Attorneys for both the City of Staunton and Mrs. Belloni have already submitted many materials for and against the respective positions to each member of the Board, so I believe the Board understands the controversy. And we have just completed an on-site view of the subject property.

In light of that, I suggest that Mr. Rhodes' explanation for the basis of his decision can be done in under five minutes. In fact, the suggestion is three minutes, but I'm going to say Mr. Rhodes needs a little bit more time, so we'll limit him to five minutes. That's the opening statement.

Next Ms. Belloni and her legal counsel will proceed to make their case in favor of overturning the

zoning violation and will have the opportunity to present facts and evidence in support of their position, including calling witnesses. After completion of Mrs. Belloni's presentation, the City and its legal counsel will then have the opportunity to make its case and may also call witnesses.

During each of these presentations there will be no cross-talk or cross-examination and no questions. Each side will be given the chance to introduce the evidence into the record without interpretation -- or interruption.

As noted above, in advance of the hearing each side has already submitted a great amount of materials to the Board. I propose we set a time limit to each side's presentation, and I think you all were saying one hour for that. Do you want to make it one hour and 15 minutes?

MR. SANTOS: Hour and 15 minutes each.

MR. VAMES: There is no limit on the number of witnesses that can be called. There will be no objections or interruptions by one side during the other's presentation, and I believe each side is comfortable that the Board can decide what is relevant, important or credible.

After the City has presented its case, the

Board members will have the opportunity to ask questions of both parties and any witnesses if the Board desires clarification of additional information. So I advise the Board members to take notes during their presentations and questions you want to ask once their presentation is over.

Once the Board members' questions are answered, Ms. Belloni and then the City will each be given three minutes to make a closing statement to the Board. I believe that this procedure I have outlined gives each side the opportunity to introduce all the evidence it desires for the Board's consideration.

We ask everyone here respect the process of the Board. All presenters are to be treated with dignity and respect. At this time I will -- I'm going to have a motion to introduce the taking of this program, okay?

MR. SANTOS: I think that what is properly before the Board today is not the correctness of the decision of the zoning administrator as to whether there's a violation or not. I think that's established. I think that the issue before the Board is whether, under the statute, the variance should be granted to Ms. Belloni. I think -- if I understood you correctly, initially, you were talking about the

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correctness of the decision of the zoning administrator.

MR. VAMES: That is correct.

MR. OBENSHAIN: And I think that the decision of the zoning administrator is that he denied the variance request, so that's the decision that is being appealed and is before this Board, so --

MR. SANTOS: It's the variance, not whether there's a violation or not. It's technically a violation, it's just that the variance --

MR. OBENSHAIN: We agree the wall is taller than 3-1/2 feet.

MR. RHODES: Let me state as Zoning Administrator, I did not have the authority to deny a variance. I don't have the authority to approve a variance.

MR. VAMES: Are we all straight on that?

MR. OBENSHAIN: I think so. The only issue that I have with the proposed rules is that we basically go first and have an opportunity to put our case on, and then Victor puts on the City's case, and he has an hour to speak to you, and if I only have three minutes to respond in closing, I really don't have an opportunity to really address some of the points that the City may have raised. I don't want a

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lot of time, but I'm just afraid that in three minutes I'm not going to have an opportunity to review or address points that may fairly need to be addressed in a closing, so unless I have a little more time, I'm not going to be able to talk.

MR. SANTOS: I think it's fair --

MR. VAMES: Those are closing remarks. You still have the right to question -- after he finishes, you will have a right to question what he says and he will have the right to question what you say.

MR. SANTOS: I'm not sure I follow that, either, Mr. Chairman. If you're saying that we each have an hour and a 15 minutes, I assume Mark could do 50 minutes and reserve his other time.

MR. OBENSHAIN: I'm okay with that.

MR. SANTOS: If he uses it up, he uses it up. If he doesn't, he doesn't.

MR. VAMES: If he wants to question any witness you have --

MR. OBENSHAIN: That would be on his time.

MR. VAMES: Correct.

MR. SANTOS: Any questions I ask, if somebody is keeping track of the time, then it would be my time, because you can burn up a lot of time asking other witnesses questions.

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MR. VAMES: Any time that the Board uses to ask any questions of the witnesses would not be counted against you.

MR. SANTOS: I doubt very seriously there's going to be a lot of cross-examination.

MR. OBENSHAIN: I agree. I agree.

MR. VAMES: Are we --

MR. OBENSHAIN: I'll tell you right now, I will endeavor to hold my time to an hour or under and will reserve that 15 minutes or whatever the balance is to speak after the City finishes.

MR. VAMES: That's fine.

MR. OBENSHAIN: Okay.

MR. VAMES: Thank you, gentlemen.

Mr. Rhodes, if you are ready -- wait a minute. I'm going to have a motion on that procedure, so that comes from the Board. Who would like to make a motion that the procedures we outlined be adopted for today's meeting only? Anyone make that motion?

MR. SHARP: I will, just to move us along.

MR. VAMES: Okay.

MR. SHARP: I'll make the motion to receive the instructions that you just set forth.

MR. VAMES: Motion is to receive the instructions as we stated. Is there a second to the

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motion?

MS. WIEGAND: Second.

MR. VAMES: And any discussion on the motion? All in favor signify by saying aye.

(Board votes.)

MR. VAMES: Motion carries. We'll begin now with Mr. Rhodes, your presentation.

MR. RHODES: Thank you, Chairman Vames. Before I get started, I would assume that you would like the staff to keep track of time for the attorneys.

MR. VAMES: We're watching from up here. You can help, too. We've got the clock right in front of us, so we're okay.

MR. RHODES: Okay. Thank you. Before I get started, I'd like to reintroduce myself to the Board. Although I've been with the City of Staunton for almost a year and a half, my interaction with the BZA has been rather limited.

I would like to state my name is Rodney Rhodes. I am a certified zoning administrator for over a decade. I have nearly 23 years of experience as a zoning administrator and principal staff member for BZAs in Virginia. Staunton is the fourth jurisdiction I've served in this capacity. The

previous ten yours I served in that capacity with the City of Williamsburg, Virginia. Over the course of my career I've reviewed hundreds of applications that went before the BZA.

Regarding the application before you today by Ms. Debra Chilton-Belloni, it is an after-the-fact variance for a wall that was constructed ten years ago in violation of the zoning ordinance at 1403 North Augusta Street. The application seeks variances to three code sections noted in the April agenda briefing, and they are, very quickly, for a wall that exceeds 3-1/2 feet in the front yard, a wall that exceeds 3-1/2 feet requirement in the secondary front yard, and a wall that exceeds 2-1/2 feet in a site triangle at an intersection.

The application did not provide any specifics on the variance request. The application seeks the variance from the maximum height restrictions, however, no particular height limits are specified. The BZA application requires supporting material such as a site plan or building elevation map.

The application only includes a street view of the wall, and I would state that if I was here back in 2014, I would have considered the application

incomplete.

I think the Board should know exactly what type of variance is being applied for. Is it 3.5 feet above what's allowed per the zoning ordinance or 4.2? Through photographs, measurements and a survey, the staff determined the wall ranges from approximately six feet to in excess of eight feet, especially at the brick pillars that you saw at the site visit.

As the Chair noted, over the past few months there's been a lot of correspondence between the attorneys and the Board regarding what codes -- what Virginia codes should this be reviewed under, either the 2014 code or the current code. For the purpose of argument, without waiving my prior position, my comments today are based on the Virginia Code of 2014. The variance standards under the 2014 code are outlined in my supplemental briefing and also shown in Exhibit 0 in your packet.

The subject property has no unique physical condition, shape, size, slope, et cetera, that restricts its use more so than other lots in the same zoning district or the neighborhood. It has no exceptional narrowness, shallowness, size or shape or any exceptional topographic conditions as referenced in the 2014 statute. None of the applicant's

arguments can change the reality that the lot is rectangular, nearly 1.3 acres and relatively level with a front yard depth of approximately 100 feet when the zoning ordinance only requires a 25-foot setback in the P1 professional district.

Furthermore, in the language of the old 2014 Virginia statute, there is no condition, situation or development of property immediately adjacent thereto that effectively prohibits or unreasonably restricts the use of the property. All of the adjoining property is also zoned P1 professional district, and most of those have been developed with residential uses. Obviously, those uses do not prevent the reasonable use of the subject property.

In this situation a variance is not needed to reach parity with other lots in the district and, actually, to grant a variance in this instance would be affording the property and its owner a special privilege or convenience which the 2014 statute specifically prohibits.

In addition, strict application of the zoning regulations does not effectively prohibit or unreasonably restrict the applicant's use of her property. The property has been utilized as a

residence for over 100 years and is still residential today. Apparently, it has been converted into multiple apartments at this time, and the property may continue to be used for this purpose without any variance.

MR. VAMES: Pardon me, Mr. Rhodes, can you sum it up real quickly? You've had your five minutes.

MR. RHODES: Well, the state code says that the applicant must meet all the requirements for a variance, and I believe, through my review, that the applicant does not meet those requirements. And whether before or adopts -- or after adoption of the 2015 amendments to the Virginia code, the applicant fails to establish that her application meets the standard for a variance as defined in Virginia Code Section 15.2-2201 and the criteria set out in Virginia Code Section 15.2-2309. A variance issued for a lesser reason or simply because the BZA feels it's doing justice or following its heart would constitute a disregard of the law, plainly wrong decision-making, and failure to apply the law as written, whether under the old law or the current law.

Staff continues to recommend denial.

MR. VAMES: Thank you.

Mr. Obenshain.

MR. SANTOS: Before Mr. Obenshain starts, since we have the April 3rd and the supplement June 12th agenda briefing, I want to make sure -- just as a matter of housekeeping, on behalf of the City I would ask that both the agenda briefing and the supplement to the agenda briefing that you received be made part of the record of these proceedings.

MR. VAMES: That's fine.

MR. SHARP: Yeah.

MR. OBENSHAIN: Mr. Chair and members of the committee -- I'm going to mess up somebody's audio/visual -- is this yours, John?

MR. WIRTH: No.

MR. OBENSHAIN: Can I -- thank you. Here you go.

Mr. Chairman, members of the Board, my name is Mark Obenshain, and I'm an attorney in Harrisonburg, and I am representing Debra Chilton-Belloni in this matter. I appreciate the briefing that Mr. Rhodes provided to the Board and his extensive experience.

I have to say, however, that Mr. Rhodes hasn't been here for the 12 years that this dispute has been before us. And while Mr. Rhodes may be perplexed as to what type of variance is being

requested, I don't think that there's a single person in the City of Staunton who doesn't understand the nature of the variance that's being requested here and the nature of the dispute that dates back to 2006.

I want to -- I guess this is a little bit backwards, but I do want to provide the members of the Board with something that typically or very often in legal proceedings we give a judge proposed findings of fact and conclusions of law, and I have what we would submit are our proposed findings that we would ask the Board to adopt. And, of course, the Board is free to make its own determination, to accept or reject any of these proposed findings, but it may be helpful in understanding our presentation if I give you these now and you consider this as you consider the testimony of witnesses and my presentation as well. Is that okay? May I tender this?

MR. SANTOS: Mr. Chairman, with the understanding that that is not the established facts but simply those proposed to be the facts by Mr. Obenshain, I don't object.

MR. OBENSHAIN: That's absolutely the purpose for which I am -- did I give somebody two? I'm sorry.

MRS. BELLONI: I think you gave Victor two.

MR. OBENSHAIN: I knew I counted right. Thank you.

Well, first of all, and I know that the Board has, as has been pointed out, received considerable materials, and I know that the Board has reviewed those, but this is at its heart a property rights issue. This case and this variance request involves a duly authorized zoning official of the City of Staunton who was acting within the scope of his authority who told Dr. and Mrs. Belloni, the property owners in this case, that they could build the wall that is today in front of their property, and he intended for them to rely on that. He knew and told them that there was no written application process. There was no permit to be issued, and he understood what they were going to build.

They built what they told him they were going to build, and they relied upon the permission that was given by this duly authorized City official. They did it. And to make them go back and tear it down is a clearly demonstrable hardship that would be imposed upon the -- upon Ms. Chilton-Belloni.

This -- for literary critics, this bears certain similarities to Dickens' Bleak House, Jarndyce versus Jarndyce, which went on for seemingly

generations. This case and this issue has really gone on since 2006, and I would hope that notwithstanding the correspondence from City's attorney that we may actually have an opportunity to bring an end to this dispute today.

The Chilton-Bellonis did everything that could be expected. They built a wall in front of their property. You saw the wall. It is behind a hedge that is clearly much taller than the wall. You cannot see the wall because of the hedge. And they did it after asking for permission and being given permission by the City zoning official.

They bought this property in 2006. They asked for permission in 2006. They built the wall in 2007. And as the wall was being completed -- the layers of block were finished but the columns had not been completed -- and as they were in the process of getting those columns built, a City official stepped over -- through the wall and served the Chilton-Bellonis with a notice that they were in violation of the zoning ordinances which they had been told they would not be in violation of if they built this wall.

In 2007, after being served with this Notice of Violation, they appealed. They appealed to

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this body, to the Board of Zoning Appeals, and sought a ruling, first of all, that there was no violation by virtue of being grandfathered, and second, they asked for a variance. This Board unanimously granted the variance request.

The City objected because there was language in the code that had been interpreted by the Supreme Court of Virginia to prevent the granting of a variance in all but a few cases, cases involving a hardship that the statute said approached confiscation. And a hardship approaching confiscation had been interpreted by the Supreme Court of Virginia as meaning a constitutional taking, the inability to make any reasonably practicable use of one's property.

In 2009, after the -- this decision by this Board -- and I'll come back to the procedural aspect -- but in 2009 the General Assembly of Virginia removed that "approaching confiscation" language from the statute. So in 2009 the law differed from the law that existed at the time that Dr. and Mrs. Chilton-Belloni asked for a variance.

So what happened is this Board granted the variance, said that being told you can build that wall, building it and then being told to tear it down constituted an undue hardship. The City appealed to

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the Circuit Court and said this Board should not have granted the variance because it was not permitted to because this was not a hardship approaching confiscation. The Circuit Court agreed with the City and cited a -- the Cochran case, which said it had to be essentially a constitutional hardship, a hardship that involved a constitutional impairment upon the owners' right to use that property.

Following that decision, it simply reversed the Board's decision granting the variance. Following that, the City did nothing. They never asked for an injunction. The Chilton-Bellonis continued to believe that they were in the right, that they had not done anything wrong and that they should not be compelled to take that wall down. The City never asked them again to take that wall down until 2011, at which time the City filed criminal charges against the Bellonis. They never sought an injunction. They took them to court, charging them with a misdemeanor and seeking to impose criminal sanctions upon them. The General District Court judge dismissed that because the City had sat on its rights from 2009 to 2011 and had not pursued the matter, had not brought any action, had not sought to enforce any ordinance during that period of time and it was dismissed. And I'll tell you, at

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risk of invading attorney-client confidence, the Bellonis called me after that, and that was the first time I got involved in this case was in 2011, defending the criminal charges. Chap Goodwin had represented them initially in the initial variance request, but they called me and said "Is that the end?" And I had to tell them "I hope so. I sure hope it is. I hope that that puts an end to this process," but I don't know.

Another three years, nearly, passed from that date until 2013, at which time a heavy truck ran off of North Augusta Street and hit the same telephone pole that was hit by a truck today, coincidentally, in front of the property and went through that telephone pole and took out the far -- the north section of the wall and the gate.

And following that, the City's zoning administrator wrote a letter to Dr. and Mrs. Chilton-Belloni, not knowing that Dr. Belloni had died, and said, "If you repair that wall, if you do any work on it, that will be considered to be a violation of our zoning ordinance and we intend to pursue it." Apparently, the City even believed and understood at that point in time or thought that the matter was closed, unless they did any modification to

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it.

And at that point in time we contacted the City and said, you know, "Can't we find some way to put an end to this, to work this out?" And the next thing that Mrs. Belloni received was a notice that, indeed, "You continue to be in violation of the zoning ordinance."

And in response to that, we, four years ago yesterday, on June 11, 2014, we filed a request for a variance, seeking a variance to permit the wall to continue to stand and to seek relief. And the grounds for seeking the variance was that in the interim, between 2007, when the first variance was requested, and 2014, seven years later, the law had changed. The General Assembly of Virginia, independent of any efforts by me, or the Bellonis, had changed and removed those words "approaching confiscation" from the statute. So it didn't have to be a constitutional burden upon the property in order to permit this body to grant a variance.

The City took the position that "we're going to pursue litigation and not permit this to come before this body for determination as to whether Mrs. Belloni, Ms. Belloni, Chilton-Belloni, would be granted the variance, and they filed -- in response to

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that request for variance they filed an injunction action in Circuit Court, in Staunton City Circuit Court asking for an injunction compelling Ms. Belloni to tear down the wall.

And we went to the Circuit Court and said "Please give us a stay to allow the Board of Zoning Appeals to decide whether or not to grant a variance, because if you don't grant that stay, she will be deprived of any opportunity to seek a variance," because the Court couldn't grant a variance; this is the only body that could grant a variance.

And the Circuit Court, at the City's urging, said "No, the issue of whether or not she was entitled to a variance had been decided once and she could never ever come back and seek a variance ever again, even if the law had changed."

And we went through, and the Court concluded that an injunction should be issued because the wall was taller than 3-1/2 feet and there was no basis for it to grant a variance, and we appealed that to the Supreme Court of Virginia. And the Supreme Court of Virginia said "No, absolutely, this has to -- the Circuit Court erred. The Circuit Court should have granted a stay, held up the proceedings, because it is a substantive right of that property owner to

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have their request for a variance come before this body."

And the City argued in the Supreme Court of Virginia variously that -- a number of things, but they argued it doesn't make any difference. They argued to the Court that the change in the law does not permit her to get a variance. And believe me you, if the Supreme Court felt like this was going to be a fool's errand, if they felt like it was moot, that her trip to the Board of Zoning Appeals was going to be governed by the same standards and the same rules, they would have never granted the appeal and they would have never sent the case back and said "allow her to go to the Board of Zoning Appeals," and they did. And as a consequence, we're back here on the petition that was filed or the request that was filed for a variance four years ago yesterday, on June 11, 2014.

So the City says that the variance should be denied for a variety of reasons. First they say that it should be denied because there is no hardship related to the property. I believe that was the thrust of at least part of Mr. Rhodes' comments. And Ms. Belloni's response is it clearly relates to the property. What the City would have

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Ms. Chilton-Belloni do is tear down a wall. It is on the property. It is a wall that the City gave Dr. and Mrs. Chilton-Belloni permission to build at considerable expense. The law says, simply, related to the property. It does not say related to the size of the lot or the dimensions or the slope. It has to be a clearly demonstrable hardship related to the property.

Now, there is language in the code that deals with -- and if you look at the chart that the City zoning administrator provided, on page 2, looking at the 2014 -- the City's analysis of the 2014 zoning or -- excuse me -- the state statutes, it says that a property owner is entitled to a variance when a property owner can show that its property was acquired in good faith, and then it does address, by reason of narrowness, shallowness, size of a specific property. But then, if you go down where it has in bold, "or" it is in the alternative, it is they are entitled to a property or where the Board is satisfied upon the evidence heard by it that granting the variance will alleviate a clearly demonstrable hardship. And that is what we are asking the Court to do -- or the Board to do is to grant the variance on the basis of the clearly demonstrable hardship that was the permission

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that was given and relied upon in requiring that the Chilton-Bellonis remove that wall. This is -- the argument that it doesn't relate to the property is the same argument that was made to the Supreme Court of Virginia, and it got no traction there. It should get no traction here.

The City -- and I don't know whether Mr. Santos is going to address this, so I won't right now, but the City has argued in some of the written submissions that the governing law governing the decision by this Board is an amendment to the statute that was made about 16 months after the application for a variance was filed by Mrs. Belloni. And I would respectfully submit that before this body, this is the first time the City has ever suggested or anybody has ever suggested that the 2015 amendments to the state code should be applied to the decision-making paradigm applied by this Board. They didn't argue that to the Circuit Court, and I know that they said the trial took place the day before the new law took effect, but the argument in the Supreme Court was more than a year after the 2015 -- or almost two years after the 2015 amendments took effect, and it wasn't argued in the Supreme Court, either. We would respectfully submit that the City should not be entitled to wrongfully, as

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determined by the Supreme Court -- and I don't mean wrongfully in a malicious sense -- but wrongfully, they were in the wrong -- refused to allow the Board of Zoning Appeals to consider a variance request for four years and then be allowed to say that the law has changed in the interim and you ought to apply the new law. That, I would submit, is a ludicrous result that shouldn't be given much, if any, serious consideration.

The City says that the -- I would submit that the City's efforts in this matter are far out of proportion to the issue at hand. I would point out that -- well, I guess through -- from 2013 through 2017 the City had spent nearly $70,000 in seeking to have Ms. Belloni remove this wall. Ms. Belloni can't keep pace. As a matter of fact, I'm not charging a penny to be here, and I haven't charged a penny for some time because sometimes you just have to fight for what's right. That $70,000 figure that is reflected there doesn't include the 2008, 2009 litigation, the 2011 criminal prosecution, time put in by the City attorney or the City's staff or the time in almost the year since the decision has been made, and we just can't keep track, keep up with that. And, quite frankly, it is an issue that needs to come to an end.

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It's my hope that it will come to an end today. This is, in our view, a contest between what's right and what's wrong. It's the -- I would point out that everybody, with the exception of the City zoning office and City attorney's office, who has looked at this agrees that what the City is asking Ms. Chilton-Belloni to do is just not right.

In 2017 the General Assembly changed the law, and it doesn't apply to this, so I'm not arguing that it entitles Ms. Chilton-Belloni to a variance, but the General Assembly heard this case and decided to change the law and said if a property owner is given permission by a duly authorized local government official to do something for which there is no written application and no permit and they do it, and there's corroborating evidence that they were given the permission to do it, that under no circumstances should that local government come back and be allowed to say "rip it out, tear it down, undo it." As a matter of fact, that passed unanimously through both chambers of the General Assembly, was signed by the governor, was not even opposed by Virginia Municipal League or the Virginia Association of Counties except to the extent they wanted to make sure that there was some corroboration that the City official had actually

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given them permission to do this. And in this case there is ample evidence of that.

Now, for the -- I would like to -- and I know that the Board has before it this substantial volume of materials, but I would like to walk through three items in particular that I would like to ask the Board to draw its attention to. The first is the transcript of the 2008 variance proceeding. Dr. Belloni died in 2013. He cannot testify except through the transcript of his testimony.

And in the bound material that was provided before the originally-scheduled hearing behind tab J, in about the middle of that section is the transcript, and at page 20 of the transcript is Dr. Belloni's testimony, and I'm going to read just a portion of it.

Dr. Belloni said, "We had a visit not by Tim Hartless but by Earl Thompson. It would be quite difficult to mix up the two of them. They're quite different kinds of person.

"Earl Thompson came out, and we spent a half an hour together. He looked at the property. He walked down Augusta. He was in the garden in front of Chilton Hall. He walked down on Ridgeview Road. He asked us where we planned to build the wall. We explained to him that we planned to build it inside

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the hedge line on Augusta and on Ridgeview. We also told him we planned to close that one drive because it was very dangerous, even to try to enter. And he -- and his advice to us was that if you close it, be sure to landscape it. And I said of course, we would do that.

"And he said, if I recall correctly, that this was a grandfathered situation, that the hedge already existed, that the hedge by the wall on North Augusta Street is 150 feet long and is only in a very small section where it does not -- where it is not higher than the wall, not the reverse.

"And so he went down Ridgeview, and in the last analysis he decided he saw no problem with it.

"And we asked him if we needed a building permit, which he thought -- which we thought we might since we're not familiar with it." And I'd point out that the Chilton-Bellonis lived in Mineral and had not been residents in Staunton. Ms. Chilton-Belloni will speak in a few minutes and will tell you what their plans were. But said 'with the code here in Staunton,' he said, 'no,' with respect to a permit. He said, basically, 'have at it,' which we took to mean as approval."

And then it skips -- I'll skip down. It

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says, "Then the next time we encountered Tim Hartless, or the only time we actually physically I remember encountering him was when he came not in November but in September. He came on September 27 and brought a Notice of Violation."

And Ms. Welsh, the chairman at that time, said, "What year was that, Dr. Belloni?"

And he said, "It was September of 2007."

Now, the second thing that I would like to draw your particular attention to comes from the transcript of the criminal prosecution of October 12, 2011, which is just a little bit farther back in that same section of the first briefing materials, and that is the testimony of Earl Thompson, who was a City zoning official at that time. And I'm going to refer you to page 25 to begin with.

It says, question -- and this is questioning by the Commonwealth's attorney prosecuting Dr. Belloni at that time. He said to Earl Thompson, "And you did meet with Frank Belloni; didn't you?" to Earl Thompson.

The answer by Mr. Thompson was, "Yes, I did. I met with the Bellonis on their property at some point in time."

Question, "Was it before they started

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building the wall?"

Answer, "It was before they started, yes, sir."

Then skip over to page 27. It says, "Does that lead you to believe that the conversation took place in September of 2006?"

Answer, "More than likely, yes, sir."

I skip down, and line 22 says, "And based on what the Bellonis told you, my understanding is that you told them that they could build their wall?"

Answer, "Yes, sir."

Question, "Were you an authorized official of the zoning office; were you not?"

Answer, "Yes. At that time, yes, sir."

Question, "And that fell within the scope of your responsibilities as an employee of the zoning office?"

Answer, "Yes, sir."

Question, "And the Bellonis didn't, to the best of your knowledge, mislead you about what their intentions were with respect to the building of the wall; did they?"

Answer, "No, they did not."

Question, "And when you told them that you thought that they could build their wall, did you

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intend for them to rely on that?"

Answer, "Yes, sir."

Question, "And understand that they were going to go to significant personal expense as a result of what you told them?"

Answer, "Yes, sir."

Question, "And that was your expectation and your intention for them?"

Answer, "Yes, sir."

Question, "For them to proceed with the construction of that fence or that wall and, as a matter of fact, you did tell them something to the effect of 'have at it'?"

Answer, "I may have."

Ed, the City attorney, stipulated that sounded an awful lot like Mr. Thompson.

It goes on and says, Question, "In September of 2007 did it come to your attention that your office was about to serve the Bellonis with a notice of zoning violation?"

Answer, "Yes, sir."

Question, "And what did you do in response to that, to learning that?"

Answer, "I met with John Glover, who is the zoning administrator -- he has the final say on zoning

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matters as far as the City -- and made him aware that I had met with them, indicated that I told them that they could do what they had planned to do."

Question, "And they served the notice anyway?"

Answer, "Yes, sir. He felt like I had exceeded the bounds of my duties and it was a violation."

Question, "Did you extend your authority in giving advice?"

Answer, "I don't feel that I did."

And then on the following page, on page 30, it says, "The wall as it's constructed" -- basically, it says that the wall as constructed was what they told him that they were going to construct and that it was consistent with what he expected.

The third thing that I want you to draw your attention to is at page 15 of that same transcript. This is the testimony of Tim Hartless.

Question, "And when you went to deliver that notice, you went with another zoning officer; is that right?"

Answer, "I did."

Question, "You took Earl Thompson with you?"

Answer, "That's correct."
Question, "And you became aware before delivering that notice that Earl Thompson had talked to the Bellonis?"
Answer, "That's correct."
Question, "You became aware before delivering the notice that Mr. Thompson had told the Bellonis that they could construct the wall as planned without violating the City zoning ordinance; is that right?"
Answer, "It's not exactly accurate. Mr. Thompson had stated that in his opinion the hedge existed and that the wall could be approved as long as it didn't exceed the height of the hedge."
Question, "And you were aware that Mr. Thompson actually met with Dr. Belloni and told him that the wall could be legally constructed because of the hedge; is that correct?"
Answer, "I am aware of that."
Question, "And you're aware that Mr. Thompson, as an authorized officer of the zoning department, intended for the Bellonis to rely on his instruction; right?"
Answer, "That's correct."
Question, "And you're aware there's no

application that people had to file in order to build a wall at that time; is that right?"
Answer, "That's correct."
There was a question, "No permit that had to be obtained in order to build a wall at that time; is that right?"
Answer, "That is correct."
Then down at line 11 it says, "Well, there's no vehicle that could have seen over that hedge, anyway, was there? That was a hedge that was six, seven feet tall right there at the coroner of Augusta Street and the corner of where it was built."
Answer, "That's correct."
Question, "Even before the wall was built, it was the hedge that materially impeded vision at that corner before the wall was there?"
Answer, "That's correct."
Question, "And the wall had no impact at that corner on vision of traffic approaching that intersection; did it?"
Answer, "Not on Augusta Street, no, sir."
These -- this testimony is the nub of the case. It is what this is about. It is what the Supreme Court heard and dispatched this emphatically back.

The City's attorney, in arguing the case, will argue that Ms. Belloni has brought all of this on herself. How that assertion can be made astonishes me and, quite frankly, if you could have seen the faces and the physical reaction of the members of the Supreme Court of Virginia at that assertion, it would surprise you as well. There is no way that Ms. Belloni or Dr. Belloni brought this on themselves. The question is, if they go to the hardship of doing everything that the City asks before constituting construction, before beginning construction, and go to considerable expense to put this structure up, is it a hardship, is it an undue hardship related to the property for the City to come back after the fact and say "you must tear it down"? And we respectfully submit that it is.
And walking through each of the components of the decision-making matrix, there is no question that this is such an application that falls within the discretion, and I would submit the obligation of this Board to grant Ms. Belloni a variance.
At this point I would like to ask Ms. Belloni to come address the Board, and I'm not going to ask her questions. I think she has a few things that she would like to say, and then I may come

up and close at least this portion of the proceedings. So with that, Debra.
MS. CHILTON-BELLONI: Good afternoon. It's been a long road to get here. I just wanted to let this current Board, meaning there are new members that weren't here the first time around, know a little bit about how we came to move to Staunton and how this whole thing came to be.
We looked at this beautiful home in 2006 in the winter, and we were amazed by it. We decided that it would be a good place for us to buy and to transfer from Louisa County to Staunton for retirement, basically. My husband, he did research and writing in political science, and he was very much attracted by the proximity of Mary Baldwin and also Lexington with VMI and College of William & Mary -- not William and Mary -- Washington and Lee, and he hoped to collaborate, and we thought this would be a great place to live. We were delighted with the property.
We closed on the 15th of August in 2006. It was right between both of our birthdays, and we spent our first night there. It was hot. It was summer. We had an air conditioner in the window, but the traffic on North Augusta Street was just coming right through. So we thought, you know, this is a

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wonderful place, but we weren't really used to that kind of noise, and we wondered if there was something we could do to abate it. So we came up with the idea of being able to build a wall, because the hedge clearly does very little to block traffic noise. We came up with this idea.

We approached the City about it. We came down here, downtown to the Office of Zoning, and we asked about it. We were told that the house sat on a corner and therefore would require a site visit. And so we arranged that, and the City sent Mr. Earl Thompson out. He looked -- as Mark said, he looked at the situation and he told us that what we wanted to do would be permissible because the hedge was there.

We then planned the wall. We went to various parts of the City. We looked at walls, especially on the campus of Mary Baldwin. There are lots of mason walls in the City, and we came up with a design for the wall. We found a contractor. We secured the materials, and we were told that we should start it in the spring, because we were approaching winter. This was in the fall of 2006. And so we made arrangements to start when the weather was better in late spring of 2007.

We started this wall. It was a long

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process. Substantial foundation had to be poured, and it took probably a month and a half to build, and all of this time nobody approached us from the City. We didn't do it at night. It was in full view. And it was only when the wall was basically built, save the brick columns, that someone from the City then came. Indeed, it was Mr. Earl Thompson who told us we could do it with Tim Hartless and gave us a notice of variance -- I mean Notice of Violation. And we approached then Mr. Glover, who was in charge of the department then, and he came out and looked at the wall and advised us of a complaint that had been made, and suggested that we could seek relief from the Board of Zoning Appeals by way of a variance. And this we proceeded to do.

I think you all know what happened from then. We did get the variance. Apparently, we were the third case in three cases that came before the Board that were granted variances. And the City took objection to the Board's granting those variances and later challenged this variance that this Board gave us. And I think Mark has pretty much outlined the situation from then.

We have continued to not be able to imagine that the City would want us to tear this wall down

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under the circumstances. We've sought compromise. We've sought every legal remedy to maintain this wall, inasmuch as we couldn't understand whose benefit would be served by tearing it down. Given the fact that we had been given permission. We didn't see where the public interest would be negatively affected if the Board and the City were to allow the wall to stand, and so we continued to hope that at some point, indeed, we thought that the City had decided just to let it stand because there was no action, as Mr. Obenshain had said, for a considerable period of time, a number of years, until the most recent case that they -- injunction they filed against us in the Circuit Court.

I really don't know what to say. We wrote numerous letters. We tried to approach City Council. We were always told that they couldn't discuss anything because we were in litigation. We were pretty much locked out. I think, you know, you have evidence of what the wall cost as well as what it costs to tear down. We did get bids for that. We were intending to comply with the law both before we built it and after the Court made its ruling.

I'm not here to ask for sympathy or any special consideration. I do think, though, that based

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on the fact that we did inquire and seek permission for the wall and were given it that the City should not insist it be taken down, especially since I can't really find where the public interest is served. It sets no precedent for punishing violations because this clearly was not an intended violation. To the contrary, we actually sought permission and received it. So the only thing it would establish is that a citizen can't expect to go to a City office and get advice and rely on it if this were allowed to take place, if they were allowed to have us tear the wall down.

It's my fervent hope that you will, now that we're finally here, consider this and give us a positive conclusion to this long ordeal. I thank you very much.

MR. OBENSHAIN: In closing, if I could just walk the Board through the elements that were actually set forth by the zoning administrator in the chart that he distributed to you and point out how this request for a variance complies with each of the components and elements necessary to grant a variance.

First of all, it has to be a reasonable deviation, reasonable deviation from those provisions relating to the size and location of a structure. We

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respectfully submit that after considering the presence and size of the hedge and vegetation, reasonableness of the variance and the deviation in this case is beyond question.

Second, the Board has to find that strict application of the zoning ordinance would result in unnecessary or unreasonable hardship to the property owner. And I respectfully submit that in this instance the hardship to the property owner is self-evident. Also, that the need for the variance should not be generally shared by other properties. I sure hope -- I sure hope that this isn't shared by other properties and, to the best of my knowledge, the City doesn't have zoning administrators going out and giving permission to City residents to build structures and then citing them with violations of the zoning ordinances.

This is a unique situation, at least to my knowledge and the knowledge of the applicant, and, as a consequence, it satisfies that element in that it is not generally shared by other properties. Variance is not contrary to and is in harmony with the intended spirit of the zoning ordinance. I would submit to you that the wall doesn't materially alter -- I mean, if you drive by, and from the site visit today, it's

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evident that it doesn't impede the view for traffic either coming out of Ridgeview or turning in or passing by. You can't see that house, anyway, because of the hedge. And the wall doesn't alter or change -- or the variance would not change the spirit or purpose of the zoning ordinance given the existence of that hedge in that location. The variance would result in substantial justice being done. That, again, I would submit, given the circumstances at issue here, is again self-evident.

The property was acquired in good faith. I don't believe that there's ever been a suggestion that the Bellonis acquired this property other than in good faith. The variance will alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the applicant. In this instance, if the Bellonis had built the wall and then asked for permission after it had been built, and found that it was in violation and asked for the variance then -- do you want me to stop while Mr. Sharp is gone?

MR. VAMES: Go ahead.

MR. OBENSHAIN: In that circumstance, that would be a special privilege. This is not asking for a special privilege. It's simply asking that a

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variance be granted to alleviate the hardship and to have the City bound by the guidance that it provided. Also, the need to find that the strict application of the ordinance would produce an undue hardship relating to the property, again, same undue hardship that we've described as being self-evident, and the Board would also have to find that the hardship is not generally shared by other properties.

Again, some of these components and elements and findings are in multiple statutes, as you'll see, and the task of this Board is not simple. And I appreciate the zoning administrator providing a chart to help you all walk through this, and I hope that the proposed findings of fact that I have submitted are the findings -- the findings that I submitted will help you walk through that, whether you accept the conclusions that I've offered or not. Also, that the variance will not be in substantial detriment to adjacent property and that the character of the district will not be changed by granting the variance. I don't believe that there's any evidence or has ever been any evidence of any substantial detriment to other property or that the character of the district was going to be changed. And I don't think that you've heard that in the past or in the

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materials that's been submitted, nor do I believe that in the -- on the basis of your experience, in looking at it, that you could determine that there's a substantial detriment to adjacent property.

And, finally, that the condition or situation of the property here is not of so general a recurring nature as to make it reasonably practicable that the formulation of the general regulation be adopted, that is, that this couldn't be addressed by an amendment to the zoning ordinances. What kind of amendment to the zoning ordinances could address the kind of hardship imposed by mistake or erroneous advice or a difference of opinion by members of the zoning office as to whether or not a structure satisfies the requirements of the zoning code for the City? And I would submit that Mrs. Chilton-Belloni, her request for a variance satisfies each and every element. So with that I thank you.

MR. SANTOS: Could we have an indication as to the amount of time used?

MR. VAMES: He has used an hour and five minutes. He has ten minutes left.

MR. SANTOS: Okay --

MR. VAMES: No, he has ten minutes plus 15.

MR. OBENSHAIN: Can I step out and get a

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sip of water?
MR. VAMES: Yes.
(Discussion off the record.)
MR. SANTOS: Mr. Chairman, members of the Board, those of you who don't know me, my name is Victor Santos. I represent the zoning administrator and, of course, also, the City of Staunton. My office is at 12 North New Street where I've been practicing law for 42 years.
I was not involved in all of this. I was retained by the City to enforce the violation. So much of what took place occurred before I was involved.
We are here because there's an ordinance that prohibits, as everyone agrees, a wall that exceeds 3-1/2 feet in height. And there's a triangle issue on the corner that also is in violation of the site.
I know this is an emotional case. It's gone on an awful long time and, because of that, there is this element of fairness that wants to creep into this case on a regular basis. I will tell you, when you were appointed to this Board, you took an oath, an oath no different than a judge would take. You are, in effect, quasi judicial judges here without a robe

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today. What does that mean? That means that you can be interested in the case, but you must be disinterested in the outcome of the case. That's what judges do.
Much of what you heard from Mr. Obenshain, frankly, has been irrelevant. Why would he bring up a 2015 -- '17 -- excuse me -- change in the law? What does that got to do with this case here today? Nothing, other than to suggest to you that's where the legislation is heading so you need to get on board.
You must base your decision on the statutes that are in effect at the time. And I will say that there is a disagreement about whether that's the 2015 or the 2014 amendment, and without waiving my right to suggest the 2015 amendment applies and the reason why Mr. Obenshain doesn't want the 2015 amendment to apply is that without a doubt, without any doubt at all, the variance can't be granted, but I will tell you the same applies to the 2014 amendment, so I'm going to concentrate and direct all my argument to the 2014 amendment.
Again, Mr. Obenshain asked that you apply a sense of fairness. He went into great detail about the testimony of Earl Thompson. He went into testimony about what Dr. Belloni said happened. Let

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me tell you what Paul Harvey said one time when his show was "You need to hear the rest of the story."
Tim Hartless will tell you without equivocation that he met with the -- with Dr. Belloni at the site before any construction started and told them they could not build the wall higher than 3-1/2 feet. Dr. Belloni did not like that answer and then went to Earl Thompson and asked him, basically, the same thing.
Now, I will tell you, if you read the transcript of the Board of Zoning Appeals hearing, what Earl Thompson said was when he met -- he testified that he met with Belloni -- this is on page 26 -- early spring, and his initial response was that the existing zoning code would not permit that but then the existing hedge might be a nonconforming condition which would allow the wall to be built behind the hedge if it was lower than the hedge. He didn't say you could do it. He said you may be able to do it.
Now, Dr. Belloni, as you know, is a professor. Obviously Ms. Belloni is very educated and articulate. When you are faced with two different responses, is it not incumbent on you to get to the bottom of whether you could or could not do it, or do

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you have the right to simply say "I like what Earl Thompson said. I didn't like what Tim Hartless said"?
You also recall -- I know that Mr. Vames was the only one on that Board at the time -- that Sherry Burke, who was the secretary -- may I have that -- at the zoning office at that time testified that when she -- when Tim Hartless came back that, in fact, she -- he said -- she asked him what had taken place, and he told her that he had to build it 3-1/2 feet. I'll read it exactly.
"As I remember, it was a warm day. Dr. Belloni had called and wanted to have the zoning administrator come out and tell him what he could. He wanted to build a sound barrier wall. Tim was in a meeting with two other department people, so I took the message. I did take it on a piece of scrap paper. When Tim went out, he came back" --
MR. BRYANT: Give us the page of that.
MR. SANTOS: I'm sorry, 19.
MR. BRYANT: Thank you.
MR. SANTOS: Bottom of 18, starting at 19. Do you have that, Mr. Bryant?
MR. BRYANT: Yes, sir. Thank you.
MR. SANTOS: "When Tim went out, he came back and I asked him, 'What does he want to do?'

"He said, 'He wants to build a sound barrier wall.'

"I said, 'Well, you know, what did you tell him?'

"He said 'Three and a half feet, but he didn't; he recommended it would not work because of the high level of traffic that would come across the road."

So Sherry Burke corroborated that Jim Hartless had gone out and told them they could not build the wall.

Now, where does that leave us? At best, it leaves us with we're not sure how, exactly, that came about, but what we do know is the Bellonis received two different answers, and it was incumbent upon them to get to the bottom of it. They could have gotten on line and seen what the code required. Again, we're talking about a professor. They could have called down and said, "I want to talk to the zoning administrator; we're getting two different answers from two different people." They chose not to do that. They chose to take the answer they wanted to take.

But you know what? All of that is irrelevant. It doesn't matter. No one from the City,

not the mayor, not a City Councilman, not the zoning administrator, no one can grant permission to a citizen to violate an ordinance. The law is very clear. If that wasn't the case, then could you imagine the City and all of the people that's employed by the City having someone call up Mayor Dull and say, "Can we do this?"

And Mayor Dull says, "Yeah, you can do that," binding the City as a whole. That's why it doesn't bind the City, even if Earl Thompson said what he said, and I would suggest to you what I read was an equivocation. He said "might."

I want to emphasize, permission has nothing to do with this case. What we have to do is look at the 2014 ordinance. Before I do that, I do want to comment on a couple things that Mr. Obenshain said. Again, irrelevant, but why is the City spending so much money? There were three people that were in violation of the zoning ordinance. They all appealed -- the City appealed it to the Circuit Court, and the Circuit Court denied the variance on all three. The other two came quickly into compliance and did what they were supposed to do.

Now, Mr. Obenshain suggests to you the City did nothing until it enforced it. I have eight

separate letters from the City asking Dr. Belloni and then Ms. Belloni to come into compliance, to do what they were supposed to do, to avoid litigation. All these letters were ignored.

Ms. Belloni suggested that we didn't compromise. I will tell the Board that I was authorized by the City and proposed to Mr. Obenshain and Ms. Belloni that the City would agree that they could take that wall down to the closest grout line to 3-1/2 feet, which my recollection meant the wall was still in violation by eight inches or so. That's a hollow core wall. All they had to do was cut to the grout line and put the top on it. We even offered to provide a City loader and have all of the debris loaded on that loader and taken to the dump at the City's expense. No response other than "we want to keep the wall the way it is." So it's unfair to suggest, although, again, irrelevant, in my opinion, unfair to suggest that the City has not done its part to try to compromise this case.

Mr. Obenshain suggested the Supreme Court gave some indication that this is the kind of case that required a variance. All the Supreme Court did was rule that it was not res judicata and that Ms. Belloni was entitled to another hearing before the

Board of Zoning Appeals to obtain a variance if she could. The Supreme Court never ever addressed the merits of whether or not the variance should be granted. That wasn't before the Supreme Court. It was a very narrow issue.

The burden is on Ms. Belloni to show that she's entitled to the variance. They walked through all of that.

So let's talk about what her hardship is. Is her hardship topographical? Is there something about the lot that causes her problems? Is there something about the adjoining neighbors that causes her problems that would qualify her for a variance? The answer is no. What she is claiming, if you think about it, is nothing but economic hardship; right? If someone, some benefactor came through and paid to bring that wall into compliance, paid for it, what would Ms. Belloni's hardship be at that point? She's in the same situation as every other citizen of this City in that the wall is at 3-1/2 feet. It is -- economic hardship is her only claim.

This notion of approaching confiscation is a red herring. It has nothing to do with this case at this point. Because her claim is economic, she's going to spend X number of dollars to have to take the

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wall down, or she spent X number of dollars to put the wall up higher than 3-1/2 feet. The Supreme Court has addressed that and says, very clearly, that economic hardship alone is not grounds for granting a variance.

I'm going to give you this case at the end, but there's a very -- recent in the sense of the law being recent -- a 1988 case that came after -- after the language of "approaching confiscation" was still in there -- it was still in there -- but it addressed the notion of unjust -- undue hardship. Not approaching confiscation, just undue hardship.

And I'll give you the very brief of the case. This lady in Virginia Beach owned a 2-1/2-acre tract of land. At that time the ordinance required that they have a minimum of 40,000 square feet each before they could be subdivided. The problem was it also said she had to have at least 100 feet going back from the setback wide and had to have at least 125 feet of road frontage. Well, her property was a pie shape. She couldn't do it. She could not do it.

So she came before the Board and basically said "my hardship is that I could make a hundred thousand dollars more if I could divide these two lots. That's my hardship. I got someone, I can divide it, and then I can make more money." The

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Supreme Court, in a very short, five-page opinion -- I did not Shepardize it; it's not been reversed in any way -- it basically says financial loss standing alone is not sufficient to justify the granting of a variance. And again, I invite you to tell me, other than financial hardship, what else does Ms. Belloni have that she suffers?

We've been out to the site. The land is relatively flat. Her neighbors around her don't have a wall. There's nothing about her building that's any different, very attractive but no different than any other of the homes around there. So her situation, if she's required to bring the wall down to 3-1/2 feet, she has no other hardship. Noise on the street? The next door neighbor has noise on the street. The neighbor across the street has noise on the street. There's no differentiation there.

So when we talk about -- there's an old saying under the law, if you don't have the facts, argue the law, if you don't have the law, argue the facts, and if you have neither, pound on the table. In this particular case, it is an emotional appeal, and I get that. But I am telling the Board it is irrelevant because two things aren't being met here. The harm related to the property, whatever

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Mr. Obenshain may suggest, it's a distortion to take that and twist it and say that the wall is the property for which the hardship has occurred. In the context of the whole ordinance, it has to do with the land.

Think about Staunton. Staunton is not a flat pancake like Kansas. It's got hills. It's got valleys. It's got topography that would suggest that one size doesn't fit all for the ordinance, and it doesn't. That's why you have variances. But Ms. Belloni doesn't meet any of that criteria in any way.

So what I'd like to do is quickly walk through -- we've got a PowerPoint on that. Actually, before I do that, I want to go ahead and have Tim Hartless testify. And I am going to ask him a few questions, because I think it's important. And I preface that his testimony, like the testimony of Earl Thompson, is irrelevant to your decision-making. It is absolutely irrelevant to the decision-making.

QUESTIONS PROPOUNDED TO TIM HARTLESS:
BY MR. SANTOS:

Q. Mr. Hartless, would you state your name, please?

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A. Sure. My name is Tim Hartless, and I'm the City planner for the City of Staunton.

Q. What is your specific role in the City?

A. As the City planner, I review site plans, rezoning requests, special use permits, subdivision plats, prepare agendas for planning commission, assist with other Commission agendas as needed.

Q. What was your capacity for the City when the issue of the Belloni wall came up?

A. At that time I was the City zoning technician.

Q. What does that mean?

A. It means I was responsible for enforcement of the zoning code, so anytime we got a complaint, I would investigate the complaint, prepare Notices of Violation, and also assist people at the counter or if folks called in with questions about zoning.

Q. Did you have an occasion to receive a call from Dr. Belloni?

A. I did. He had called the office. At the time I was in a meeting with our property maintenance inspector and our Deputy Fire Marshal; we were in a code enforcement staff meeting. So our department secretary, or one of our department secretaries, Sherry Burke, took the message, and she handed it to

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me as I came out of the meeting. And it had a phone number and Dr. Belloni's name and asked me to give him a call back.

Q. All right. Did you then talk to him?

A. I did. I called him the next morning and asked him what I could do to help him. And he told me that he was interested in building a wall at their home on North Augusta Street that would serve as a sound barrier. So I looked it up in the computer and realized it was a corner lot, and our practice is that anytime there's a corner lot, generally, if the -- if the applicant or, in this case, a citizen is willing, we like to meet them on-site so we can make sure that we explain it thoroughly and everybody is on the same page in terms of what the regulations are.

Q. Did you do that?

A. I did. I met with him that afternoon. I was out doing inspections, usually, in the afternoon. So I was on that side of town, so I stopped, knocked on the door. He came out, and we walked around the front yard, and he explained to me what type of wall he wanted to build, where he wanted to build it, the height, walked around his front yard. I looked at the hedge.

Q. Let me stop you. Was Ms. Belloni present

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at the time?

A. She was. She was there as well. They both came out in the front yard.

Q. Go ahead.

A. We walked around the yard, looked at Ridgeview. I looked at North Augusta. He explained that they wanted to build a wall; likely, it would be a masonry wall. I asked him about the height. He said he wasn't quite sure. He assumed it would be six to seven feet tall and that, again, he stated the purpose of the wall would be as a sound barrier for traffic noise on North Augusta Street.

So I explained to him the zoning code requirements, which limited the height of walls to 3-1/2 feet, and he said he didn't think that a 3-1/2 foot tall wall would serve as a very good sound barrier. And I said I understood, and I suggested to him that he might think about some kind of vegetative plantings. My experience --

Q. Does the ordinance control the height of vegetation?

A. It does not control it now. At that time it controlled the height of hedges but not trees or other kinds of shrubs. Our experience is that living plants tend to do a better job of absorbing sound than

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a solid hard masonry wall would.

Q. And at the time you left, did you in any way suggest to Dr. Belloni or Ms. Belloni that there might be a possibility that this would be a nonconforming use, that the wall could be built because of the hedge that was in front of it or was going to be in front of it?

A. No, I did not say that at all. We didn't even really talk about the hedge and whether it would be conforming or nonconforming. A hedge is not a structure, so it cannot be given that same nonconforming status that a structure would, so we didn't talk about the hedge at all. I was very clear with him that any wall that they built could not exceed 3-1/2 feet.

Q. To make it clear, was there any construction on the site at that time?

A. No, there was no construction, no materials, nothing at that time.

Q. Do you recall what, if either, response was by Dr. or Ms. Belloni when you told them the wall height was limited to 3-1/2 feet?

A. They weren't very happy with that requirement and again said it would not serve as a -- would not function very well as a sound barrier.

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Q. Was there a time when you came back -- first of all, does the City monitor whether construction goes on or not, or is the violation complaint-driven?

A. Violations are always complaint-driven.

Q. Clarify that for the Board.

A. What that means is that we only respond, we only enforce the zoning code when we have an active complaint. We don't go out and explore the City, patrol it and look for violations. We only act when someone calls us or comes into the office and specifically gives us an address and a specific complaint.

Q. So that if there was inaction by the City after the wall was built, it wouldn't have made a difference unless someone complained?

A. Right.

Q. Did you come back later to serve the Notice of Violation?

A. I did. I came back with Mr. Thompson later, when we handled over the Notice of Violation.

Q. Mr. Obenshain and I think Ms. Belloni suggested that the wall was virtually built by the time you came and served the notice. Is that accurate?

A. Segments on North Augusta had been constructed. I'm not sure they were completed, but they were definitely more than 3-1/2 feet tall. On the Ridgeview side of the property, very little, if any of the wall had been constructed.

Q. Were you able to step over it at that point?

A. Yes. Yes, we were able to -- we parked on Ridgeview and we got out of the vehicle, walked up the little bank and right across the front yard. There was no wall there to obstruct us.

Q. How about the columns, had the columns been constructed?

A. No, the columns had not been constructed yet.

Q. All right. Thank you. I think that's all I have for you, Mr. Hartless.

MR. SANTOS: I'd like to go ahead and project for the Board the definitions of variance and the particular points that need to be shown in order for this -- the variance to be granted. I think what we're going to do -- back up one for me. You all, this is the survey that was submitted to you and this is a little awkward for you, Mr. Vames, you're right in the middle of it. That was prepared by Howard

Vance and would indicate -- and you saw it today -- still indicates that the wall is not in compliance with the 3-1/2 foot requirement and remains all the way across. I would also point out -- again, I don't know how relevant this is, but if you look at the submission, the initial briefing and looked at the photographs at the very end of the briefing, you will see that contrary to what Mr. Obenshain might suggest, that hedge hides the wall today. It doesn't hide the wall in January. And those photographs that were taken, I think, just before the April 3rd hearing that didn't take place, will show that that wall is very much visible to the citizens of Staunton driving up and down North Augusta Street. Go to the next one.

So there's two parts to the code, and it is a little bit cumbersome. I agree with Mr. Obenshain that they need to clean it up. But they have what's called a definitional section, which is the definition of a variance. In other words, you can only grant a variance as it is defined, which is a reasonable deviation. I'm not going to argue whether the wall height is a reasonable deviation or not because I don't think it's relevant. Go to the next one.

When the strict application of the ordinance resulted in unnecessary or unreasonable

hardship to the property owner, okay? It used to say "unnecessary, unreasonable hardship or hardship approaching confiscation," which is what Mr. Obenshain told you. He believes that that language being removed from that is magical, that now the Board can issue variances to anyone who can just show unreasonable hardship. That's not the law.

The unreasonable hardship -- go to the next one -- first of all, has to not be shared generally by other properties. There is no property in that area that doesn't have the same issues that Ms. Belloni has if the wall weren't in existence. It is not the wall that creates the hardship. It is the land that may or may not create the hardship. Go to the next one.

These are all definitions of a variance. Result in substantial justice being done. I don't know if this is substantial justice or not, but it really has nothing to do with whether or not the criteria is met. Now, it can include a change which could be accomplished by a rezoning. You know, Mr. Obenshain spoke to statute being changed. You can change ordinances. The City Council could say we're not going to put a limit on the height of a wall in the City of Staunton. It could apply it to everyone. It has chosen not to. And that is a change that could

be accomplished by rezoning or by conditional rezoning, not something that you grant a variance for. Go to the next one.

All right. That's your duties. Let's go to the next one. Those are simply your powers and duties, which we all know.

When owing to special conditions, a little enforcement of the provision will result in unnecessary hardship, provided that the spirit of the ordinance shall be observed and substantial justice done. Here's where we part ways in terms of what the unnecessary hardship is. Mr. Obenshain said for reasons that are clear the unnecessary hardship is the fact that she has to take down the wall. I suggest to you that there are no hardships for which a variance can be granted. It's really taking a square peg and slamming it into a round hole. You know what? If she had been misled by the City, and somehow that would bind the City, she could have taken some action. She could come before City Council, say "it's unfair, you need to pay me for taking down that wall." She could have sued the City of Staunton and said "I'm going to have to spend $10,000 to take down the wall because you are making me do that and you gave me permission." It's not the variance's job to correct a hardship

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that's been created. Frankly, whether it's self-imposed, which I suggest in part it is, or whether it was imposed in part by the City, that's not the job of a variance. Go to the next section.

I have no doubt that Ms. Belloni acquired the property in good faith. But look at what it says. "Where, by reason of the exceptional narrowness, shallowness, size or shape of the specific piece of property at the time of the effective date of the ordinance." Again, addressing these problems, that case I cited to you, pie-shaped, Virginia Beach, that has a shape that would suggest to you that maybe a variance could have been granted. She has a pie shape. She can't meet all the requirements of the ordinance. What does the Supreme Court say? No, that, by itself, your economic loss isn't enough to constitute a hardship. Go to the next one.

Save, A, topographical conditions or the development of property immediately adjacent thereto. You were there. You saw that the properties on both sides are basically the same as Ms. Belloni's. There's nothing -- there's no gravel pit next door to her that's making a lot of dust or noise. That's what that's talking about, the development of property immediately adjacent thereto. Go to the next one,

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please.

The terms of the ordinance would effectively prohibit or unreasonably restrict utilization of the property. Now, clearly, that property has been there for a hundred years. If that wall is taken down to 3-1/2 feet -- we're not asking the wall be taken out completely out, just to meet the ordinance -- where does that restrict the utilization of the property by Ms. Belloni? She mentioned today at the meeting that there are three apartments up above on the second floor. I assume, although she didn't say, the first floor is her living area, although I'm not sure if Ms. Belloni lives there; I think she may still live in Mineral. But the bottom line is nothing has changed. Whether that wall comes down or whether that wall stays up, she still has the right to use that property in the same way she always has. Next.

In granting the variance, you need to alleviate a clearly demonstrable hardship as distinguished from a special privilege or convenience sought by the applicant. Okay. Has she shown a demonstrable hardship? I would suggest to you that what she's saying is "I am a citizen of Staunton, but I should have the right to have a seven-foot wall

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regardless of if nobody else can have that wall themselves." It is a special privilege or convenience for her to maintain that wall and not a demonstrable hardship that meets the requirement of 15.2.2309. Go to the next one.

Again, it repeats itself and says "undue hardship relating to the property," and I would suggest to you that it is a tortured definition of property to say that the wall, which is the hardship, relates to the property, which is the wall. It has to relate to the real estate in some fashion. Or it could relate to some, again, narrowness that would allow -- that wouldn't allow you to meet the side yard setback, but not because the wall is taller than it is required to be. Go to the next one.

If the hardship is not shared generally by other properties in the same zoning district in the same vicinity. Again, Mr. Obenshain suggests to you the fact that the wall is the hardship means that no other properties in that area suffer that same sort of hardship. In other words, they don't have a wall, but Ms. Belloni does have a wall and, therefore, Ms. Belloni's hardship is not shared generally by the other properties in the same zoning district. Again, it's taking the square peg and slamming it into a

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round hole. That's not what a variance is supposed to be granted for. Is that it? Next one.

I will agree, I mean, the wall being up or down isn't going to be a substantial detriment to adjacent property. However -- and I have Jim Williams, who is the chief of police, here to tell you that those kinds of walls are walls they don't want to see in the City of Staunton. It prevents the City police from seeing what they need to see.

And can you imagine -- and I also have, and I'm not sure I'm going to put it on, but Susan Lancaster from Frazier & Associates actually did a mock-up of Augusta Street with all of them having the same size walls all the way down. And you can see, one, not only does it create a problem in the sense that it changes the character of the whole neighborhood, it also poses a danger to the citizens of the City when people can hide behind these walls.

Again, I don't want to put too fine a point on this because I will tell you right now, it doesn't matter. It doesn't matter whether the wall is safe or not or whether it's a substantial detriment to adjacent property, because it is not a hardship for which a variance can be granted. Go to the next one, or are we finished? That's not relevant. Go ahead.

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All right. The situation of the property concerned is not so general or recurring a nature as to make reasonable practicable formulation of a general regulation to be adopted as an amendment to the ordinance. What that means is if the wall is necessary to prevent the noise from Augusta Street, and everyone is in that situation, then what you really do is you don't piecemeal grant a variance; what you do is you change and amend the ordinance to allow the wall to come to a height that may limit the noise. Again, this is a situation where, if City Council wanted to adopt an amendment, that would be the appropriate way to do it.

You know, the City has to keep in mind that if I want to build a wall on Edgewood where I live and Ms. Belloni has a six-foot wall, why can't I build a six-foot wall? Why shouldn't I be able to build a wall as tall as I want? Why shouldn't I get forgiveness before permission, or why shouldn't I just be able to do what I want to do? That's why we have ordinances in place, and that's why we have, in this particular case, a situation where there's a violation of that ordinance, and nothing within the statute allows Ms. Belloni the benefit of a variance. Next. That's it.

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So I want to give you right now that case. It's Long versus Lunsford. It really, by Supreme Court standards, is about 3-1/2 foot -- not 3-1/2 foot -- 3-1/2 page opinion. And the point of this case -- I'll get back to the podium. The point of this case is also to differentiate between that approaching confiscation and this Supreme Court case that didn't address approaching confiscation. It was a City ordinance about undue hardship. In that case the Supreme Court said no variance because all you can prove is financial hardship and that's not enough.

Again, I ask you to go back and ask yourself, okay, other than the financial hardship that Ms. Belloni may suffer by having to take down part of the wall, what other hardship does she have? The fact that this dragged out for ten years? That's not one of the grounds for a hardship. There's nothing within the code section that creates any other hardship besides the financial, and Mr. Obenshain knows that what we're talking about is financial hardship. Didn't name it by name, but if she has to tear down the wall, it's going to cost you money, and that's where she suffers the hardship.

How much time do I have, Mr. Chairman?

MR. VAMES: You've got over 20 minutes still left.

MR. SANTOS: I want to call Mr. Williams to speak, Chief Williams. Why don't you go over there. It will be easier if I can ask you questions.

QUESTIONS POSED TO CHIEF WILLIAMS:
BY MR. SANTOS:

Q. Would you state your name for the record?

A. I'm Jim Williams.

Q. What is your occupation, Mr. Williams?

A. I'm the chief of police in the City of Staunton.

Q. How long have you been chief of police?

A. July of this year will be 15 years.

Q. Did you have an opportunity to look at what I'll call the Belloni wall on Augusta Street?

A. I have looked at it, yes.

Q. From a law enforcement standard -- or what are your thoughts about the public safety as it relates to that wall?

A. There are public safety concerns when you have structures that tall. I think it's analogous to a tinted windshield in a car. From a law enforcement standpoint, we're in the unenviable position to have to react when somebody does something, so it's always

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helpful for us to be able to see, and that's why the General Assembly has limited tinted windshields, so when you walk up to a car, to be able to see in.

And it's similar to that in neighborhoods. You know, if you know what's going on behind the wall, either a chain link or a split rail fence or something that you can see, or if it's short enough -- in this case, if it's 3-1/2 feet -- you can see over it, and it doesn't offer you the same concerns as something that you can see behind it.

Q. Would that concern be enhanced if, for instance, all the residences on Augusta Street were able to put up a wall six or seven feet tall?

A. I think that would be a nightmare.

MR. SANTOS: Thank you.

CHIEF WILLIAMS: Can I be excused?

MR. SANTOS: Go ahead, unless Mr. Obenshain wants to call him as a witness.

MR. OBENSHAIN: Fine. Thank you.

MR. VAMES: Chief Williams, would you please -- again, this is a little bit out of precedence here, but I remember your testimony, it was many years ago, and I was the only one that is here now -- that was here then, and it pretty much was centered around the idea that when a car came up the

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side street there and couldn't see.
CHIEF WILLIAMS: That's a concern as well.
MR. VAMES: That was the main concern that you voiced at that time.
CHIEF WILLIAMS: I don't even remember.
MR. VAMES: I do remember that. That was the main concern. And, of course, then we had the question come up, well -- and I think Mr. Glover will verify this -- we asked Mr. Glover, "What about the hedge?"
And he said, "Well, the hedge is grandfathered in. We don't have to take the hedge down.'
So the Board, thinking wait a minute. You can have this lady take the wall down, but the wall is behind the hedge and the hedge is what's causing the sight problem, and I don't remember the argument about the security part. I'm not saying you didn't make it, but I do remember the argument. I remember the statement about the hedge and the fact that the hedge was grandfathered in, and you can take the wall down, but the hedge can remain. And I'm assuming that's still the case; is that right?
MR. SANTOS: That's vegetation, yes.
MR. VAMES: It can stay, but that's what

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caused the sight problem. But in this case we have another problem, and that is a security problem. That's all I need. Thank you.
CHIEF WILLIAMS: Yes, sir. Thank you.
MR. SANTOS: For the Board's benefit, again, I want you to look -- at your convenience look at Exhibit N to the April 3rd briefing. I don't want you to be misled by the view that you saw today of the hedge, because this is the way the hedge looked on March 6, 2018. The very end, Mr. Vames.
MR. VAMES: But you're -- that's pretty much, you're talking about the side wall; right?
MR. SANTOS: No. If you look at the front, you'll see that the front also -- the side wall hardly has any vegetation, but you go down to the fourth photograph, you can see that's the front of the building. Look at photograph number 4, and you'll see that that's on the corner of Ridgeview and Augusta but it's the front part of the property.
MR. VAMES: I do not see a picture that shows the actual Augusta Street looking right in. I go by there probably a dozen times a week, and it is very difficult, and even in the middle of winter very difficult to see the wall.
MR. SANTOS: This is the front of Augusta.

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This is Augusta Street. This is Augusta Street. That's Ridgeview over there.
MR. KEELING: That's a current view?
MR. SANTOS: March 6, 2018.
MR. KEELING: Okay.
MR. SANTOS: I'd like to call Mr. Glover. John.

QUESTIONS POSED OF JOHN GLOVER:
BY MR. SANTOS:
Q. Mr. Glover, would you tell the Board your name, please?
A. I'm John Glover.
Q. And at the time of the first Notice of Violation directed to Ms. Belloni, what was your position with the City?
A. Building official, Deputy Fire Marshal, zoning administrator and erosion and sediment control administrator.
Q. Okay. Do you recall going to the Belloni property with Mr. Hartless?
A. I do.
Q. What was the purpose of going there?
A. We had sent a Notice of Violation sometime around September, middle of September, maybe the 20th,

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I can't remember dates exactly, but somewhere around September the 20th.
Q. This is of?
A. This is 2007 for a Notice of Violation. Work continued on the wall after the Notice of Violation was delivered, so -- I wasn't there personally when it was delivered. You mentioned that earlier in the proceedings.
So later on, between September and November, I went back -- I think it was sometime the end of September, probably, beginning of October, I went back with Mr. Hartless and we delivered a Stop Work Order and advised Dr. and Mrs. Belloni to stop construction on the wall at that time. It was not complete.
Q. So describe what you recall the condition of the wall was at that time.
A. When we parked on the Ridgeview side and got out of the car, walked directly -- stepped over the wall. It was no more than -- I can't remember -- maybe one course of block, maybe; we were able to step right over it. We walked to the front door, rang the doorbell, and Dr. and Mrs. Belloni both came out and spoke with us.
Q. Did you hand them the Stop Work Order?

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A. Yes, sir, I did.
Q. In terms of the front, Augusta Street, can you recall how much construction had been done?
A. It was considerably more complete on Augusta. I can't say whether it was a hundred percent or 50, but it was considerably more complete, but the Ridgeview side was not very complete.
Q. Did the Bellonis stop construction after being provided -- after being told to stop?
A. No, sir. They continued yet to construct the wall until it was completed.
Q. Did they -- at that point had they sought a variance?
A. No. I actually had met with them and sent them another letter dated November -- I don't remember the date, but it was in November of 2007, after I had reviewed the matter, and said that I concurred with the actions of Mr. Hartless and that it was, indeed, a violation and advised them of their right for a variance and an appeal which they had been advised previously on the September whatever Notice of Violation. That's language at end of all violations as required by the Code of Virginia.
Q. Despite all those notices, they continued to build?

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A. Yes, sir. Despite that notice, construction continued until the wall was completed.
MR. SANTOS: Thank you, Mr. Glover.
MR. GLOVER: Thank you. May I be excused?
MR. VAMES: May he be excused?
MR. SHARP: What was the date you said you delivered the Stop Work Order?
MR. GLOVER: I can't remember exactly. It was sometime after the September -- I think it was 20th or 21st is when we -- when they had delivered, Tim and Earl had delivered the Notice of Violation. We received another phone call of the multiple complaints that we received during the process that it was still under construction, so that's when we went out, so I know it was between September and November. I believe it was the end of September is what I'm thinking it was, but I can't recall the exact date.
BY MR. SANTOS:
Q. If I tell you that the Notice of Violation was dated September 20, 2007, when would you have issued the Stop Work Order?
A. I believe about the end of September, maybe beginning of October, yes, sir, within a week or two.
Q. I would like --
MR. SANTOS: Do you have a question?

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MR. VAMES: Do you have one?
MR. BRYANT: If I reference the original proceedings, it clearly states that Mr. Belloni stated that he came September 27th and brought the notice, so the date on the paperwork is the 20th, but he received it on the 27th, per page 20 of the original proceedings.
MR. SANTOS: Okay. I'd like to introduce these various letters that were submitted to the Bellonis over the course of this whole proceeding.
MR. OBENSHAIN: Can I see those?
MR. SANTOS: Sure. You have those. I'm sorry. I thought you have them.
MR. OBENSHAIN: I may, but I don't know if that's what you're giving them, if it's something that's already in the packet. In the interest of fairness, I would hope you'd give all of Dr. Belloni's letters as well.
MR. SANTOS: That's not my responsibility to give Dr. Belloni's letters to the Board.
MR. OBENSHAIN: Okay. You can give them this partial record.
MR. SANTOS: I'm going to object.
MR. OBENSHAIN: The letters that the City sent to him without the letters that were sent in

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response.
MR. SANTOS: You know, this is not a court of law. I'll take what Mr. Obenshain said graciously, but Mr. Obenshain is as skilled if not more skilled than I am in these matters.
MR. VAMES: Mr. Glover, before you leave, and I'm going back on my memory now, you recall -- and I can still see Mr. Belloni sitting right there and Mr. Hartless got up and made a statement about when he went to the house to visit. Again, I didn't mean to bring this up. This came up because he was asked to come in, and he said, "When were you at my house?" And Mr. Hartless gave him the date. "What was that date again?" He gave him the date. He says, "I was in Europe then." Do you remember that? And then you all ended up changing the dates or something. Do you all remember that?
MR. GLOVER: No, sir, I do not, and, in fact, I reviewed the transcript last week and don't recall anything like that being mentioned about anyone being in Europe before the hearing. I don't recall that.
MR. VAMES: I don't want to put you on the spot, but I do recall that, that it was a debate about the date.

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MR. GLOVER: There was a debate at one of the Circuit Court hearings regarding someone's presence in the country, but that was not during the 2008 BZA hearing.

MR. SANTOS: That's correct. That was in the hearing.

MR. GLOVER: That's my recollection.

MR. SANTOS: May he be excused?

MR. VAMES: Yes.

MR. SANTOS: With that said -- and I think I'm going to end -- I want to caution the Board, I put this evidence on to show that there are two sides to this, not because I believe it's relevant. I don't care and I don't think it's a part of the proceedings, whether or not she got permission from a City official or didn't get permission from a City official, but it also shows -- so that there's no question of fairness -- that the City has its side to this, too, and it's not all one-sided.

Dr. and Ms. Belloni could have stopped construction and sought legal advice, could have sought a variance. They chose to build. They chose to build knowing that they were to stop. They chose to incur that expense knowing they were to stop but went ahead and did it, anyway.

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So I was going to -- that would be it for right now for me. Thank you. I'd be happy to answer any questions the Board has.

MR. SHARP: One quick question from me, Mr. Santos. How strong a document is a Stop Work Order? If it's issued by the City, who enforces that? How quickly is it enforced? Who monitors it?

MR. SANTOS: You're going to have to ask somebody smarter than me. I don't know.

MR. SHARP: Maybe --

MR. SANTOS: But the point, Mr. Sharp, being that if I receive a notice from the City to stop, I think I'd look into it before I kept building. I do it at my own risk. That's the problem, you do it at your own risk. That doesn't answer your question because I don't know what happens.

MR. SHARP: Okay. You don't know. Okay. Thank you.

MR. SANTOS: John Glover might say what happens is you go to court and get an injunction.

MR. GLOVER: There were two notices, again, that the wall was not correct, yet construction continued, I think is the important point.

MR. SANTOS: I'm sorry. Do you have any questions? Sorry.

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MR. VAMES: Now, yes, Mr. Santos, Mr. Obenshain, let me ask you this: We normally have people in the audience that want to get up and speak and give an opinion. Do you all want to have that before you get your last 15 minutes or so?

MR. OBENSHAIN: That's fine.

MR. SANTOS: I don't have any problem with that, but, for the record, I want to again suggest to the Zoning Board that's irrelevant. What this is --

MR. VAMES: It is standard procedure for the Zoning Board to do that.

MR. SANTOS: I get that, but I don't want to acknowledge it's somehow relevant evidence.

MR. OBENSHAIN: And what I would -- I would submit that it may be irrelevant, but it may be highly relevant. And I think it's for the members of the Board to determine whether it's relevant or not, because it could very well address certain of the factors that fall within the ambit of the Board's decision-making matrix. Moreover, this is a public hearing, and notice was -- is even statutorily required to be published, so public comment is certainly an appropriate input for the Board to consider in making its determination.

MR. SANTOS: May I comment on that? I

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certainly didn't mean to suggest that people couldn't speak. They certainly have the right to speak. What I am suggesting to you, again, is you are judges, and you have to accept the facts as they've been presented and the law as it applies, and not someone saying "I like the wall," "it's a pretty wall," "you ought to keep the wall up the way it is."

MR. OBENSHAIN: They weren't born yesterday, and they can apply their common sense and experience to this as well.

MR. VAMES: Since Mr. Obenshain spoke first, was there anyone in the audience that would like to speak in favor of granting the variance to Ms. Belloni? All right. You can step up one at a time, give your name and address. Go to the microphone.

MS. KIPP: My name is Carol Kipp, 16 Church Street. I met Debra barely a year ago, but I am standing here today because I am in complete sympathy with her cause and I want to be very supportive. I've listened to both sides of the argument from the attorneys, and it actually was very illuminating, but the bottom line is I would specially question the spirit of the ordinance and the fear that everybody else is going to build a six-foot wall.

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And I would question something else. If the hedge was there, and it was, the argument for public safety, specifically drivers coming out of Ridgeview and not getting a clear view of Augusta, that's an empty argument, because I've gone to that intersection many times and turned onto Augusta, and there is no obstruction. It just doesn't exist.

And I also don't believe that everybody in the block is going to put up a six-foot wall. Few people could afford it. I don't -- I just think that's a silly argument.

I do think that the intention of the wall was to create a sound barrier, and it most definitely does.

And, let's see, the last thing, the hedge existed, and I believe the spirit of the ordinance has been maintained since the wall is behind the hedge. I have gone by there in all seasons. Even in the winter you really can't see that wall. You've got glimpses of it from the Ridgeview side, but that doesn't obstruct any views.

The real obstruction, and this probably doesn't relate at all, but the real obstruction that should be addressed by the City is that if you are turning south out of Ridgeview onto Augusta, you

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cannot see oncoming traffic from the north because Augusta takes a downhill slope. You cannot see cars coming. That's the risk. Yet the City hasn't addressed that.

I think ordinances exist for the main -- for very good reasons, but sometimes you really have to look at, in this case, does it apply logically? So I'm in very much support of a variance being granted, particularly since it was unanimously granted before.

Thank you.

MR. VAMES: Thank you. Let me ask those that have yet to speak, would you please keep it to two or three minutes? Who was next? Go ahead.

MS. BROOKS: Good afternoon. My name is Stephanie Brooks. I live at 30 Ridgeview Road. Most of the points are in my statement but I did spend time typing it and I can't type, so I would like to share my thoughts with you in support of Mrs. Chilton-Belloni.

Since making Staunton my home 22 years ago, I have lived on Ridgeview Road, which we all know intersects Augusta Street at the corner where the property in consideration is located. A major attraction to Staunton for me was the incredible quality of the well-preserved architecture throughout

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the City. Chilton Hall is one of the most beautiful and historic homes. It was obvious from my first encounter with Mrs. Chilton-Belloni and her now late husband that they truly appreciated the architectural treasure they had purchased and would be good storers in its care.

With the traffic and, thus, noise on Augusta Street, the owners chose to build a wall that would act as a sound barrier and promote privacy for the home's occupants, thereby affording them a better quality of life. The owners adhered to all requirements made by the City of Staunton in the planning and execution of this project. The benefits the wall provides have made it much more likely that Chilton Hall will remain as a residence. As a residence, I believe this architectural gem has a more secure future than if it was used for some other purpose.

It was surprising to learn the subject of the wall as a public safety hazard has been raised. As everybody pointed out, the wall for the most part is fronted by a thick hedge which existed prior to the wall's construction. As an occupant of one of only nine homes which front the one-block-long Ridgeview Road, I doubt there are many people in Staunton who

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use that intersection of Augusta and Ridgeview more than I do. I have experienced no difference in visibility at this intersection since the wall's construction or before its construction. I do not see how it is physically possible for the wall to have created a hazard of safety. And I realize all of this is irrelevant, according to Mr. Santos.

The owners of this property planned and built the wall with the good intention of creating a better quality of life for themselves and their tenants in full and faithful compliance with the rules and regulations of the City of Staunton, at great personal expense and without creating any hazard. It would be a shame and detrimental to the property to have Mrs. Chilton-Belloni take down a wall that had caused no harm.

In Staunton we have a very rich architectural heritage. Chilton Hall, as I have said, is one of our most beautiful historic homes, and I think not only would the wall coming down be a hardship just because of the expense, but it puts this important architectural home at risk, in my opinion.

I hope the members of the Board of Zoning Appeals will grant Mrs. Chilton-Belloni's request for a variance so that what has been a long and difficult

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process can be ended without further hardship.
I thank you for your consideration.
MR. VAMES: Thank you.
MR. CUBBAGE: Hi. I'm Sonny Cubbage, I live at 2618 North Augusta, and I wrote a letter; I'm not going to read it. You have a copy of it. Pretty much a lot of the points have already been hit on that I talk about in there.
I lived at Chilton Hall. I rented the bottom floor from Dr. Belloni and Debra Belloni from January 2010 up until around March of 2013. I can tell you, there is noise in the neighborhood, and there is noise on the street. And I understand the point that all houses had that, but this property sits directly across from The Legacy and Kings Daughters. The Legacy is a multi-complex, hundreds of units in there that people live in. You got friends, relatives come to visit them. You've got the Kings Daughters facility, same thing, hundreds of residents there, people coming and going throughout the day.
In addition to that, you have emergency response, and, again, this is directly across from that property. So -- and these fire trucks with the jack brakes coming in there and the sirens, the noise is incredible. So enough on the noise, but it is an

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extreme. I think it is different in the sense that it's directly across from those two large facilities.
Another thing is the hardship. I've known Debra. She's a very honest person. I wouldn't be here today if she wasn't. I believe her wholeheartedly asking that the Board, please grant this variance, save the hardship and the hardship to taxpayers; it's also a hardship on taxpayers. We got over $70,000 in legal fees by the City fighting this case.
And the other issue with the hedge, I found it interesting in the witnesses' testimony that we had a hedge that you couldn't hear anything through, but you got a hedge that you can see through, so I'm still trying to figure that; you can't hear through it but you can see through it.
Anyway, again, with respect to everyone, two good cases presented, but I side with Debra. I believe her. I lived there for three years. I experienced it. I know it, and I think it's time she got the variance for this.
MR. VAMES: Thank you, Mr. Cubbage.
MR. NIBLETT: Hi, folks. My name is John Niblett. Actually, I reside in Maryland now, but I resided in Chilton Hall from 2010 to 2015 in various

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units the Bellonis own there, so I experienced living there and living within the wall, so I know the wall from both sides, and I feel very secure inside of it. The security argument, I thought, kind of made no sense to me, because as a resident, I felt much more secure with the wall there. It's just -- you'll be removing an active good and not gaining anything that benefits anybody in that area by removing this wall.
And I've been there over the time of a lot of the conflict that was raised by this wall issue, and it does bring up the issue of fairness, and you were warned by the City's attorney that you might be tempted to let fairness creep in, your sense of fairness. Oh, no. That would be bad. I mean, sometimes, if fairness is in conflict with the law or judicial procedure, then there's an issue to be resolved there. I think you should invite fairness in, not to let it creep in; let it walk in through a giant double door and really consider it. It should be the basis of all law and regulation.
So I say in the interest of fairness, and maybe it's not too much to say in the interest of justice and truth, let this variance go through. As a resident, former resident there, I'm so grateful for their care of that historical property. When you took

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your tour today, I was sitting on the back porch enjoying views and memories, and I would invite you to see how they treat that property. Go down the little asphalt path to the cottage and look at the roof they put on the shed there, which they could have slapped an asphalt roof up, and they spent quadruple that to put a slate roof on. This wall is in that spirit. Everything they did to that property was in the spirit of that slate roof, which you missed, which take a walk and just look at the vanishing craft of that kind of work that they buy. The wall is compliant with that.
So thank you. I hope you're fair, and I appreciate being able to address you today.
MR. VAMES: Thank you, sir.
MR. BEATTY: I'm not a resident of Staunton. I've been a friend of the Belloni family for 30 years. I was in business with Frank on a number of ventures, renovating houses in the fan district and restoring property, so I know his work ethic. I know what he wants to do in improving the property, so he was always looking out for the best interest of the property and the neighborhood.
MR. VAMES: Pardon me, sir. Will state your name and address, please?

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MR. BEATTY: Okay. I am Larry Beatty. I currently live in Fairfax, Virginia, prior living in Richmond in the fan district.

I just want to talk about Frank's work ethic and dedication to improving property, but also want to mention as an example I had when I had a similar situation in my home county. I wanted to build a shed in the backyard. And my son requested to include a man's cave, a boy's cave in the top, so there was a second floor. So I went to the zoning Board and requested permission to do that. They required me to present architectural plans to -- on the plans, what I planned to do, so I hired an architect and we started. He drew up the plans, and I presented them to the Zoning Board. The Zoning Board looked at them, approved them and presented them to me, and I immediately started hiring a contractor and starting the work on this project.

So the contractor was hired. They put in the footer, started digging the footers. And as they started the process, the Zoning Board came and said, "We made a mistake. Adding the second floor to the shed made the shed too much square footage for the lot and we can't approve it."

I said, "Well, I'm sorry. You know, I've

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already engaged a contractor, paid X number of dollars to have a backhoe come in, and I can't stop the project. It's going to go ahead."

So I proceeded with the project, similar to what I think Debra has done with the wall. She proceeded with the wall with the approval that had been granted by the Zoning Board.

So later the Zoning Board came back and said "we have to give you a variance because we made a mistake, and it was our staff's fault, so we're going to have to give a variance to you," and that's what they did. And so I proceeded with the shed, and the shed is still there today, 15 years later.

So I think your duty as a Zoning Board is to make variances, to look at situations. Your taxpayers, your residents of this county -- excuse me -- the City of Staunton, you've got to look out for the best welfare of Staunton and treat each person fairly and, I think, the fact that Debra put enormous expense in this project, not only the wall but maintaining the property.

One of the hardships people seem to forget, fail to mention is if that wall is torn down, that's going to decrease the property value. You can talk to any real estate agent. Anyway, tearing that wall down

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would have a detrimental effect on the property value, not only of the house but the neighborhood. That's my opinion but -- from past experiences.

So I know you've got a tough job to do here. But I think it's incumbent upon you as a Zoning Board to make variances, and this is a perfect example where a variance should be granted.

I wish you the best in making this decision. Thank you.

MR. VAMES: Thank you, Mr. Beatty. Anyone else that wants to speak in favor?

MS. HOFFMAN: My name is Jean Hoffman. Can you hear me?

MR. VAMES: Yes, ma'am.

MS. HOFFMAN: Okay. I met the Bellonis after they bought Chilton Hall, maybe two or three years later. And I worked in real estate at that time but I did not sell it to them. Anyhow, we became very close friends, and I can tell you that I don't think any of you all understand the lack of respect for these two people. Doctor -- I'm sorry; I had a stroke two or three years ago. Dr. Belloni is a renowned historian. He has written many books and is an authority on history. He is really responsible for saving the fan district in Richmond, Virginia. He was

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one of the few people to realize the value of historic properties.

I would hope you would find it in your heart and head because, number one, I'm a foreigner and I can't believe the amount of money. You all have drug this thing on for ten or 12 years. If I were a citizen of Staunton, I would be questioning you about the amount of money you have wasted on something that could have been easily corrected by the variance.

Thank you.

MR. VAMES: Thank you, Ms. Hoffman. Anyone else that wants to speak in favor of granting the variance? Is there anyone in the audience who would like to speak in opposition to the variance, come forward. All right.

Seeing no one, Mr. Obenshain, according to our calculation, you have 15 minutes left, and, Mr. Santos, you have 26 minutes left.

MR. SANTOS: Thank you.

MR. OBENSHAIN: Mr. Chairman, members of the Board, I don't know whether you would permit me to do this, but in light of some of the testimony that was elicited from the City's witnesses, giving me the latitude to call Ms. Belloni to respond to some of that. I'd like to do that. Otherwise, I can proffer

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what she would say and represent to you that it is the truth. Would it be objectionable to members of the Board for me to ask her a couple of questions?

MR. KEELING: No.

MR. VAMES: Okay. That's fine.

MR. OBENSHAIN: Debra, if you maybe would step over there where witnesses have been testifying.

QUESTIONS POSED TO DEBRA BELLONI:

BY MR. OBENSHAIN:

Q. Debra, let me just walk you through a couple of points. First of all, Mr. Hartless offered some testimony about a meeting he says took place at your property with you and Dr. Belloni before any construction took place, before ground was broken, before the wall was begun. Tell us about that.

A. There's nothing to tell about that because he did not come to meet us before we built the wall or before we started building the wall. The only person that came and did a site analysis was Tim Hartless. He came by himself.

Q. I'm sorry. Tim Hartless?

A. I'm sorry, excuse me, Earl Thompson. Earl Thompson.

Q. And, now, Mr. Hartless also indicated that

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when he came and actually, I think, Mr. Glover also indicated that when they came in September of 2007 that the wall was not nearly finished. Can you -- do you remember what the state of construction was at that time and, if so, tell the members of the Board where it was and why you remember it.

A. I distinctly remember answering the door with my husband, and the two of them were there, Mr. Glover and Mr. Thompson, and behind them, because I remember my husband saying this as well, we could see our wall constructed, the masonry block part of the wall. The columns had not been constructed but all the masonry had been constructed. In fact, after the fact we checked on this, hearing this testimony that you've all heard today, and we do have a cancelled check dated prior for this work that was completed, and we only paid when work was completed. That portion of the wall had been completed and paid for prior to their serving us the Notice of Violation. And we were just amazed that it took that long for them to suggest that we were in violation.

Q. Now, Mr. Santos has on a couple of occasions pointed the members of the Board to the photographs of the shrubbery on the North Augusta Street side that were attached at the rear of the

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initial briefing materials. Can you explain the state of the shrubbery at the time that that was taken?

A. I can. In March of this year in the spring I had that hedge severely trimmed.

Q. Why?

A. To address concerns of the people on the ground floor entering and leaving the drive. As you see there, that drive, the hedge can potentially obstruct the vision, so -- or the sight vision there, so in an effort to make it as safe as possible, I had that hedge that was a picture was taken of severely pruned, and it was at a winter, almost a wintertime, so naturally nothing would have grown back and it would have looked as bare as it could possibly look, but that's not the normal state of the hedge in the winter.

Q. So in the winter, as with today, on the 12th of June, is the wall visible, typically, behind the hedge?

A. Well, that hedge is partially deciduous. It's not completely deciduous. I would say that there aren't many people that walk on North Augusta, but, certainly, if you are in a car driving down the road, no, I don't think you would even notice that wall.

Q. Finally, Mr. Santos tendered to the Board a

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number of letters that he says that City officials wrote to you and to Dr. Belloni, I think in 2008 and 2009, and suggested that the City repeatedly talked to you all and you all just ignored them repeatedly. Is that true?

A. No, that's not true. Every letter that we got from the City was answered amply by my husband, and I've had -- in recent weeks I've had occasion to look through those letters, so I know for a fact that he very considerately and amply addressed the City's letters.

Q. Finally, Mr. Glover testified and, in fact, did Mr. Glover, when he talked to you and Dr. Belloni, did he -- was it he who suggested that you could get a variance?

A. In fact, Mr. Glover was actually very helpful. We appealed to him after Tim Hartless and Earl Thompson served the notice, and he came out to look at the situation to see if he could be of assistance. He told us at the time that one person had complained and that the City couldn't ignore the complaint, and so we asked him then -- and he couldn't tell us who it was. We asked him then to see if he could intercede and see if there was some compromise that could be brought about, what the objection to the

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wall was specifically, and if we could help meet that objection in some way. After about two or three weeks he got back to us and said he had not been able to resolve the matter, and he suggested that our alternative would be to file for a variance before this Board, and that's what we did on his suggestion.

Q. Thank you.

MR. OBENSHAIN: Unless any member has any questions, I will just address some issues that I wanted to address. Thank you, Debra.

MR. SANTOS: Mr. Chairman, could you give me a time, how much time Mr. Obenshain has left?

MR. VAMES: He has about 6 minutes left.

MR. OBENSHAIN: Six minutes, okay. I'll do my best. First of all, the hardship that's being asserted here is not in being required to take down the wall, but it's in being required to take down the wall after being told to build it. That is the hardship that is at hand.

Now, Mr. Santos spent a good bit of time walking through these statutes with his PowerPoint, and I don't have the resources that the City has to match that, but in this nice chart that the City provided, he spent most of his time on page 2 of that chart, the provisions of 15.2-2309, and says that

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there's no issue with respect to the shallowness or size of that piece of property at the time of the date of the ordinance or other extraordinary situation, and then says, also, that the strict application of this ordinance would not effectively or unreasonably restrict the utilization of that property. He says because she fails to satisfy either of those components, she's not entitled to a variance. I would ask you to look at this chart. The very next word, the City's zoning administrator puts in bold and under lines, it's the word "or." It's the word "or." It says that she can get a variance if the Board is satisfied upon the evidence heard by it that the granting of the variance will alleviate that clearly demonstrable hardship. And that is what gives the Board in this case the power to grant that variance.

Now, this case, Mr. Santos knows just as well as I do, that it is Hornbook law that in order to make a claim that there's been a constitutional deprivation of property, you have to show that it's not just a diminishment of the economic value of that piece of property or economic damages. That is the nub of what is meant by unreasonable -- by a hardship approaching confiscation. That is the nub of approaching confiscation. That is the constitutional

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taking. So before the amendment in 2009, this case was absolutely ripe, and this is what Cochran held. And if you've looked at that transcript, and as Mr. Vames and Mr. Keeling painfully remember, that was essentially the City's position. This didn't approach confiscation and she can't prove that it approaches confiscation because she can still use that property. She's still renting it to people.

The General Assembly took that out, and there has not been a case that has been decided about what the meaning of that is, but I will tell you that the City argued that in front of seven members of the Supreme Court of Virginia and said "don't send this back" because they still couldn't get a variance because the law hadn't change. The law has changed. And the removal of those words means something. She has experienced a substantial hardship that will be imposed if she is required to remove that wall. This case would have never been sent back but for that.

I would also submit, as some of the witnesses or some of the testimony, this notion that there's a public safety concern from people hiding behind the wall. I mean, that's a new and novel concern that's never been articulated. And just as with the hedge potentially obstructing traffic,

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certainly, if somebody is bound and determined to hide, they're going to hide behind the hedge or behind the house or behind the car, and I just respectfully submit that that is not a real concern.

Dr. Belloni testified previously in both the General District Court and before this Board of Zoning Appeals that he was never told by Mr. Hartless that he could not build the wall. Moreover, there is clear and uncontradicted evidence that an authorized, duly authorized City employee acting within the scope of his employment told them to build the wall, to have at it. And that he intended for them to act upon that. That is reliance. They had every right to rely on that. And they started the construction of that wall.

If the City wanted to implement an application process and a permitting process, they could do that, but they didn't have it. And the argument that if the mayor went and told somebody that they could do something, clearly, the mayor is acting outside of the scope of her duties and responsibilities. And this is a case in which somebody, without dispute, was acting within the scope of his employment, within the scope of his duties, and he told them to build this wall. They did it, and now

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they're being told to take that down. They're going to spend about $60,000 total in building it and taking it down. That may not be a big deal to the City or the City's attorneys, but it sure is to most people. And that is an undue hardship, especially given the fact that they were told to do it.

MR. VAMES: Your time is up.

MR. OBENSHAIN: Thank you. I sensed that.

MR. SANTOS: Mr. Chairman, members of the Board, I struggled before this hearing to even put on much evidence because all of this has been a distraction. What is -- whether the wall serves as a noise barrier, whether the hedge blocks the wall, whether or not there's a fairness issue about Ms. Belloni loving her property and wanting to keep it preserved, that is not the elements for granting a variance.

When I started off my opening, I said to you all that you were judges. Justice is blind. We can't have judges who decide "I'm going to do this because I think it's the right thing to do, despite what the facts might be, despite what the law might be." Now, it's easier for a judge who is trained on a daily basis to do that. I get it. And you all are not judges; you're lay persons. You're not even

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attorneys. But I can't impress enough upon you that the validity of what you do is based on your application of the facts to the law and not irrelevant facts.

Frankly, how much the City has spent on attorney's fees has no bearing on whether a variance should be granted. In fact, if I wanted to, I will say if Ms. Belloni had just done what she was supposed to do, there wouldn't have been any legal fees incurred. It's a two-way street, but it's irrelevant to these proceedings.

Mr. Obenshain suggests to you that this case that I cited, Long versus Lunsford, was decided before they changed the law that took out the language "approaching confiscation." What he didn't tell you is that this case was decided on a local ordinance, not the state statute, and the local ordinance says "no variance shall be authorized by the City Council unless it finds that a strict application of the ordinance would produce undue hardship." That's all. Undue hardship. So it was not a case of this law being applied because of the approaching confiscation. That ordinance was different. It was different. It was much more liberal. It allowed somebody to get a variance if they could just prove undue hardship,

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whatever that might have meant. But the Supreme Court of Virginia, not reverse -- not reversing themselves in any way, not distinguishing it in any way, says financial loss standing alone is not sufficient to justify the granting of a variance.

And I ask you again, putting on your judges' robes, if I make the cost go away today, if there is no financial loss, what hardship does Ms. Belloni now suffer? And the answer -- it's a rhetorical question because the answer is none. There is no hardship she suffers either in terms of her property, the surrounding neighborhood, and that's where I'm trying to make the point that a lot of what's been said today is absolutely irrelevant to your decision, because all Ms. Belloni can say is "don't make me bring the wall into compliance because it's going to cost me money." This case says "not enough." You can't just claim hardship financially and get a variance. And that's all we have.

The other point I want to make is that -- and, again, it goes to the -- it's probably irrelevant. There has been a dispute in facts, everyone here being credible. I'm not saying Ms. Belloni is not credible. Certainly, I wouldn't suggest Tim Hartless or John Glover, who have been

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City officials for years here, just couldn't sit here and lie to you all. There is a difference of opinion about what took place in terms of the facts, but the bottom line is that really doesn't end up mattering because what was said, even if you look at it in the worst case scenario -- let's say Earl Thompson said unequivocally "you can build it," Mr. Obenshain is wrong. He's not acting within the scope of his authority. He has no authority to do that. Mr. Rhodes doesn't have the authority, and he's the zoning administrator, to say "sure, you can build it." No one. No one can violate the ordinance.

And the fact that it took so long as Ms. Belloni suggested for the City to file the notice, again, I brought up the point and I think it's an important one, all violations are complaint-driven. If no one had ever complained as of today, the wall would still be there and it would -- they wouldn't make them tear it down until somebody complained. Somebody complained. I don't know who it was. It doesn't matter. That's what triggered this whole process.

I'd be repeating myself to say much more other than to use the guiding principles of fact and law, and use your head and not your heart, and I see

where the heart could come into play. I get it. I'm not an unsympathetic individual. But I'm also trained after 42 years to say we have to look at the facts and the law, and wherever it takes us, it takes us.

Thank you.

MR. VAMES: Thank you, Mr. Santos.

Gentlemen, I don't think there's anything else to come from you all at this point. I think we're ready to close the public hearing.

MR. BRYANT: Does the Board get a chance to ask questions?

MR. VAMES: Yes. I'm sorry. Go ahead.

MR. SHARP: Take a break, Mr. Chairman?

MR. VAMES: We'll have a short break.

(Recess.)

MR. VAMES: We'll go ahead and resume. One of our Board members would like to ask a few questions of those people who did give testimony.

Mr. Glover, would you be kind enough to come to the microphone for a minute?

MR. GLOVER: Yes, sir.

MR. BRYANT: Brad Bryant. In regards to the wall, we all know that there's no question, no one is questioning the height of the wall. Does the wall distance from the corner meet the specifications, as

in because it needs to be a certain setback from the actual road, the highway, does it meet in that manner?

MR. GLOVER: I think Mr. Hartless or Mr. Rhodes would be a better person to ask that question. He's the current zoning administrator, and I don't recall that.

MR. RHODES: In the packet there is a survey that was prepared, and that shows the wall off the property line on North Augusta Street, I think, about eight feet and along Ridgeview about five feet. There is no setback requirement for a wall if it meets the height limit of 3-1/2 feet.

MR. BRYANT: I don't think that's true. I thought that every fence had a setback from the highway. I can't build a fence right at the edge of the highway because it comes up, issues, so there is a setback somewhere there.

MR. RHODES: You can build it up to the property line, not to the road but to the right-of-way.

MR. BRYANT: Okay.

Then, lastly, Mr. Glover, because you are not able to -- at the time you were the zoning official, so I'm asking you, and you may defer to Mr. Rhodes -- because you are not able to rule on

something like a bush or a planted object, but aren't they considered semi permeable? Because when I left the residence today, I was able to -- where I was at with the wall, I couldn't see anything, but once I pulled out to where I was within the bush range, I could actually see motion through the bushes. I could see vehicles were approaching or not. So in the original statements, everything was saying that maybe it would be grandfathered for the wall or not. The bushes never came in question then; correct?

MR. GLOVER: It's my opinion the bushes were never a question due to the fact that they are not a structure. By definition, in the building code or Webster's dictionary or any other reference you could find, a hedge is a living thing. It is not a structure. So, therefore, the nonconforming provisions of our ordinance do not apply to a hedge.

MR. BRYANT: All right. Very well.

MR. GLOVER: Okay.

MR. BRYANT: Thank you.

MR. VAMES: Thank you, Mr. Glover.

MR. BRYANT: I have a couple questions for Ms. Belloni, if you'd be kind enough. I did want to inquire, because it's come up on a couple occasions, were there exchanges where the City did offer the

financial help to bring the wall back into code?

MS. BELLONI: They didn't offer financial help, and I'm not claiming that this is a hardship based on financial consideration. What they offered, to my best recollection, was to provide City dump trucks to assist my contractor in tearing the wall down. I don't think there was any kind of mover or thing to transport -- to actually help destroy the wall. And they offered to waive the landfill fees, but they wanted the wall down to the nearest grout line near 3-1/2 feet, and they wanted the concrete caps you saw on top of the block replaced on top of that wall, so we would have a demolition and reconstruction. And I got bids for all that, you know, long ago.

And apart from the cost, the hardship here in tearing down that wall has been to literally ruin our hopes for ever living in the City of Staunton in that beautiful property. It is not strictly a financial hardship. I want the Board to know that.

We have the highest respect for the law. We never, ever would have made that investment if we thought there was any reason to ask for a variance, because we just would have forgotten about it and made other plans.

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MR. BRYANT: Yes, ma'am. Have you resided for any length of time with that as your primary residence?

MS. BELLONI: Yes. We were there for three years, and the course of this dispute finally convinced us that it just wasn't comfortable to be there anymore.

MR. BRYANT: Yes, ma'am. Lastly, do -- am I clear that you don't recall meeting Mr. Hartless for the very first time when he came out and advised you that it could only be 3-1/2 feet and that was prior to Mr. Thompson's visit?

MS. BELLONI: I remember meeting Mr. Hartless for the first time, but it was not on my property. It was in the office here when we came to ask for a site analysis. And he had very little to say.

And we were later contacted by Earl Thompson, who came out and did the site analysis. Mr. Tim Hartless never did a site analysis on our property in our presence.

MR. BRYANT: Lastly, is it in agreement that the wall was not completed, it had not been completed when they served you the Stop Work Order notice?

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MS. BELLONI: Okay.

MR. BRYANT: I don't really care what state of completion, just that it was not complete?

MS. BELLONI: The brick columns had not been completed because the contractor had another job to go to. Otherwise, they would have been completed by that time. But, technically speaking, that was all that remained, and it would have really been an eyesore if all this time those columns hadn't been built.

MR. BRYANT: Yes, ma'am. I don't disagree. Thank you.

MS. BELLONI: Anyone else have a question for me?

MR. VAMES: Anybody else, any other Board member?

MR. SHARP: I have one for Mr. Glover, again, if I may.

MR. VAMES: Mr. Glover, I'm sorry we're picking on you. You're a nice guy.

MR. SHARP: Because you were an employee of the City --

MR. GLOVER: And still am, I hope.

MR. SHARP: Well, in this capacity, I'm a little troubled by this procedure where you cited them with a violation and issued the Stop Work Order but then nothing happened. You didn't enforce it. I just -- I'm still struggling with that. Why does the City not have the powers to enforce a Stop Work Order?

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MR. GLOVER: Once the Notice of Violation was issued and the Stop Work Order was issued and an additional letter from me, after I reviewed the matter, it was turned over to the legal authority of the City, which was the City attorney, and then it becomes -- I turn it over to him for any action that should be taken.

MR. SHARP: So --

MR. GLOVER: There was numerous letters back and forth, I believe, during that time period and couldn't come to any resolution was my understanding.

MR. SHARP: But there was a time period there with a month and a half or so that construction was taking place that nobody took any action on, as I observe?

MR. GLOVER: I don't know when the construction started, but September the 20th, whatever the date was, is when the Notice of Violation was given and, in my opinion and stating my integrity, the wall was not complete then, and I stepped over the wall. Towards the end of September, beginning of October, I stepped over it. I didn't walk between two sections through a column that wasn't complete. I stepped over the wall, and I stand by that to this day.

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MR. SHARP: I understand that. One more question. So after the Stop Work Order was issued, was it after that that you offered the avenue of seeking a variance?

MR. GLOVER: The avenue of seeking a variance is required by the Code of Virginia to be offered when the notice -- it's part of the Notice of Violation. It's the last line. It's in your records, I'm sure. It states that you have a right to appeal this decision, which they did exercise that right, and the Board found in the City's favor that there was no error in our interpretation of the code on the unanimous vote at the February 20th meeting or whatever.

MR. SHARP: I understand. Okay.

MR. VAMES: Thank you, Mr. Glover.

Any other Board member have any questions for anyone?

MR. BRYANT: I don't have any questions, but can I read from the very same section of the code? Well, actually, the section of the code is written as

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the powers and duties of the Boards of Zoning Appeals. This is the Virginia State Code. I referenced it and went back to it multiple times in order to see if the language changed from 2014 back to -- all the way back to when this case would have been prevalent. It says, "Notwithstanding any other provisions of law, general or specific or special, a variance shall be granted if the evidence shows the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that granting the variance would alleviate a hardship due to physical condition related to the property." We all agree that doesn't come into question.

As I read further, though, "The property interests for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance." I'm struggling on the sticking point with that. That's actually in the -- it's 15.2-2309. Am I --

MR. SANTOS: That's not an "or," "either/or."

MR. BRYANT: No. I skipped over a piece and I went to -- what I'm reading -- I'm not asking for an "or" or an "and" or anything. What I'm getting to is "being requested was" -- "being requested was

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acquired in good faith and any hardship that was not created by the applicant." And the reason I bring that point up is because multiple times we've had discussion about what was the state of the wall, where were we at when the notice of -- Stop Work Order notice was continued. We also have had multiple conversations about what is the financial status or what is the legality of it all.

I am a general contractor. If the environmental services people that are part of the zoning issue me a Stop Work Order because I don't have my silt fence up, anything that happens from that moment on is no longer -- it is my fault. I have become the cause, and it has become my responsibility because I created the burden. Does that make sense?

It's continued to stick in my mind that the law is the law on that one. Like, if you continue to work on the wall after -- so any expense you spent after that with Mr. Ellis Farber that you have checks going out to or any expense to Mr. Evers after that to backfill it or anything else like that, they no longer -- there was a case in Virginia Beach, also, where they continued to build a garage knowing that it was within five feet of the setback that I was asking about, and they were required to tear that down. I

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built a home in Buckingham that they didn't get the proper permitting for. It was required that we move the house. We moved the house, $18,000 to move the house.

My experience in all of these things is the law is the law. And if -- I will lean back to this Board only gets the authority to apply the law. And we went to the courts; a bunch of us have been to the courts. We were asked to leave our heart outside of this door. With that, that's my little check-in.

MR. VAMES: All right. Thank you.

MR. OBENSHAIN: Is that a question? I mean, do you want us to respond to that?

MR. VAMES: He opened the can up.

MR. SANTOS: I think it's just a comment. I don't think it's a question to either of us.

MR. BRYANT: I don't believe it's a question. I think I was just trying to read that there is more to the duties and powers which we are given, and it's come into question, and I'm sure the crowd would wonder what our decision would be, but we are restricted by being a quasi -- we are sworn in by the judge and we're given his power to do this job. So --

MR. VAMES: Do you want to respond to that?

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MR. OBENSHAIN: All that I would point out is that in terms of even if they had stopped, the contractor -- a different contractor had not come back and erected the brick columns, the block fence and wall was already, according to the City, in violation, already in violation, and that is what we submit was through no fault of their own. And even if they had stopped at that point, we may very well be at the same situation and asking for the same variance to pertain to the same wall. It's just a component of it that wasn't completed and would have been encompassed by the same variance at the same point. So that's all I would point out. And, you know, this is very different, given that there's no permit that can be sought, no permit --

MR. BRYANT: With a date that would tell you --

MR. OBENSHAIN: Or plans that could be submitted, so it's very different from the house or garage.

MR. BRYANT: I agree. There's plenty of gray area because dates are not easily recorded and it's memory and witness testimony.

MR. OBENSHAIN: And the statute requires you to look at things like hardship and substantial

justice, which aren't quite as black and white as might be suggested and do require the application of common sense. I mean, after all, that's all -- that's what a variance is about is applying that latitude in the appropriate circumstances.

MR. SANTOS: May I comment?

MR. VAMES: Yes, sir. You may. Go ahead. Equal time.

MR. SANTOS: Mr. Bryant hit the nail on the head. If I am given a Stop Work Order, I'm going to stop. And to the extent I don't stop, it's on me. And there is a big disagreement about what the evidence is as to at what point in the construction that Stop Work Order was given to the Bellonis. Common sense is important, but common sense isn't what drives the decision of a Board. It is the facts and the law. And you've got to combine the two and let it take you where it goes.

Again, I know you're interested in this case, but you have to be disinterested in the outcome because it takes you where it takes you.

MR. VAMES: Thank you, gentlemen. Once again, we'll close the public session of this part of this meeting, and I'll open the closed session, if anyone wants to make a motion. Is anyone ready to

make a motion?

MS. WIEGAND: Not quite yet. I'm still looking through my material here.

MR. VAMES: Okay. Anyone wish to make a motion?

MR. KEELING: I can make a motion. Are you all ready to make a motion?

MS. WIEGAND: If you are, please go ahead.

MR. KEELING: Okay. I've listened -- first of all, let me say I've been on this thing since the very beginning, so I kind of know all the facts, I think. I've carefully listened to all the material, the evidence presented by both sides. I've listened to all the arguments presented by both sides today, so I now make a motion to grant variances to Section 18.120.010(2), Section 18.120.010(3)(b), and Section 18.120.010.3(d) for the property at North Augusta and Ridgeview Road. My motion in variances are to leave the wall in place without modification and to allow for repairs to the damage to the entrance gate.

MR. VAMES: Members of the Board, you all heard a motion. Is there a second to the motion?

MR. SHARP: Second.

MR. VAMES: Motion has been made and seconded. Call for the vote. Let's do this one at a

time.

MS. WIEGAND: Nay.

MR. BRYANT: Nay.

MR. SHARP: Yes.

MR. KEELING: Yes.

MR. VAMES: Yes. Motion carries, 3 to 2.

And there is no other business to come before the Board today. Again, either party, when they are on the losing side of this, know you have 30 days to file an appeal.

MR. SANTOS: Thank you for your time.

MR. OBENSHAIN: Thank you, members of the Board.

(Proceedings were concluded at 5:08 p.m.)

CERTIFICATE OF COURT REPORTER

I, Kay Trigilio, RPR, do hereby certify that I recorded verbatim the proceedings at the Board of Zoning Appeals for the City of Staunton in the captioned cause, on June 12, 2018.

I further certify that the foregoing pages, numbering 1 through 127 inclusive, constitute a true, accurate, and complete transcript of the proceedings.

Given under my hand this 4th day of July, 2018.

Kay Trigilio

KAY TRIGILIO NOTARY PUBLIC COMMONWEALTH OF VIRGINIA REG. #7507496

Kay Trigilio, RPR

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