

STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES
September 22, 2015

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, September 22, 2015, was called to order with the determination of a quorum at 7:00 p.m. by Chairman Dean Larson in the Board of Supervisors Chambers of the George L. Gordon, Jr., Government Center.

MEMBERS PRESENT: Dean Larson, Danny Kim, Robert Grimes, Ray Davis (arrived 7:02 p.m.), Ernest Ackermann, Dana Brown, and Steven Apicella

MEMBERS ABSENT: Larry Ingalls and Heather Stefl

STAFF PRESENT: Susan Blackburn, Melody Musante, Evelyn Keith, and Stacie Stinnette

DETERMINATION OF QUORUM

Dr. Larson: Good evening ladies and gentlemen and welcome to this meeting of the Stafford County Board of Zoning Appeals. The BZA is a quasi-judicial body whose members are volunteers appointed by the Circuit Court of Stafford County. The purpose of the BZA is to hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Administrator; to hear and decide upon requests for Variance from the Zoning Ordinance, when a literal enforcement of the ordinance would result in unnecessary hardship to the owners of a property; and to hear and decide on requests for Special Exceptions where the Zoning Ordinance allows for Special Exceptions. The Board consists of 7 regular members and 2 alternate members. An alternate member may be called upon to participate when a regular member is unable to hear a case. Let the record show that we have six members of the Board present tonight. All the way to my left is Mr. Steven Apicella, and then Dr. Ernest Ackermann, then Mr. Danny Kim, I'm Dean Larson, this is Mr. Robert Grimes, and Ms. Dana Brown. We also have representing the County our Zoning Administrator, ah sorry, ah yes, Zoning Administrator, Mrs. Susan Blackburn, our Zoning Manager, Mrs. Melody Musante, and our Senior Admin Associate for Zoning and Administration, Stacie Stinnette, and Zoning Technician, Evelyn Smith, ah Keith, I'm sorry. Oh and Mr. Ray Davis is also, so we have seven members present. The hearings will be conducted in the following order. The Chair will ask the staff to read the case and members of the Board may ask questions of the staff. The Chair shall then ask the applicant or their representative to come forward and state their name and address, and present their case to the Board. The presentation shall not exceed 10 minutes unless additional time is granted by the Board. The members of the Board may ask questions of the applicant to clarify or better understand the case. The Chair will then ask for any member of the public who wishes to speak in support of the application to come forward and speak. There shall be a 3 minute time limit for each individual speaker and a 5 minute time limit for a speaker who represents a group. After hearing from those in favor of the application, the Chair will ask for any member of the public who wishes to speak in opposition of the application to come forward and speak. After all public comments have been received, the applicant shall have 3 minutes to respond. We ask that each speaker present their views directly to the Board and not to the applicant or other members of the public. After the applicant's final response, the Chair shall close the public hearing. After the hearing has been closed, there shall be no further public comments. The Board shall review the evidence presented and the Chair shall seek a motion. After discussion of the motion, the Chair shall seek a vote. In order for any motion to be approved, four members of the Board must vote for approval. In order to allow the Board time for appropriate review, the applicant or the applicant's representative is required to submit relevant material to the Department of Zoning and Planning 10 business days prior to this hearing to be included in the staff report. The Board may accept additional relevant material from the applicant or the applicant's representative

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during the hearing. However, large amounts of additional material may require deferral at the Board's option on behalf of the client to allow the Board time to consider the additional material. Members of the public and/or staff may also submit relevant material during the hearing. The applicant should be aware that we have all seven members of the Board tonight, but if you wish to defer for any reason you can do so only once in a 12 month period. Deferral requests are granted at the sole discretion of the Board. The applicant may also withdraw his or her application at any time prior to a vote to approve or disapprove the application, provided the applicant has not withdrawn a substantially similar application within the previous 12 months. Any person or persons who do not agree with the decision of this Board shall have 30 days to petition the Stafford County Circuit Court to review our decision. Also be aware that the Board will not hear any denied application for a variance or special exception that is substantially the same request for at least one year from the date of our decision. I now ask that anyone who has a cell phone, pager, or other electronic device to please silence it. It is the custom of this Board to require that any person who wishes to speak before the Board shall be administered an oath. Therefore, I ask that anyone who wishes to speak tonight, stand and raise your right hand. Do you hereby swear or affirm that all testimony before this Board shall be nothing but the truth? Thank you; you may be seated. The Chair asks that when you come down to the podium to speak, please first give your name and address clearly into the microphone so that our recording secretary can have accurate record of the speakers. Also, please sign the form on the table in the rear of the room. Thank you. Are there any changes or additions to the advertised agenda?

Mrs. Musante: There are no changes.

DECLARATIONS OR DISQUALIFICATIONS

Dr. Larson: Before we hear the first case, does any Board member wish to make any declaration or statement concerning any cases to be heard before the Board tonight?

Ms. Brown: I do, Mr. Chairman.

Dr. Larson: Go ahead.

Ms. Brown: Just three quick things. I just wanted to restate that last month, on August 25th, I had driven by the Austin Park property. Additionally, yesterday I drove by and viewed the property at 324 Brooke Road from the street. And then I'd just like to mention to Mr. Leming, his wife is my School Board representative; this does not affect my ability to be impartial, but I wanted to mention that. Thank you.

Dr. Larson: Thank you. Any others? Hearing none, I'll ask the secretary to read the first case.

PUBLIC HEARINGS

1. A15-03/15150811 - H. Clark Leming for Austin Park Development, LLC - Per Stafford County Code, Section 28-349, "Appeals to board generally," the applicant is appealing a Zoning Administrator's determination letter dated June 26, 2015, regarding vested rights on Assessor's Parcel 30-7H (known as Austin Park). The property is zoned B-2, Urban Commercial.

Mrs. Musante: You have the application, the vesting determination letter dated June 26, 2015, information requested by the Board member, and additional information from the applicant. The applicant is appealing a vesting determination that was issued by the Zoning Administrator on June 26,

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2015. The applicant submitted a request for a determination as to whether the property, Assessor's Parcel 30-7H, met the statutory vesting test of Virginia Code Section 15.2-2307. According to the Virginia Code Section 15.2-2307, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the following occurs: The landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act. The state code deems the following to be a significant affirmative governmental act (SAGA) allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of §15.2-2311. The Property is zoned B-2, Urban Commercial, and is not developed. As a portion of Assessor's Parcel 30-7B, it was rezoned with proffered conditions from M-2, Heavy Industrial, to B-2, Urban Commercial, in 2004 by adoption of Ordinance O04-41. The proffered conditions were amended in 2005 by the adoption of Ordinance O05-62. The applicant believes the rezoning of the property in 2004 and the amendment approved in 2005 was for a specific project and therefore constituted a SAGA. The applicant also believes the court case *City of Suffolk v Board of Zoning Appeals of the City of Suffolk* Record No. 021981 supports the claim that the subject property is vested. The property in the referenced case was rezoned in 1988 to a zoning district that limited the uses and the density of the project. From the approval of the rezoning through 1999, plans were submitted and approvals were granted by the appropriate commission or board for a master land use plan reflecting a mixed use and mixed-density development, a preliminary subdivision plat, a preliminary recreation plan, rezoning of a 10 acre tract, reducing the density on the remaining property and amending the Master Land Use Plan. The question of vesting was made when the City of Suffolk rezoned the property in 1999 to a zoning district that did not allow for the use. The Supreme Court of VA affirmed the BZA decision that the property was vested due to the limiting scope of the uses and density permitted in the zoning district and the significant expenditures incurred by the developer in diligent pursuit of the project which resulted in various approvals of development plans. Even though this was the majority opinion, there were 3 judges that dissented. The Property subject to this appeal was not rezoned to a zoning district that had limited scope in the uses permitted. The B-2, Urban Commercial district is the commercial zoning district in the Zoning Ordinance that encompasses all uses listed in the B-2 district in addition to those listed in the B-1, Convenience Commercial district. In addition, neither the description of the rezoning case nor the proffered conditions approved with O05-62 stated a specific land use was to be developed on the property. The proffered conditions approved with the rezoning case cited various architectural details for the buildings, transportation improvements, a layout for the development and a schedule for cash proffers, but they did not state a specific use. Each of these proffers regulates the construction of the project, not the uses within the project as the applicant suggests. The uses permitted are those legally permitted in the district at the time of construction. The list submitted of expenses which were incurred from 2004-2007 corresponds with

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the submittal of development plans during 2006-2007. But due to the developer not pursuing completion of the review/approval process, the plans were closed. There is no record of a submittal or approval of a preliminary or final site plan, a variance for this property, or a written order issued by a zoning administrator regarding a specific use or density for the property. In regards to the need for an approved site plan, the applicant states such an approval is irrelevant to the SAGA analysis because in this case the rezoning designated a specific use and incurring of any significant expenses is enough. Pursuant to the State Code, a site plan is one of the approvals that is deemed a SAGA. In the analysis of whether a property has a vested land use, one must determine if any of the items deemed a SAGA are present. Staff reviewed each item as a possible SAGA and did not find any of these items listed were applicable. The applicant does cite previous decisions by the Stafford County Board of Zoning Appeals (BZA) concerning the appeal of a vesting determination - A13-03/130025 (Theatre Square Case), Case CL10-1425 (Chesapeake-Stafford Case), and Case No. 2000-505 (the Dogwoods Case) to support his case. Each of these cases were heard independently of each other by the Board of Zoning Appeals and the determination was made after hearing the unique circumstances of each. This case will be heard in the same manner. As of this date, there are no approvals of any type of development plans for this property, there was no specific land use cited in the rezoning case or the proffered conditions, and as was the case in the City of Suffolk case, the zoning district does not consist of limited uses and/or density. Therefore, staff does not believe this case supports the claim that Assessor's parcel 30-7H is vested to a land use. Staff believes these findings support the determination made by the Zoning Administrator that this property 30-7H is not vested to a particular land use and that any development of the property must comply with the uses that are currently permitted and as regulated in the B-2, Urban Commercial Zoning District in addition to the development standards applicable at the time of development.

Dr. Larson: Thank you. Any questions for staff?

Dr. Ackermann: I have one. Could you... we have 78 pages of attachments?

Mrs. Musante: I'm sorry, Dr. Ackermann, Susan Blackburn, the Zoning Administrator is going to answer any questions regarding this case.

Dr. Ackermann: Oh okay. I was just wondering if you could give me a quick guide through these 78 pages of attachments, how they are grouped. Because I know some are Ordinances, some are Sections of Code. You know, help me get... a table of contents for these 78 pages would be nice. I don't want a table of contents, but just sort of what we're doing in these pieces. I know some are from the County and some are from the applicant. Is that possible?

Mrs. Blackburn: Mr. Chairman, members of the Board of Zoning Appeals, the packet is a combination of information submitted by the applicant. Part of that was in response to some of the questions put out by one of the Board members. And there were also requests to have the staff reports from 2004 and 2005 for the rezonings. We're sorry that we did not put a table of contents to help find it. That may be something we do for our next cases.

Dr. Ackermann: Okay, thank you.

Dr. Larson: Any other questions for staff?

Ms. Brown: I have a couple.

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Dr. Larson: Go ahead.

Ms. Brown: The development plans; our report indicates that the plans were closed by the County because the applicant did not pursue completion. Did the County send out a notice to the applicant notifying them that they were closing the plans?

Mrs. Blackburn: That I don't know. It was marked in the computer printout for the plans, and unfortunately we are in the process of digitizing all of our cases. So to actually find the paper copies, they may actually be in between here and the digitizer and the scanner.

Ms. Brown: But the County sent out something?

Mrs. Blackburn: Normally we do. Normally we send out a note. I know I have seen them in other files that a case has been closed due to inactivity.

Ms. Brown: And, just for my own records here, no right-of-way was ever dedicated for this project?

Mrs. Blackburn: Not to my knowledge, no.

Ms. Brown: Okay. And, for the layman here, what's the difference between a development plan versus a preliminary plan?

Mrs. Blackburn: In our Ordinance a preliminary plan can be used... used to be used for a subdivision, to do a general layout of what was going on with the development, show the overall boundaries of the development. A development plan is normally referred to in our Code also as a site plan, and it is mostly used for commercial development, which can include apartments.

Ms. Brown: Okay. I'm... that's it. Thank you.

Dr. Larson: I have a question. In the County decision in November 2005 the Ordinance O05-62, there is a lot of reference to the Generalized Development Plan, and a traffic plan is referred to somewhere in there. My question was, was that incorporated into the decision by the Board of Supervisors, those two plans?

Mrs. Blackburn: It would be my hope that in reviewing those plans it was part of the decision. The General Development Plan is submitted with all cases and at times they are actually proffered in the rezoning case that the development will look like that. Other times they are just a general guideline, and by definition they are just a general development plan. So that is what is normally submitted and then it depends on the particular case, as to whether or not they are proffered to, you know, how strong that they use that as guideline for development.

Dr. Larson: So do we... we don't know whether they were included as part of the Board of Supervisors decision?

Mrs. Blackburn: Oh they... as far as the decision?

Dr. Larson: Yes.

Mrs. Blackburn: No, I do not know that.

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Dr. Larson: Okay.

Mrs. Blackburn: I know that they were submitted with the application.

Dr. Larson: Okay. Any other questions for staff?

Mr. Apicella: Mr. Chairman, in doing my homework and researching this case, including material provided by the applicant and the staff, I also reviewed some slides from a vesting workshop that many of us attended back in 2013. In those slides the land use attorney, Andrew McRoberts, summarized several vesting cases which I think had bearing on this case. And so for brevity I think the shorthand names for those cases include, and I'll cite them in descending order: Norfolk 102; Long Lane Associates; James v Falls Church; Hale; Crucible; Goyanaga... not sure if I'm saying that the right way... Greengael and Suffolk. So, I have several questions; I know you'll be surprised. My questions stem in part from reviewing those cases, as well as my experience as both a Planning Commissioner and BZA member. So I beg your indulgence, I do have several questions.

Dr. Larson: Go ahead.

Mr. Apicella: Mrs. Blackburn, what is or are the official documents that identify the approval of a conditional zoning and the specific agreements and conditions placed there upon?

Mrs. Blackburn: Well, a conditional rezoning is...

Mr. Apicella: Would it not be the Ordinance that was actually approved by the Board of Supervisors?

Mrs. Blackburn: Yes. The case is submitted, if in fact the Board of Supervisors approve it, there is an Ordinance that is done. It will list what it is zoned from and what it is zoned to as far as what the zoning districts are and if there are any proffered conditions that are part of that approval.

Mr. Apicella: And that fully encapsulates what the agreement and conditions are in respect to the rezoning. So anything that was said prior to that point in time, any representations made by the applicant, any of the documents produced -- because it goes through an evolution process. It goes from the applicant to the staff, to the Planning Commission, ultimately to the Board. Things can evolve and change through that time. But that Ordinance is what encapsulates the full extent of the agreement between the property owner and the County, correct?

Mrs. Blackburn: Yes sir.

Mr. Apicella: From the County's perspective, what are the distinguishing characteristics that would differentiate a rezoning that is general in nature and one that identifies a specific project or use?

Mrs. Blackburn: In general in nature, it would be a rezoning from a certain district to another district with no specific uses listed. It could also be no specific use is listed; there may be proffered conditions that would talk about transportation, put in a new road, or put in a traffic signal. If it is a rezoning with specifics, it will limit uses. It will exclude uses. It will state only this will be allowed to be built on the property. It will limit the number of units in a subdivision, if that is what it's being rezoned to, single-family or to residential. It can have an entire list of regulators, which are called proffered conditions in the case. But in general it will state things that it needs to be or what it cannot be.

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Mr. Apicella: Under what circumstances or to what extent does the County require fees, a GDP, an impact statement, to rezone a parcel from one zoning category to another?

Mrs. Blackburn: We have fees for... application fees. The general development plan is a required plan that must be submitted. As far as impact fees or cash proffers...

Mr. Apicella: They're not impact fees, and impact statement.

Mrs. Blackburn: Impact statement, okay. An impact statement is also required.

Mr. Apicella: So for every rezoning, whether it winds up being a generalized zoning or a specific project or use identified, those documents are required to be part of the submission?

Mrs. Blackburn: Yes.

Mr. Apicella: When is a TIA also required? TIA being a transportation impact assessment.

Mrs. Blackburn: The TIA is now required for rezonings and... I don't have my ordinance with me. That is a new item that has been required in the last few years and I do not know the threshold. I don't have my book with me.

Mr. Apicella: Okay, but when... even when the uses aren't necessarily cast in stone, a TIA would normally be produced based on the potential that could occur on that particular parcel.

Mrs. Blackburn: Yes, based on the use. If it's going to be rezoned to a commercial district to allow commercial uses, the TIA would be used for that, yes.

Mr. Apicella: And that TIA is based when there's not a specific project or use identified. It's based on the highest use that could possibly occur on that parcel, right?

Mrs. Blackburn: Yes.

Mr. Apicella: What's the difference between a non-proffered GDP and a proffered GDP?

Mrs. Blackburn: A non-proffered GDP is not required to be built to according to the proffered conditions. A proffered GDP, it is stated in the proffered conditions that this development will be built in accordance... shall be... shall is our big word... will be... shall be developed according to the GDP attached to the case or included in the case.

Mr. Apicella: So just to clarify, when the GDP is not proffered, the applicant has a great amount of flexibility to deviate from the non-proffered GDP to develop any and all authorized uses under that zoning category. Is that correct?

Mrs. Blackburn: Yes, that is true.

Mr. Apicella: Whether it was in that GDP or not in that GDP. So if they said they were going to do X in a non-proffered GDP and it was one of the allowable uses, they can decide not to do X, they can do Y, as long as it's an allowable use.

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Mrs. Blackburn: Yes, they could.

Mr. Apicella: I think it was mentioned in the staff report, the initial action on this parcel occurred in 2004. That was a rezoning from M-2, Heavy Industrial to B-2, Urban Commercial. And the subsequent action in 2005, that was a proffer amendment, right?

Mrs. Blackburn: That was amendment to proffered conditions, yes.

Mr. Apicella: Okay, I'm going to ask some clarifying questions. In the 2004 rezoning, it doesn't appear to me that there was anything in the application, in the proffers, the staff report, or more particularly in the Board action indicating any actual or potential residential uses. Is that your understanding?

Mrs. Blackburn: Well, let me find my case.

Mr. Apicella: Mine starts on attachment 2, page 8 of 123, with respect to the 2004 rezoning.

Mrs. Blackburn: As I am reading through this, there is no mention of residential uses at all.

Mr. Apicella: Okay. On a close review of the 2004 proffer statement, which is RC230603, while it says in the first paragraph that Austin 610 Associates applied for a rezoning of parcel 30-7B to the B-2 zoning district, it says further, in quotes "hereby proffers that the use and development of the subject property shall be in substantial conformance with the following conditions." It does not mention any specific uses though. Is that correct?

Mrs. Blackburn: And where are you...

Mr. Apicella: I'm looking at the actual proffer statement.

Mrs. Blackburn: Okay. I'm looking at... you're not looking at the ordinance?

Mr. Apicella: I'm looking at the proffer statement first.

Mrs. Blackburn: Oh, okay.

Mr. Apicella: That's page 49 of 123 of attachment 2. I'm reading from the first paragraph.

Mrs. Blackburn: Okay. And you were reading...

Mr. Apicella: I was reading the first paragraph.

Mrs. Blackburn: Yes.

Mr. Apicella: Again, it says "Austin 610 Associates, the applicant, has applied for a rezoning of Assessor's Parcel 30-7B, The Property, to the B-2 zoning district, and hereby proffers that the use and development of the subject property shall be in substantial conformance with the following conditions." It goes on to mention several conditions; right-of-way dedication, traffic study, inter-parcel access, entrance curb, cuts to parking areas, development RPA, low impact development, maintenance of Austin Park Drive, secondary access... that's it, two pages, right?

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Mrs. Blackburn: Yes sir.

Mr. Apicella: No specific uses mentioned at all.

Mrs. Blackburn: No.

Mr. Apicella: A couple of pages further into the staff report, where it actually has the Board approved Ordinance. It starts on page 33 of attachment 2. Does the Board Ordinance O04-41 which was approved by the County on August 17, 2004, does it mention any specific uses?

Mrs. Blackburn: What page did you have it on yours?

Mr. Apicella: Starts on page 33.

Mrs. Blackburn: Of attachment 2?

Mr. Apicella: I'm sorry, that's attachment 1. That kind of goes back to Mr. Ackermann's point. I had to pull pieces together to kind of make a history of the project. Apologies for not mentioning it was attachment 1.

Mrs. Blackburn: No. I have right-of-way dedication and improvements, traffic study, inter-parcel access, architectural treatment, entrances, development in RPA, low impact development, maintenance of Austin Park Drive, secondary access, signage, and the Fred bus stop.

Mr. Apicella: Again, no uses at all were mentioned. Once the Board approved the 2004 zoning, again codified under O04-41, to what extent was the applicant bound by the potential uses or structures it identified in its non-proffered GDP?

Mrs. Blackburn: Within...

Mr. Apicella: So it has a non-proffered GDP that was submitted as part of the package. To what extent could it go outside of what was identified in that non-proffered GDP? I kind of asked that question, but I'm getting specific now to the actual documentation that's in front of us that was approved by the Board.

Mrs. Blackburn: As far as the non-proffered GDP, it would have been able to go outside of that, unless any one of the conditions referenced something in particular.

Mr. Apicella: But it didn't, as far as I can tell. There were no limits placed on what could be built. Again, it was a generalized zoning, rezoning to B-2...

Mrs. Blackburn: And this is in the 04?

Mr. Apicella: Yes.

Mrs. Blackburn: There was one.

Mr. Apicella: Okay, what was that?

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Mrs. Blackburn: That was in the architectural treatment, in number 4.

Mr. Apicella: Yeah, but that's a... okay, that's a condition, but that's not a use, right?

Mrs. Blackburn: Right, exactly.

Mr. Apicella: Okay. Moving on to the... in September 2005 the staff report on the proffer amendment, it states that the purpose of the amendment was to amend the building heights and that while the GDP was revised to include office space and commercial apartments and remove a recreational enterprise, it specifically says in the staff report, no monetary or capital proffers are associated with the application. Is that correct?

Mrs. Blackburn: Yes.

Mr. Apicella: Okay, and despite there being a non-proffered GDP and an impact statement which mentions apartments and a TIA, in the recommendation section of that staff report, both in the staff report to the Planning Commission and the Board of Supervisors, there's a comment that says, in quotes "lack of data makes it difficult to assess the capital impacts on the County." So, my question to you, given that statement in the report, staff report, when the specifics of a rezoning are clear, for example the number of buildings or units that can be built, can staff not usually identify the impacts or at least the range of potential impacts? You're going to build X number of apartments. You're going to, in a...

Mrs. Blackburn: Yes.

Mr. Apicella: ... in a proffered GDP you're going to do X, Y, and Z. So, when you have specificity you can normally tell what the impacts are to schools, etcetera, right?

Mrs. Blackburn: Yes.

Mr. Apicella: In this case the staff report says that there is a lack of data on which to be able to make those... to determine what the impacts would be. Is that correct?

Mrs. Blackburn: Yes.

Mr. Apicella: In the TIA that was submitted, there is a caveat that says it's based on the assumed uses. Okay? So when a TIA normally says this in the scope of a rezoning, does that normally indicate that the project is clear or not clear?

Mrs. Blackburn: I would say it's not as clear as it could be.

Mr. Apicella: Again, I apologize, Mr. Chairman, for the questions. Again, I'm trying to get to what really happened when the Board made its decisions, both in 2004 and 2005. In looking at Ordinance O05-62, approved by the County Supervisors on November 1, 2005, it refers to a revised, but non-proffered GDP and a \$4,593 cash contribution per residential unit, but it does not indicate a specific number or cap on residential units or even clearly indicate that residential units would be built. Is that correct?

Mrs. Blackburn: Yes sir.

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Mr. Apicella: So for both the 2004 rezoning and the 2005 proffer amendment, in the absence of identifying specific uses that would be built versus those that might be built, to what extent could the applicant veer from the non-proffered GDP and any other submitted documents, and pursue any and all other uses allowable in the then B-2 zoning category?

Mrs. Blackburn: As far as uses go, he would be... they would be allowed to do that with whatever other restrictions are placed on the property.

Mr. Apicella: Okay. The applicant submitted a concept plan. What legal status does that have and what requirements does that place on an applicant, a concept plan?

Mrs. Blackburn: I would suspect a concept... now this is me assuming... we do require a GDP. Many times an applicant will supply a concept plan as potentially a further clarification of what may be developed on the property, a color rendering for a presentation to make it clearer for whoever is making the decisions. If a concept plan is not mentioned in the proffered conditions as a project will look like this, be built like this, then it is a picture, a rendering showing potentially what can be built on the property or what the vision at the time was.

Mr. Apicella: Okay. Beyond the parameters of the governing ordinances, and I mentioned which those were, does the BOS-approved rezoning and the associated proffers put any restrictions on the number of commercial buildings and/or residential uses? The ordinances themselves that were approved by the Board, do they place any restrictions?

Mrs. Blackburn: On the number of buildings?

Mr. Apicella: On the number of buildings, or the type of buildings, beyond what is, again, at that point in time allowable under the B-2 zoning district.

Mrs. Blackburn: Not that I can read, no. It discusses other things about buildings, but not the numbers of buildings.

Mr. Apicella: Okay. And if there's a proffer that's mentioned as a potential in terms of development and the developer chooses not to proceed forward with that use, would they still have to provide the proffers associated with that type of use? So here again, there is the potential for residential units and a per unit contribution of, I forget the number, \$4,500; if they don't build residential units, do they have to provide those proffers?

Mrs. Blackburn: No.

Mr. Apicella: Okay. At the time, commercial apartments were a by-right use in the B-2 zoning district, right?

Mrs. Blackburn: Yes.

Mr. Apicella: When did the BOS change the allowable by-right uses?

Mrs. Blackburn: It was in 2006. They changed it to... an ordinance was passed and amended the Code to allow them as conditional uses and in 2007 it was amended to remove them completely.

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Mr. Apicella: And both those changes occurred by the normal public process where everybody had notice?

Mrs. Blackburn: Yes, to the best of my knowledge.

Mr. Apicella: Before, when the County was considering changes to the uses, did the applicant request a vested rights determination?

Mrs. Blackburn: Not to my knowledge, no.

Mr. Apicella: And when did the applicant finally seek a vesting determination from the County?

Mrs. Blackburn: It was, the best of my knowledge it was the one that they submitted that we're here tonight.

Mr. Apicella: Okay. Based on your knowledge, did any actual development occur on the subject parcel between the date the BOS approved the rezoning and the date the BOS changed the allowable by-right uses?

Mrs. Blackburn: Not to my knowledge, no.

Mr. Apicella: Okay. Can you explain to us what's required to proceed forward with a development of a parcel under its zoning designation? So after they have an approved rezoning, what happens next?

Mrs. Blackburn: Normally what happens is they will go through their site development process, which will include developing a site plan and submitting it. They will do engineering work which can require many different kinds of tests and studies. If there are wetlands on the property, they will look at that. And grading permits, and these are also submitted through the County and reviewed for compliance with the appropriate codes. And when the plans have been drawn to the satisfaction of all the code requirements, they will then be approved. And at that point then development can commence as far as moving dirt.

Mr. Apicella: And in the context of a site plan, how would the conditional proffers on potential apartments have been triggered? When would they actually have commenced? If they decided to proceed forward, if they had a site plan that was approved and it included commercial apartments, when would that trigger the actual provision of providing those proffers associated with those apartments?

Mrs. Blackburn: You mean the cash proffers?

Mr. Apicella: Right. Wouldn't that normally happen as a result of the occupancy permit?

Mrs. Blackburn: Today, yes. Yes. That has changed through the years, but yes, now it is the occupancy permit.

Mr. Apicella: The applicant provided an email from a then Supervisor expressing interest in apartments potentially being built on a property. Does that email have any legal status at all in what would actually happen on the property?

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Mrs. Blackburn: Not to my knowledge, no.

Mr. Apicella: Okay. I provided via Melody an excerpt from a report by McCandlish Lawyers about what the legal status of representations... I think it kind of speaks to whether or not that email... in my... you know, again, it's one law firm expressing his views, but it indicates that an email by itself that's not part of the approved rezoning really has no legal status at all. You certainly can make your own determination based on it, but I suggest you might want to take a look at that. What do the owners do with respect to this submission of the preliminary site plan?

Mrs. Blackburn: They submitted a site plan for review.

Mr. Apicella: And what actions did they and the County take on that preliminary site plan?

Mrs. Blackburn: According to the County records, there was a first review process and from what I could find in the logs, no other actions occurred.

Mr. Apicella: So the site plan was not ultimately approved, the preliminary site plan, and certainly no final site plan was submitted and approved.

Mrs. Blackburn: Correct.

Mr. Apicella: What's the current status of the parcel?

Mrs. Blackburn: It is vacant.

Mr. Apicella: So no construction, development whatsoever?

Mrs. Blackburn: Nothing. No, not to my knowledge.

Mr. Apicella: Okay, I apologize, a few more questions. So the applicant contends that they received County approval to develop a specific project that falls within the threshold definitions and criteria contained in 15.2-2307. Can you explain to us again why the County does not agree that the rezonings of the parcel and the proffer amendment involved a specific project under the statute? I think it's somewhat explained in your determination, but if you can just give us a couple of sentences.

Mrs. Blackburn: According to the research that I did, I could not find were a specific use was actually stated in the rezoning case or in any of the proffered conditions associated with it. As I also stated in my determination letter, there were issues that were proffered. There were transportation issues that were proffered. There was entrances proffered, but the specific uses were not proffered. Now any kind of development would have to comply with those particular proffers, but as far as the use goes, they did not specify the use. They talked about a use. They inferred a use in the staff reports, but if for some reason someone wanted to come back and develop that property, they would not have been bound to that use. They would have been bound to whatever uses were permitted within that zoning district at the time of development.

Mr. Apicella: So, it's the County's view that this rezoning was general in nature and could have proceeded forward with any and all allowable uses, or some alternate version that they didn't mention in their non-proffered GDP, that would have triggered some proffers if and when those uses actually happened, right?

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Mrs. Blackburn: They were allowed... they would have been allowed to develop other uses, but still within the parameters of what the proffered conditions were part of case involved.

Mr. Apicella: So, in the context of what they submitted, they might do X, or they ultimately could do Y, because there were no limits to or controlling specificity about what they would do, and I emphasize what they would do on that parcel.

Mrs. Blackburn: Yes sir.

Mr. Apicella: Lastly, the applicant contends that after obtaining approval by the County for what the owners of the parcel maintain is a specific project under 2307, that they met the third condition of the statute by incurring extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on a SAGA. So can you, again, explain why the County does not agree that the applicant diligently pursued the development of the parcel following the rezoning within the meaning of the statute and as further informed by case law?

Mrs. Blackburn: The... according to the County records, the applicant and the information that was submitted with the vesting request, the applicant did spend money between, and I want to say, 2004 and 2007. And this was when site plans were being done, this was when the rezonings were going on. And after the submittal of the site plan in 2006, there was no activity that spent money towards us, and so, there may have been some legal fees submitted by the applicant. Legal fees were done, but that was as it stated in trying to sell the property, but there wasn't any more action going on with the case.

Mr. Apicella: Thank you Mr. Chairman.

Mrs. Blackburn: I do have one correction to make. I said the zoning cases for changing the commercial apartments, removing them from the code, were done in 2006 and 2007. It was 2007 under Ordinance O07-42 and in 2008 under Ordinance O08-61.

Dr. Larson: Are there any other questions for staff? Dana?

Ms. Brown: Okay, trying to follow all that, it brought something to mind. We talked about renderings. I'm pretty sure you said that the only thing that the County did was the first review of a site plan. I just wanted to clarify for my own mind, there was never any building permit applications received, anything like that?

Mrs. Blackburn: No ma'am. Not that I could find a record of.

Ms. Brown: Okay, and you just talked about the expenses incurred. Do you think that 2006 was the last time that they incurred expenses for the county stuff?

Mrs. Blackburn: According to what I saw, there were some expenses done in 2007 and then there were legal fees done after that. And the note about that was that it was used in pursuing sale of the property.

Ms. Brown: Okay, because I was looking at what the applicant submitted on attachment 1, on page 42, and there was some stuff about soils testing and wetlands delineation, all the way up through September of 07, so I just wanted to make sure that was right.

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Mrs. Blackburn: Yes.

Ms. Brown: Okay thank you.

Dr. Larson: Any other questions for staff? Thank you, Mrs. Blackburn. Will the applicant or his or her representative please come forward to present their case?

Mr. Leming: Good evening Mr. Chairman, members of the Board of Zoning Appeals, I'm Clark Leming. I'm here on behalf of the applicant. Let me start... do each of you have the statute 15.2.-2307 where you can access it? If not, I have a bunch of copies. I do have the full statute and I think it's instructive and there were some... there were two things that were left out in the staff presentation. Let me explain, before we get into the actual statute, that the issue here is framed partly based on the questions Mr. Apicella has asked. And that is whether or not the applicant can proceed with the development that was allowed by the 2005 proffer amendment at this time. And as you all know, the Ordinance changed to eliminate the possibility of commercial apartments. Commercial apartments. Does everybody know what a commercial apartment is? A commercial apartment is a residential unit that occurs over a commercial or office first and second floors. The ordinance at that time, the main requirement for it, was that you couldn't have more residential space over the commercial than office space. So if you had a building and 51% was dedicated to office and commercial use, 49% could be dedicated to residential use. Now, let's go back. So that's what this is all about. Did the landowner obtain a zoning right to complete the project that was presented -- and we'll talk a little about what's official and what's unofficial, and what case law says about that -- in 2005 in particular. But first, turning to the vested rights statute. I call your attention... first of all we have a zoning determination here from the Zoning Administrator that really only deals with the first prong. We got into some discussion of expenses and we gave you information about expenses. But the Zoning Administrator's determination only deals with whether or not there was a SAGA for a specific project, or a specific use. Those two terms are used interchangeably by the Zoning Administrator, even by Mr. Apicella. We'll talk a little bit about what the difference is between them. But first, calling your attention to the Ordinance. The first prong of the Ordinance is what the Zoning Administrator's determination was based on. Was there a SAGA here? The third prong however is instructive because it re-references the SAGA and the language is significant: incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant, affirmative, governmental act. Back to the first prong. Obtains or is the beneficiary of a significant, affirmative, governmental act which remains in effect, which this does. The 2005 proffer amendment is in effect and then the important word in that first prong there: allowing development of a specific project. The term utilized there is permissive, allowing. So, in our view and with all due respect to Mr. McRoberts and the vesting classes that maybe more than Mr. Apicella had attended, I'm sorry there wasn't somebody there from the land use bar because you would have gotten a completely different perspective. The vesting test is permissive. It allows... the SAGA allows the development of a specific project. Now...

Mr. Apicella: Mr. Leming, I'm sorry to cut you off there. So, it goes back to a general zoning versus a specific zoning. So under your theory, a rezoning from one category to another, which allows any and all uses under that category in all cases would therefore be a SAGA.

Mr. Leming: No.

Mr. Apicella: Then explain the difference.

Dr. Larson: Let's let the applicant's representative finish his presentation.

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Mr. Leming: I would appreciate that Mr. Apicella, because otherwise I'll never get all I wanted to say on the record here, and I'm sure you have a whole laundry list of questions. So, first point is that the vesting test is permissive. Now how do we determine what a SAGA is? There was one particular phrase that was left out of Melody's recitation of it. For purposes of this section and without limitation. Now there are seven things listed there that are SAGAs, that are deemed conclusively to be SAGAs, but it's not a definitive list. It says without limitation. So there are other things. There were originally six. After the Crucible case, and some of you were on the BZA when that came up, it went up to the Circuit Court in part on a vesting determination. The Circuit Court determined there was... that the Crucible was vested. The Virginia Supreme Court overturned that decision and the next General Assembly session number 7 was added to prevent that kind of thing from happening again. It became a SAGA. Now, I digress and I want to talk specifically about this particular application. So we have a zoning determination from Mrs. Blackburn that basically says there was no specific use, no specific project. In four different places in her determination the term specific project, specific use is used interchangeably. Specific use, specific project, specific project use. What is the difference between the two? I'm not sure that we have a judicial, a clear judicial determination as to what the difference is. The term specific use occurs three times in the statute. It occurs for the first two SAGAs and the first one is going to be the one we talk about the most. The governing body has accepted proffered or proffered conditions which specify use related to a zoning amendment. Now, we have a zoning amendment here. There were proffered conditions. You know, the issue is whether or not which... whether they specify use. And we're going to talk about why I think they do specify use in just a moment. But I hasten to add that this list is not definitive. These are simply SAGAs that are deemed to be significant. These are simply governmental acts that are deemed to be significant, affirmative, governmental acts for vesting purposes. Now, into the history of this project. There is a lot of case law here, and I'll be happy to talk about any of the cases that Mr. Apicella mentioned. Hale is a very interesting case, because in that case we have just the opposite of what's going on here. We have a zoning application and a rezoning without any proffers, but lots of representations, lots of conceptual plans, and then we have the applicant coming back some years after that and saying they were vested to everything under the zoning ordinance, which had changed, including big boxes, which is what they really wanted to build. And ultimately the Court determined that they couldn't do that. They weren't vested for everything that could be done under the zoning district. They were vested for what they presented. What it was that the town of Blacksburg thought they were getting. Well, in this particular case, so it did go beyond the actual formal documents that constitute what can be enforced here, what was the presentation. Now in this case the presentation was very clearly for a mixed use development, in the case of Austin Park. No question, everybody understood what it was. The staff report reports that it is a rezoning for commercial retails and commercial apartments. That's what everybody understood was coming. That's what they want to do now. They're not changing. They're not doing what they tried to do in Hale, and try to come in and do something else, other than what they said they wanted to do. They want to do the thing they said they wanted to do, which is a mixed use development. Now, there are a number of cases decided by this BZA and upheld by the Circuit Court. And one case appealed to the Virginia Supreme Court and rejected that you all have decided that deal with the issue of specific use. Way back in 1999 there was the Dogwoods case, and the County argued there, no specific use. In that situation however there was a determination from the Zoning Administrator that they could only build townhouses and the BZA decided that's enough of a specific use and the Circuit Court agreed, and that was the end of the case. Now in this case we don't talk about types of housing in the proffers. We don't talk about it, because there was just one that was permitted, commercial apartments. That was it. So there was no question about what type of housing it was. How many apartments could they have? It's a direct function of the Ordinance. What was the square footage of the retail and the office that could be accommodated on the property? They couldn't have any more. They estimated how many it would be, but that was... that was the... that was the particular

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residential aspect of the project. This court heard a case called Chesapeake-Stafford and this is the one that did go... the County did appeal this to the Virginia Supreme Court. It was rejected by the Court. Again, the County says, no specific project. Some of you may remember it. It was an industrial park. Somebody had a final plat, wanted to follow through with additional industrial development on the property, but the property been changed to commercial. But they had a final site plan recorded and the issue was, well what was the specific project. Well, they had a preliminary site plan that said industrial park on it. That was it. That was the specific project. This is flashing at me Mr. Chairman.

Dr. Larson: Mr. Leming, the County had ample time to present their reasoning, so you may have ample time as well.

Mr. Leming: Alright, well thank you very much. I appreciate that. The Circuit Court upheld the BZA's determination that that property was vested, that that was a specific project, just industrial park. The... most recently, in 2013 you had a case that just came to you all, the Theatre Square case. And this is a case as some of you may remember where there was a commercial piece in the middle of another commercial piece, or attached to it and had cross proffers referencing that. The County took the position that there was no specific use, no specific project, even though you had these cross proffers, but there had been no site plan, no site plan approved, nothing that had moved forward. But you had these interchangeable, these cross proffers. And the Board of Zoning Appeals determined that that was a specific use. And once again, the County had argued no specific use. So this is a very familiar theme. No specific project, no specific use. Now, what I want to talk to you about is why I believe you do have a specific use here... or a specific project. Now, I'll tell you that I think that it was unfortunate that the General Assembly utilized these two terms. It would have been a lot easier if they had just used one, and then you wouldn't be scratching your head saying what's the difference between a specific project and a specific use. I have no problem with the first part of the analysis here. I think that there was a... there was certainly a governmental act, we can agree on that, there was a governmental act that allowed a specific project. What was that specific project? It was what was described. It was a mixed use development. It allowed that. The action of the government allowed that. Now, is it a SAGA? That's the key. So we get to SAGA number 1 here. And candidly, I think, it's the one that fits the best. I don't mean to preclude the possibility that there are other unlisted SAGAs that may fit better. This is not intended to be an exhaustive list, but that first one is the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment. And as we analyzed before, no question; the government accepted proffers and proffered conditions and it was related... it was a zoning amendment. Every time this County sets up a rezoning or proffer amendment, it completely re-ordains the ordinance. It's amending the zoning map. Proffers amend the zoning map. So we have all that here. So, what is the specific use and is it different from the specific project? Now, again, what they're seeking is to do what they said they were going to do, not something different, but what they said they were going to do. They had to... in 2004 they obtained a rezoning. It was a commercial rezoning. Commercial apartments were permitted in the B-2 zoning district, but they didn't try to do that under that. Why? Because the presentation that had been made didn't suggest commercial apartments. Nobody talked about them. It was to be an office center. That's what was... that's what was, uh, put before the Planning Commission and the Board of Supervisors. That's what the staff report says. There's no mention of commercial apartments. Now, could they have done them? Well, the reason that they came back and did a proffer amendment is because it was concluded that they couldn't do them, that what was necessary was a proffer amendment that actually set forth the commercial apartments and the residential mixed use project that they then wanted to pursue. So they set forth again and did a proffer amendment right on the tail of this first rezoning. It happened very quickly. The market changed and just as an aside, you know, there's all this discussion about well nothing's happened since 2007. Well you know what, there been a whole lot

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of developments where nothing has happened since 2007, because of what happened with the economy. And that's the main reason that it did not proceed, but they were not required to in order to be vested. I point out also, the General Assembly has adopted a couple of statutes that extend the life of various plans specifically because of the recession that we went through. So certainly widespread recognition that this was not a good time for a development. Now let's talk about what I think some of you may be most interested in. And that is the proffers and whether or not the proffers specify use under this first SAGA. And it is my contention that they absolutely do specify use, read as a whole. First of all, if you compare the 2004 with the 2005 proffers, and I happen to have a red lined one, I hope that's the one that's included in your packages, and I realize this is an incredible amount of material, but the red lined one is instructive because it shows what was taken out and what was put in. Now, which proffers are relevant to use? Now, I would first point out that there is a proffer that indicates... number 2, proffer number 2... that they're going to make any improvements indicated by the study. Now the study, in 2005 assumed the residential component. So, any improvements that the study indicated were necessary, traffic improvements are proffered here, based on that traffic study. Now I'll be candid with you. There were no significant difference in the traffic volumes between the 2004 zoning and what was proposed here. So there were no additional improvements that were required. Nevertheless there's the proffer that incorporates the traffic study and agrees to makes those. Now, more importantly, is proffer number 4. And if you have a red lined version you will see a good bit was struck and there were... there is a preamble in one, two, three paragraphs that were added. Now most significant, I think, in terms of, well what are they going to do, how are they bound by these proffers to do the thing that now the county says they can't do, which is commercial apartments. And that I think is contained in the preamble here, which states: The applicant agrees to utilize a consistent architectural theme and general layout of buildings that features a neo-traditional design in substantial conformance with the renderings entitled Austin Park Center Architectural Renderings, dated August 1, 2005. Now I don't know whether you've had... and I realize you have a massive amount of material, and I don't know whether you've had an opportunity to look at those renderings. But those renderings are proffered. And, for your convenience, I do have the proffers that are renderings here. Now these are the renderings that are specifically proffered here and you'll notice down at the bottom at C, it says renderings, to ensure conformity with these proffers at the time of submission of building permit applications, renderings of proposed structures included in each application shall be simultaneously submitted to the Planning Department for review and approval. Now, what did they have to do? They had to propose actual construction here that is consistent not just with these renderings but also A, B, and C, particularly in the case of the buildings C, where they were required to do things such as recesses, balconies, stoops, and breezeways. It doesn't sound like a retail center. It doesn't sound like an office park anymore and I note that on a couple of the pages of the proffered renderings you'll see that there is a specific proffer, I think it's your third page, of office and residential units. There is a specific page in the proffered renderings entitled retail residential units. Now, again, we're looking at what it was that they could do... what is it that they could do with these proffers? And I would submit to you, not much beyond the scope of what they said they wanted to do, because of the nature of these proffers. Now perhaps, hypothetically, you know, in a purely conceptual way, you could say, well they could do anything in the B-2 zoning district legally, but they would have had to comply with these proffers. And they would have had to have submitted construction drawings for approval by the county staff that was consistent with these renderings. And the renderings very clearly envision the mixed use component and the residential side of it. Now in addition, and if you did have an opportunity, as I'm sure some of you did, to actually follow the progression of the staff analysis, the staff requested a number of things here. For instance, if you look at proffer number 7. They proffered to do residential... I'm sorry, recreational amenities. The applicants will construct a trail system, general location, benches interspersed. Now I suppose a fancy office park might, you know, be nice to have something like this for the workers there. It's certainly more consistent with a residential

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development. The other things that were added, and again, these were things that were added at the request of staff, were the crosswalk, because there's going to be more pedestrian activity because of the residential component, and pedestrian access is another of the features back at proffer 4 that is now deemed important because you're going to have people living there. And finally we have the cash contribution which, of course, would not be operative at all unless there were going to be... unless there were going to be a residential component here. Now, I think it's fair to say, if they didn't build any apartments they wouldn't have to pay any cash proffers. Sure, you can say that in a vacuum, but how can you say that in the context of these architectural requirements? What their buildings had to look like. What kind of features were required. How were they going to comply with the renderings which show 3 and 4 stories, how were they going to comply with that, and the balconies, and so forth and so on, and not do any residential? What I would submit is that these proffers are totally incompatible with anything other than a mixed use development. That is what was advertised. That's what the proffers contemplate. And I think that that specifies use. It does not... and it certainly is a specific project allowed. That's the language used by the statute, allowed, specific project allowed. I think that the determination of the Zoning Administrator is wrong. It is wrong compared with the prior decisions of this Board. It is wrong compared with the decisions of the local Circuit Court, which are the ones that are binding here, as well as opinions of the Virginia Supreme Court. Now, the Suffolk City case, and a few others are interesting here. And let me touch on one other aspect because some of you have referenced it. We have a period of activity, trying to move the project along right after the proffer amendment is adopted and then nothing. Well, what does that... is that diligent pursuit? Well number 1, diligent pursuit is not an independent prong of the vesting test. The third prong... and let me add this caveat again, because we're talking about the prong, the third prong. The third prong, the only way in which the Zoning Administrator dealt with the third prong was to say, well there was no specific project, so no decision on the third prong because there is no SAGA. So, with that caveat, if we look at the third prong, it is a combined test, incurs extensive obligations or substantial expenses in diligent pursuit of the specific project. It's not... it's not read they diligently pursued the project. Did they incur substantial expenses in diligent pursuit? Well, what is it, what circumstances, what facts satisfy that prong? In the Dogwoods case, very similar situation. We had a 1989 rezoning. Very quickly a preliminary is put together. The preliminary plan is let to expire. It goes away on its own as happens under statute if you don't do certain other things. And that was it. And then in 1999 we came forward and asked for the vesting determination and the County said no specific use. So I think that is instructive. The Suffolk City case is instructive. And there was... what was explained to you about that case was not exactly accurate. There are some important details of that case. Suffolk City was the first big zoning case after the vesting test was adopted by the General Assembly. And yes, it was a 4 to 3 vote. You know, so was Obama Care. So were a lot of other decisions, but it's the law of the land. And the important thing about that case for purposes of this discussion is that you had a 1988 rezoning and then nothing that happens. Nothing happened. Now, there was a representation that there were things going on all that period time. You know, you have to... there was an original master plan, and then you have to move forward to like 1994 before anything else happens. There was no construction. None of these cases. None of the cases that had been before you had any actual construction, no building permits; simply plans that were advanced. Now, Suffolk City, remember there was a recession in the early '90s too that held that project up. Then they get back into the act in the mid-90s and then the city changes the Ordinance on them, and they want to go back and do what they said they were going to do. So there are parallels to this. And once again, the county said in that case, they said, similar to what I'm hearing here, I'm not sure this is exactly what the Zoning Administrator has in mind, but you have to have a site plan in order to be vested. Well, a site plan is another of the listed SAGAs. I don't have to have two SAGAs. I don't have to have a SAGA SAGA. I just need one. Now, it is true that if a site plan had been obtained here, if they'd gone, if the economy had not fallen apart and they had finished what they started out to do with the site plan approved, they would have

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had to post all kinds of bonds and things to have it approved, which is largely why they didn't. But, if that had happened, there'd be no question they'd have another SAGA. But the SAGA we're focusing on is not a site plan. The one that I call your attention to is SAGA number 1. So those cases I think are instructive, in both the Chesapeake-Stafford case that you all decided and the Circuit Court heard, and the Theatre Square case, there were no... there was no construction. The prospect and the long delay between the time the site plan was... I'm sorry, the final site plan was recorded in the Chesapeake-Stafford case and the time they wanted to develop it. So these delays happen in the development business. The question before you is whether or not there is a specific project that the governmental act allowed, whether that governmental act, and I'm talking specifically of the 2005 rezoning, whether that was a SAGA under the statute, whether or not the proffers, you want to look at this very narrowly which is not what happened in the Hale case, but if you want to look at this very narrowly and ignore the representations, the staff reports, everything that went with the application as to what they were going to do, if you want to just focus on the proffers, the proffers don't permit them to do a significantly different development than what they said they wanted to do. They can't get around these proffers. They run with the... with any application that they had to file. They still run with any application. Think of the quandary that they're in now. They've got these architectural proffers. If they wanted to move forward with a B-2 plan, no commercial apartments, they've got proffers that they've got to satisfy that require balconies and appearance, the appearance of apartments, of apartment buildings, recreational amenities, all of the things that were put there in anticipation of the commercial apartment use. So I would submit to you that they have met the requirements of the vesting test. The County's argument here, again... again and again and again... is no specific use. That's what you've heard every time. I've been before you on a vesting case. No specific project, no specific use. So I think we have satisfied what is required in order to be vested and in order to permit this landowner to proceed with exactly what they thought they received permission to receive in 2005 and now the County says, you can't do. I'll be happy to... now, I'm sorry, thank you for letting me ramble on there, Mr. Chairman, and I'm happy to answer any questions that you may have.

Dr. Larson: Are there any questions for the applicant's representative?

Dr. Ackermann: Could you tell us what the landowners have done since the proffers were approved on the project?

Mr. Leming: Well let's, yeah, let's talk about that a little bit. As I indicated, Dr. Ackermann, the Zoning Administrator really doesn't get to the third prong. The most important thing that they've done, I think, for purposes of measuring their pursuit of the project after the 2005 rezoning is the site plan exercise and what they incurred in engineering fees alone.

Dr. Ackermann: That is the plan that was begun but never completed?

Mr. Leming: Yes. They plan was completed and an application was made and submitted and was reviewed. And then, because of the economy, they did not pursue it past that point.

Dr. Ackermann: And when was that?

Mr. Leming: That was in 2006.

Dr. Ackermann: 2006.

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Mr. Leming: That's correct. So right on the heels... I mean, you know, they sat out. You know, by 2006, although there was some warnings economically, most moved ahead with things, so they moved right into the site plan. There were soil studies and other engineering that Ms. Brown mentioned a moment ago. There were other things that were done to try to move the project along, but then the economy got to the point that they didn't... they were afraid to go any further so they stopped.

Dr. Ackermann: And are these the same owners of the property?

Mr. Leming: They are the same, yes, the same basic owners. I'm still dealing with the same clients today that I dealt with in 2004 and 2005. There is a different corporate name that they've utilized, but the ownership is still the same. I don't know if we have to submit that information with these applications.

Dr. Ackermann: I just... it was in the proffers.

Mr. Leming: Yes, okay.

Dr. Ackermann: Thank you.

Mr. Leming: Yes sir.

Dr. Larson: So...

Mr. Leming: And if I... Dr. Ackermann, if I may, the engineering fees and so forth added up to about \$150,000. How do you know if there is a substantial expense issue here, she didn't decide it. But if there is one, in the Suffolk City case the expenditures deemed sufficient for prong 3 or \$158,000. In the Dogwoods case, which you deemed sufficient and the Circuit Court deemed sufficient, it was \$20,000. In the Chesapeake-Stafford case it was about, if I'm recollecting, it was about 8... I think I've got it written down here, it was about \$18,000 plus a bond. Those were deemed to be substantial expenses in reliance, in pursuit, diligent pursuit, of the specific project (inaudible).

Dr. Ackermann: But that has to be taken into account of what the overall cost of the project would be. I mean, if (inaudible) is going to cost me \$10 million, spending \$10,000 isn't significant. Even spending \$100,000 isn't significant.

Mr. Leming: That's certainly one way to look at it. The development in Suffolk City was much, much larger than this one. So that was a major, major development. This is a pretty small development here.

Dr. Ackermann: Also several years before.

Mr. Leming: Just a few acres.

Dr. Larson: So Mr. Leming, back to the site plan. When the preliminary version of it was, I guess, completed and submitted, you implied that it was the applicant that decided not to go forward with that, so it was on the applicant that... were they due to make the next move in the process and just didn't?

Mr. Leming: I believe they had gotten one or two, I don't know whether I have somebody here that knows the answer to that, but they had gotten one or two sets of comments back. However, the term

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preliminary site plan is something of a misnomer. You know, these days, although the ordinance has a provision for a preliminary site plan, nobody fools around with that, they just go straight to file a site plan. So this was a fully engineered site plan that was intended to implement... and if you look at the site plan, for purposes of intent, and it was not approved... but if you look at the site plan, what do you see on it? Commercial apartments. You see a layout that almost exactly mirrored what was on the Generalized Development Plan, because that's what they wanted to do.

Dr. Larson: But they submitted it, the County came back with comments, and then they did not respond to the County's comments? Is that...

Mr. Leming: First go around they did come back. There were two rounds of comments and the whole process took the better part of a year. By the end of 2006, early 2007 I believe they had made a determination that the economy simply wouldn't support the project.

Dr. Larson: And, out of curiosity, why has it been so long since they decided to present their vesting case?

Mr. Leming: Look at what's going on right across the street from this. Aquia Towne Center. Aquia Towne Center was rezoned to the P-TND district in early January 2008. I did that zoning. It is today moving forward. They tore everything down, much to the County's consternation, and then did nothing because of the economy between 2008 and the present day. Incidentally, with Aquia Towne Center, there was an approved site plan, but you know what they did? They vacated it. They withdrew it because they wanted to get their bond money back. You know, when you go final with a site plan you have to post a significant bond with the County, a bond for completion of utilities and stormwater, and anything else in the way of public improvements, and carry that letter of credit until those improvements are actually made, which of course turns on a decision to move forward with the project. So, that's why it has taken so long and Aquia Towne Center is now moving. It's a significantly different project than what was envisioned in 2008. This one's not, Austin Park is not. They want to do what they said they were going to do in 2005. But, I think, just looking right across the street gives you a pretty good indication of why they didn't pursue it.

Dr. Larson: Are there any other questions for the applicant's representative?

Ms. Brown: I have one.

Dr. Larson: Go ahead.

Ms. Brown: When I drove by the property last month there were two for sale signs on there. Is the property still for sale?

Mr. Leming: They have tried to market the property since 2005. So the property is worth more, and of course that was true with Aquia Towne Center too. The owner of the property in 2008 has tried to market the property and finally sold it. The plans, the approvals of course run with the property. It was their original intent to develop it themselves. They've not sold it. So it is still owned by the same participants in a corporation that were involved originally.

Ms. Brown: But they're still trying to sell it?

Mr. Leming: Every developer tries to sell their property.

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Ms. Brown: I noticed on the sign, I couldn't read all of it, but it did say residential, mixed-use.

Mr. Leming: Yes. That's what they thought they had. It's not totally accurate according to the Zoning Administrator.

Ms. Brown: That's why I was asking. That's why I wondered if it was still for sale.

Mr. Leming: To me, that would be a sign, at least until this Board acts or a Court does. Going the other way, I think that would be a sign that ought to come down.

Dr. Larson: Any other questions for the applicant's representative?

Mr. Apicella: I know you'll be shocked that I have some questions. All meant with the best of intentions. In fact, I like commercial apartments, Mr. Leming. I just want to clarify because I didn't hear the last part of the description of that third condition, so I'm going to rephrase it. Or I'm going to phrase it as it exists.

Mr. Leming: You're talking about the proffers?

Mr. Apicella: Under part 3 of 2307, it says: incurs extensive obligations or substantial expenses in diligent pursuit of a specific project in reliance on the significant, affirmative government act. So in my mind, that expenditure... that incurrence of extensive obligations or substantial expenses follows what is supposed to be the SAGA. And in this case you're saying the SAGA was the approved proffers. So it would have been after the Board approved the proffer amendment in 2005.

Mr. Leming: That's correct, and that's why I say, Mr. Apicella, I think it makes more sense... I think you're absolutely right. You can't expend funds before the SAGA happens and have it count toward this prong I think. But, that's why I say focus on the engineering fees, because it was the site plan that where the expenses were substantial, certainly substantial consistent with the precedent that we have here. That soil study, the engineering work is the major expenditure. I don't think it's appropriate to consider things like attorneys selling the property...

Mr. Kim: Can I have one question? So the engineering fees I'm kind of stuck on. You said that two different cases that you had stated, in Suffolk and Blacksburg, I think one said was 20,000 and the other was 18 or 8,000?

Mr. Leming: Well, in Suffolk City...

Mr. Kim: Suffolk City, yes.

Mr. Leming: ... or the City of Suffolk, the exact total was \$158,000.

Mr. Kim: Oh okay.

Mr. Leming: In the Dogwoods case, in the cases that have been decided here, in the Dogwoods case it was \$20,000. And in both of those cases all of those expenditures were plans. We're not talking about... I have a summary of the engineering here... fees and to some extent, the things that I've listed here, total engineering expenses and furtherance of the 2005 SAGA. And I have a total of over almost 186,000 actually; 144,000, 145,000 and we did try to... we did give you the spreadsheets here... and

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engineering work associated with the site plan, entrance plans, grading plans, and so forth, through September of 2006. Remember we have a November of 2005 approval here and then they go right to work. Stormwater preparation, end of 2005 through September of 2006. Landscaping plans a much smaller amount. The biggest number is the engineering fees. Site plan -- engineers make out a lot better than lawyers. -- site plan... at least on rezoning applications... site plan and their aftermath, entrance, grading plans and so forth. That I think is the cleanest thing. You know, there were environmental studies that went on through 2007, but again, these numbers pale in significance. But certainly the engineering fee that I've given you I think is, and that is documented by the spreadsheet, I think is sufficient to deal, to establish the third prong. And again, I told you, I'm not even sure that's before you. You know, the Zoning Administrator, we're appealing the Zoning Administrator's determination. The Zoning Administrator didn't deal with that. She talked about it tonight, but that's not what her determination goes to. That goes to there not being a specific project. And if you go back and look at her determination on the second page there, basically what she says, you know, nothing here, because it wasn't a... not a specific project. Again, the blending of the terms here; specific project, specific use.

Mr. Kim: Thank you.

Mr. Apicella: I'm gonna try to ask some of the same questions I asked of staff. So in the 2004/2005 timeframe, the B-2 zoning district, it allowed commercial uses and it allowed commercial apartments being residential uses, right? Back in 2004.

Mr. Leming: I think Mrs. Blackburn has indicated when the ordinance changed.

Mr. Apicella: Yeah, it changed in 2006... 2007/2008, but I'm just going back to what the ordinance, the zoning ordinance allowed in 2004, in 2005, commercial uses and commercial apartments.

Mr. Leming: Which is why they came back in 2005 with an application seeking commercial apartments.

Mr. Apicella: I'm just asking the question.

Mr. Leming: Mr. Apicella, I'm not going to just give you one word answers.

Mr. Apicella: So, in the context of mixed-use development, commercial apartments, commercial, that to me denotes a potential multi-use activity could occur by-right on that parcel when the rezoning was approved, and subsequently thereafter.

Mr. Leming: You mean 2004?

Mr. Apicella: 2004/2005; not until the point when there was a CUP requirement and then the apartments were... the commercial apartments ability was extinguished in 2008.

Mr. Leming: You know, Mr. Apicella, we met with Mrs. Blackburn's predecessor, Mr. ... Ms. Hudson, after the 2004 zoning and said, well, we've got a change in plans here. What do we do? She said, she looked at all the materials and said, well, if you want to do commercial apartments I think you need a proffer amendment. So that's what we did. So whether the County would have permitted us to do under the 2004 zoning commercial apartments... they were a by-right use in the zoning district, but

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we had proffers and we had made a presentation as to what this was going to be. So we were advised to get a proffer amendment.

Mr. Apicella: I'm just going to give you a Planning Commissioner's perspective. When someone indicates that they want to do a residential use, normally the County's going to be somewhat more receptive to proffers that mitigate the impacts. And in this case the applicant proposed some mitigation per unit, but again, did not establish any threshold on the number of units or quite frankly whether any residential units would actually be built, from my vantage point. You said that the applicant was bound...

Mr. Leming: By the proffers.

Mr. Apicella: ... by the proffers, but the only proffer that you cited that they were bound to on use was the architectural renderings.

Mr. Leming: Well, actually I went through a number of them.

Mr. Apicella: That's for the general development itself, the vast majority of those proffers would apply to the development, whether there are commercial apartments or not.

Mr. Leming: I think that the proffer number 4 is what locks the landowner into a multi-use development simply because those architectural proffers and those renderings and those requirements for appearance would not be conducive to any other kind of development except mixed-use development.

Mr. Apicella: I've got to tell you, I've been to several commercial developments where there are false balconies and high standard architectural design where residential does not occur. So... and even so, the fact that those architectural renderings... I'm going to read what it says.

Mr. Leming: You know of any of those in Stafford County?

Mr. Apicella: It doesn't matter whether it's in Stafford County, it just matters whether it's allowable. So I'm going to read exactly what it says in the ordinance as it was approved, just those sections that deal with the architectural provisions. The applicant agrees to utilize a consistent architectural theme in general layout of buildings that features neo-traditional design in substantial conformance with the renderings entitled Austin Park Architectural Renderings. Streetscapes, enhanced pedestrian circulation, it talks about courtyards, fountains, gazebos, in approximate locations as noted on the conceptual plan. Again, it's a conceptual plan. The buildings in the development shall include varied ornamentations such as recesses, balconies, stoops, and breezeways. Are you telling me with absolute certainty that you could not build a solely commercial development with these features in the absence of residential units?

Mr. Leming: I tell you with absolute certainty that in Stafford County there would be absolutely no market...

Mr. Apicella: This is not that... there's no requirement that it just occur in Stafford County, sir.

Mr. Leming: Mr. Apicella, you asked me a question; let me finish. Alright, number 1, that would not be built in Stafford County because there would be absolutely no demand for it. It simply wouldn't

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work. It wouldn't be built. If they did proceed, it is my strong contention that the proffers taken as a whole, particularly because we have renderings that actually reference residential development, residential retail, residential office, that anything shy of that would be inconsistent with the proffer.

Mr. Apicella: Say that again; I'm not following you.

Mr. Leming: Anything... anything inconsistent with the renderings and the uses shown by those renderings (inaudible)...

Mr. Apicella: How is the absence of apartments...

Mr. Leming: Mr. Apicella, if you interrupt me then I'm not going to get my answer out. Okay?

Mr. Apicella: I appreciate your ability to talk to many different issues, but I'm going to go back to the central theme here, which is, how would the absence of apartments have any bearing on what... on the architectural renderings?

Mr. Leming: How would the absence of the apartments... well, we're just going to go around in a circle here. They wouldn't be built because there would be no market for them here.

Mr. Apicella: Right, but you could still achieve those architectural renderings in spite of the absence of commercial apartments.

Mr. Leming: You know, you're getting... this was a rezoning in Stafford County, a rezoning that was approved by the Stafford Board of Supervisors.

Mr. Apicella: I didn't know the rules applied just in Stafford County. I thought they were statewide.

Mr. Leming: No, but the proffers are Stafford County proffers and under these circumstances I don't believe that the applicant could have pursued this development without a residential component, number 1. And number 2, we're looking at this through different ends, and you know, based on the questions you initially asked it was pretty clear, and the questions you've asked tonight, it was pretty clear where you were going with all of this. But we're looking at it from two different ends of a telescope here. You know, you are focusing on specific use and trying to nail that down, when what the ordinance says is a SAGA allowing a specific project. Now it's not me... it's not me, it's you and it's Mrs. Blackburn...

Mr. Apicella: I'll go back to my same point, Mr. Leming.

Mr. Leming: If I can finish my point, then I'll answer another question. But it's you all that have blended the use of specific project and specific use. You've used it interchangeably tonight. She does four times in her opinion. So, what the statute says is a SAGA allowing a specific project. You want to look at... you want to pin down that specific use. If specific use and specific project mean the same thing, we're talking about something that is allowed, not required; that's the gist of the statute.

Mr. Apicella: And by that logic, and that's why I asked it before, I'm led to the conclusion, even though you say otherwise, that any of the allowable uses, from zoning, from one category to another, the mere allowance of any and all uses under that category would vest a right. And I don't see that it says that. It very clearly says a specific project and I know you say there's a difference potentially or

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there's not a difference between project or use, but as I read the case law in Hale, in Suffolk, and in the other cases that I cited, it did talk about specificity, in fact I'll read from Hale.

Dr. Larson: Mr. Apicella, after you read this, I'm going to call a ten minute recess and we'll leave the public hearing open.

Mr. Apicella: Let me just find one that I think that is completely on point here. I'm looking at Hale, on page 34 at the end of the paragraph, it says: flexibility is the opposite of specificity and specificity is what the code 2307 requires for a landowner to obtain a vested right.

Mr. Leming: What were the proffers in Hale?

Mr. Apicella: There were numerous proffers in Hale, including there was an illustration...

Dr. Larson: Let's resume this after the recess, okay? Shall we? Okay we're going to recess for 10 minutes and reconvene at 8:50.

RECESS 8:40 p.m. – 8:50 p.m.

Dr. Larson: Okay, we'll now reconvene and before we get started I wanted to explain to the audience that this is a vesting case and vesting cases are always very complicated and tend to be the hardest cases that we try, so it's not unusual for vesting cases to take a while. If you're here for the second case, I was hoping to get to the public hearing so we could at least hear what people have to say, but I can't guarantee that we're going to do that in a timely manner. So just so you know, I'm not sure we're going to get far into the second case tonight. These cases, the vesting cases take a long time. Thank you. Mr. Apicella, you had other questions?

Mr. Apicella: I would, again, just like to clarify that in this case, at the applicant's choosing, there was no proffered GDP that would have bound them to doing any specific activity on the parcel, other than that was any and all uses that were already authorized at the time.

Mr. Leming: Is that a question, or...

Mr. Apicella: Do you agree? Disagree? Again, your assertion is that what bounds them in this case are the architectural renderings.

Mr. Leming: Well that's what the SAGA number 1 goes to, proffered conditions, and whether the proffered conditions specify use and, if you tie that back into the first prong of the test, specify use allowing the specific project. And in my view they do.

Mr. Apicella: In the Hale case they actually did the opposite of what happened in this case which was to eliminate some of the allowable uses and in that case the Court found that they were not vested merely by doing the opposite which was narrowing what they could do. In this case, again, my reading is that the applicant could do any and all of the uses since there was no restriction placed in the proffers to restrict any use. And the GDP, as staff indicated, did not have to be followed because it wasn't proffered.

Mr. Leming: Is that a question?

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Mr. Apicella: Yes.

Mr. Leming: Okay. In Hale, as I indicated previously, Hale is just the opposite scenario of what you have before you. In Hale, you had a zoning that I would argue was for a specific use. It was tangential to the issue that was before the Court. The issue that was before the court, and the only respect in which the original zoning mattered, was because the applicant came in and wanted to do something different. They wanted to do a big box development, different than what was submitted as part of the approved rezoning. And there were proffers that accompanied that. There were also illustrative design concept plans showing how the project would look; not proffered, but concept plans. There was a proffer that said the residential density would be 400... uh, limited to 400 bedrooms. You know what? In this particular case we have a limitation of 74 apartments. The reason for that goes strictly to the ordinance. That's what the ordinance anticipates. That's the maximum build-out, because that's the maximum square footage that can go on the property for what's underneath those commercial apartments. And remember the definition of commercial apartments? It's what goes upstairs and it cannot exceed what goes downstairs. Now it could have been less than 74, but based on the footprint... this is a developer who like most developers maximizes the use of their property. So what sort of buildable area did they left after they have subtracted out the open space that's necessary, any areas that they can't use, there was a creek on the southern side of this property, there was RPA, the parking areas, what do you have that you can build? And how many square feet of buildable area do you have? And they calculated both of them and that is what the GDP showed. Now, it is not proffered, but there is a maximum number of residential apartments that could be built that is covered right in the ordinance. And that's not unlike the Suffolk City case. Because in that case, in the City of Suffolk case, the original 1988 rezoning had no proffers associated with it, but it was zoned to a particular zoning district that specified what kinds of residential development could occur there. There were many more than could occur here. We just got one, and that's the one that was bargained for, and 74 would be the maximum.

Mr. Apicella: I'm not following you there, because again, there's no requirement for them to build any apartments. So how would they be restricted to 74 apartments when they could do zero apartments?

Mr. Leming: Yeah, they could. They wouldn't have to; 74, as I indicated, would be the maximum number of apartments they could use.

Mr. Apicella: Or none.

Mr. Leming: Well, if we're talking about not doing any residential component at all, then we're back to what we discussed previously, Mr. Apicella, that I simply wouldn't happen and could not happen in my view under these proffers.

Mr. Apicella: Perhaps I'm reading it incorrectly, but I'm looking at page 38 of Hale.

Mr. Leming: I may have a different version than you.

Mr. Apicella: It says: For these reasons we hold the developer not the beneficiary of a significant, affirmative, governmental act based on the acceptance of proffers that specify retail sales as a particular use for which they subsequently sought to establish a vested right nor do the towns acceptance of the limitation on residential density as part of the proffers provide the developers with a vested right to non-residential uses of the property including unrestricted retail sales. And my point here being, again, in the Hale case they were more... the circumstances were more restrictive than the

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maximum flexibility that the applicant has in this case. I'm going to leave that line of inquiry where it stands. I'm going to go to the... you say it doesn't matter. I think it does matter because it was mentioned both in the Zoning Administrator's determination and your response. Again, the applicant chose not to follow through with the site plan review and approval and by their own indication because of economic circumstances somewhere around the 2008 timeframe. So, I need you to help me understand, help us understand, if the SAGA, as you contended, was the County's acceptance of the proffers for a specific project and/or that the approval of the rezonings from M-1 to B-2 included in a specific project within the meaning of 2307 -- which I think is what you're trying to indicate by virtue of the architectural renderings -- what specific, substantial obligations or expenses did the applicant incur post 2005 in actually developing the so-called specific project?

Mr. Leming: Alright. That was a very long question, Mr. Apicella. Maybe you could shorten it to just what you want me to respond to.

Mr. Apicella: In the context of commercial apartments, which is I think what's really the issue here, what specific expenses did they undertake to develop commercial apartments on the parcel?

Mr. Leming: They're not required to incur expenses specifically related to the commercial apartments. They're required to incur expenses in pursuit of the SAGA, all aspects of the SAGA, anything that they spent money on, any site plan they developed. The site plan, you know, we really... I don't know where we would have to go to actually find it, but the site plans, because we don't have it, but the site plan shows the residential units. Those had to be engineered. So, yes, I mean some aspect of this went to what was necessary to design the residential units. But, for the most part, the cost of the site plan was for the overall site development, as any site plan would be. But there's no requirement under 2307 that the expenses go to a particular component of the specific project; it goes to the entire specific project.

Mr. Apicella: We'll have to agree to disagree on that. You referenced the Suffolk case as dispositive in this case. So, in that situation, the number of residential units was specifically identified and restricted. Post the rezoning, the property owner submitted a preliminary recreation plan and a preliminary subdivision plan, both of which were approved by the City, then they also followed up with a final plat prior to the zoning changes that affected the property which was the reason for them pursuing their vesting determination. So I'm trying to understand how these circumstances in this case are similar, given that there was no follow-through by the applicant on the submitted site plan. The County presumably, by virtue of the notification [notation], advised the applicant that the site plan was being... was no longer being pursued due to inactivity. There was no subsequent site plan submitted by the applicant. There's been no development on the parcel and no proffers had been implemented.

Mr. Leming: It's hard for me to follow, Mr. Apicella, what your questions is and what your argument is.

Mr. Apicella: I'm going back to the circumstances in the Suffolk case, because you indicated that the Suffolk case is informative to us. And I say the circumstances are completely different because in the Suffolk case they actually followed through with several other activities beyond just merely submitting an initial site plan. They got that site plan reviewed and they followed through with other plans and they followed through with a final site plan. So there was regular activity all the way from the point where the rezoning was approved to the point where the County changed its policy and put a restriction on what could happen. None of that happened here.

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Mr. Leming: I think if you look at the facts of the Suffolk City case, there was a rezoning and then very little activity until the mid-1990s. Now they did get some things, they attempted to get some things approved right up front. But then we have this long gap and then a flurry of activity in the mid-1990s and then the County changes the ordinance. So in that respect...

Mr. Apicella: I agree. To me it's not about the timeframe, it's the amount of regular activity that took place after the rezoning. Not just one specific piece of activity, but several pieces of activity demonstrating that they were still interested in pursuing a project.

Mr. Leming: You know, what the test says is substantial expenses. It doesn't say multiple (inaudible)...

Mr. Apicella: I'm going to the court's determination of what is... what demonstrates diligent pursuit.

Mr. Leming: What the statute says is substantial expenses in diligent pursuit of the project. Diligent pursuit is not a separate prong. Substantial expenses, the expenses in the Suffolk City case were 158,000. If we just limit this to engineering fees alone, we've got over \$180,000 (inaudible).

Mr. Apicella: You're going to an amount and I'm going to activity. And again, I think, in the case of Suffolk they clearly articulated what they thought was a necessary amount of activity, not amount of money or amount of time, but amount of activity specifically demonstrating that they were diligently pursuing a project.

Mr. Leming: There was no separate diligent pursuit analysis. What we have...

Mr. Apicella: I can read you straight from the Suffolk case where they talk about that.

Mr. Leming: What we had in Suffolk City is an analysis of the expenses and the adequacy of those expenses. Diligent pursuit is not a separate prong. Diligent pursuit is...

Mr. Apicella: It's a prong... there are three prongs. All three prongs have to be met; not just one prong, not two prongs, but all three prongs.

Mr. Leming: No disagree, but you made four.

Mr. Apicella: I didn't make four. I said the incurrence of substantial obligations or expenses in diligent pursuit of a specific project following the SAGA. I said that earlier.

Mr. Leming: And you've analyzed substantial expenses and you've analyzed diligent pursuit.

Mr. Apicella: I'm not analyzing. I'm saying what the Court said in the Suffolk case.

Mr. Leming: Well, what the prong says is, substantial expenses in diligent pursuit. If they weren't in diligent pursuit of this specific project, what were the expenses incurred in the pursuit of?

Mr. Apicella: Mr. Chairman, I think I've made my point and I think that the reference is clear in the Suffolk case, if anyone wants to take a look at it.

Dr. Larson: Any other questions for the applicant's representative?

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Mr. Grimes: I have a couple.

Dr. Larson: Go ahead.

Mr. Grimes: Mr. Leming, there was a General Development Plan included in our package.

Mr. Leming: Yes, uh-huh.

Mr. Grimes: I assume that was supplied from your office?

Mr. Leming: Mr. Apicella asked for all of the documents, I think, that was submitted as part of the supplemental application. And the Generalized Development Plan, I think, assists in understanding what the concept was that was presented. There was a question that came from somebody, I think Dr. Larson, regarding whether or not the Board was aware of the Generalized Development Plan. Well, it's part and parcel of the Board package. That is what is presented to the Board of Supervisors and all of the application materials were, as you may recall, requested by Mr. Apicella in his questions. So we put together the staff reports, zoning ordinances, and the plans which include the renderings, the Generalized Development Plan, and there's a conceptual plan that we gave you also. So, they're all there.

Mr. Grimes: And I appreciate that. My question goes to the actual plan itself.

Mr. Leming: Yes.

Mr. Grimes: Because it is referenced in the 05-62 zoning ordinance.

Mr. Leming: It is referenced, yes.

Mr. Grimes: It specifically says, as indicated on the GDP. My challenge is I can't read the GDP and I was hoping there was a larger version.

Mr. Leming: Well, you know what...

Mr. Grimes: Because I... working in this field for a number of years myself and seeing these types of plans, the tabulation block that's located in the lower right-hand corner often defines the types of buildings, square footage, and uses. The site plan itself also defines on the building type itself, it'll usually define the building. For example, the smaller buildings, without seeing the actual plan I'm going to make an assumption. The smaller buildings located around the large parking lot are probably listed as retail and it'll define it as 2-story, x number of square feet.

Mr. Leming: Yes.

Mr. Grimes: There is U-shaped building and an L-shaped building and this was very common in this particular time and one of my questions is, what is the date on this General Development Plan? And usually that little U-shaped building and L-shaped building will say, this is a x-number of stories building... ah, there it is.

Mr. Leming: I knew I brought it.

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Mr. Grimes: Would it be possible to take a look at that?

Mr. Leming: Absolutely. That's the only one that I have so you all will have to share that. You're welcome to it, but you'll have to share it.

Mr. Grimes: Alright, I'd like to share for everybody sitting up here on the dais and you can take a look at this plan, but I'll point to the U-shaped building in particular on this General Development Plan. And it's dated August 2005. Now, unfortunately I have no way of knowing whether this was the GDP plan that is referenced in 05-62, but I would like to think that there's got to be some documentation of what GDP was submitted with that.

Mr. Leming: Well, if you look at the ordinance and the proffers, the date that they bear is August 9, 2005.

Mr. Grimes: It says August 2005 and I think it says... there's a conceptual plan dated August 1 but where did you see the GDP date referenced? I'm sorry.

Mr. Leming: Oh, it's in proffer number 1.

Mr. Grimes: Proffer number 1, sorry, wrong page. Beautiful, okay. The U-shaped building on the site plan, this General Development Plan that was submitted, office/apartment number 1, office 2-story, 86,700-some square feet, apartment 2-story, 38 units. The L-shaped building, office/apartment number 2, office 2-story, 55,000 square feet or apartment 2-story, 27 units. Then as I go through the plan to the smaller buildings, they also start referencing apartments. They give apartment counts and/or square footage and stories for the buildings. So, I just wanted to confirm that this was the development plan that was approved inside these proffers.

Mr. Leming: That was the... that's the development plan, left me stated that precisely, that's the development plan that is referenced in the proffers. It was the one that was submitted with the application. Now, as Mr. Apicella would tell you, there are certain parts... portions of the plan that are proffered, but that was the plan that ran with the zoning.

Mr. Grimes: That... very true. So, with the submission of this General Development Plan, the change in zoning request and what was approved in the proffers, the proffers noted the cash contribution because of the residential units shown on the General Development Plan.

Mr. Leming: That's correct.

Mr. Grimes: That could be developed or could not be developed.

Mr. Leming: Could not be developed, but I would submit there wouldn't be a project without them.

Mr. Grimes: But the owner was leaving his options open to do either or combination of some, because it is a General Development Plan.

Mr. Leming: There could have been changes, no question, there could be changes to the Generalized Development Plan so long as the proffers were complied with.

Mr. Grimes: That's exactly what I needed to find out on the plan. Thank you very much.

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Mr. Leming: Yes sir.

Dr. Larson: Any other questions for the applicant's representative?

Ms. Brown: I had one, Mr. Chairman.

Dr. Larson: Go ahead.

Ms. Brown: Just regarding expenses. Earlier when Mrs. Blackburn was up I had asked about if any permits had ever been issued, and she said no. And I was going through your Exhibit C, under your expenses, and I noticed there were some line items for permit processing.

Mr. Leming: Yes, they're environmental permits.

Ms. Brown: Environmental permits? All of them?

Mr. Leming: Yes. There were not... well, there was not a site plan that was approved. That would be the planning permit that would be the next step. But yes, there were environmental permits that were obtained. So those were obtained; they're not County permits.

Ms. Brown: Were any building permits ever applied for?

Mr. Leming: No, because you couldn't do that until you had an approved site plan.

Ms. Brown: Okay, that's what I just wanted to check. Thank you.

Mr. Leming: But I would also tell you that there were no building permits approved in any of these cases we've been talking about. You know, you don't get to that point. This vesting cases turn on plans and the amount spent on those plans, and whether the plans comprise a specific project, specific use.

Dr. Larson: Any other questions? Thank you, Mr. Leming.

Mr. Leming: Okay.

Dr. Larson: Marathon session.

Mr. Leming: Yes sir. Well, it's an interesting subject and I completely appreciate, you know, this is one of the most complicated things you guys and lady are asked to do. It's not an easy analysis, but you've been right every time in the past.

Dr. Larson: We try. Would any member of the public wish to speak in support of the application? Let's see, how would that work... in support of the applicant. So, would any member of the public have anything to say here? Seeing none, we will close the public hearing. Sir? I asked if any member of the public wanted to speak at all and there were none. Okay. I close the public hearing for this application and I actually have a question for staff before we press on with motions. One of the handouts is a memo from the Planning Commission dated September 7, 2005, and in it in the second paragraph it says the new GDP shows 7 retail buildings, 2 office buildings, 2 retail/apartment buildings, and then it talks about commercial apartments and 2 office/apartment buildings totaling

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100,000 square feet with 65 commercial apartment units. So, the Planning Commission somehow got that these were commercial apartments. I assume... let me put it this way, does this report get presented to the Board of Supervisors when they're considering their proffers and ordinances?

Mrs. Blackburn: Yes.

Dr. Larson: Okay, thank you. Does anybody have any other questions before we open it up for motions? Okay, do I have a motion on this case?

Mr. Apicella: Mr. Chairman, I'm going to make a motion to deny the appeal and uphold the Zoning Administrator's determination in this case.

Dr. Larson: Is there a second?

Dr. Ackermann: Second.

Dr. Larson: Okay, Mr. Apicella made the motion. Would you like to say what you were thinking?

Mr. Apicella: Mr. Chairman, based on the record in this case, I believe the Zoning Administrator made the correct decision. The applicant does not have a vested right to build commercial apartments on their parcel. That was the only question that was actually asked in the determination. In determining vesting rights, the burden is on the applicant to prove that they have met the statutory requirements and I don't believe they've met that burden. First, it does not appear to me that the Board of Supervisors approved a rezoning from M-1 to B-2 that included a specific project or use, however that is defined, clearly indicating that commercial apartments at any number would be built. At the time the rezonings occurred in 2004 and the subsequent proffer amendment in 2005, commercial apartments were a by-right use among many other by-right uses. And the way I read the ordinance as covering the rezonings, the two page proffer statement proposes what I would call an if-then scenario. I always ask, as a Planning Commissioner when we have a project in front of us, a rezoning, whether the GDP is proffered or not proffered. And there is a difference as I elicited from staff and I think to some extent from Mr. Leming. A proffered GDP has to be followed. And if the applicant wants to change that proffered GDP, they have to amend the proffered GDP with any changes that they want to make. A non-proffered GDP is not the same as a concept plan, but not that different than a concept plan, in my view, because they could do something vastly different than what's in the non-proffered... than what's in the GDP, being they could change the types of buildings, what those uses are, where those buildings would be, the roads. There are a number of things they can change without necessarily having to come back to the Board and getting it approved via the site plan, as long as it's not inconsistent with all the other requirements of the County. If the developer builds apartments in this case then it will provide... normally in a rezoning that has specificity and a proffered GDP, it would say that the developer will build x number of... will provide x number of dollars per unit. The specific project would indicate a specific number of units or at least identify a cap on the number of units, as well as a total sum of proffer dollars to be provided to the County at build-out of these units. As I referenced in my points, the package to the Planning Commission and to the Board indicated that there were no proffers, no total proffers, because there was no project. Additionally, the staff said that they could not assess the impacts, the capital impacts, again, because there was no specific project. While a GDP was submitted with the zoning that showed potential uses, building locations, etcetera, as noted in this hearing all rezoning applications must include a GDP as well as other documents. Again, the distinguishing characteristic is whether that GDP is proffered or not proffered. The purpose of the GDP, an impact statement, and a TIA are generally to gauge the potential impacts of the rezoning from

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one category to another. Those materials by themselves did not provide certainty that the parcel will be developed as noted and that's what's important here. Without a proffered GDP and other restrictions, a developer can completely alter course and develop any and all uses that are not in conflict with the zoning ordinance. Again, the fact that a concept plan was submitted, staff commented they couldn't gauge the impacts, and the TIA indicated that it was based on assumed uses, not actual uses, in my view further reinforces the view that this rezoning did not involve a specific project or use. In this case, the back and forth indicated from the applicant's agent that he believes what bounds this as a specific use is the architectural renderings. Again, there's no requirement that all of the uses that are potentially available to them have to be built. The only requirement would be that the buildings that they do construct conform to those architectural renderings. So again, not required to build apartments. All that being said, even if there is some gray areas to whether this was a specific project or use for which a SAGA occurred, the fact remains that the property owner still needed to meet the second and third conditions in the statute to achieve a vested right. This includes incurring substantial obligations or expenditures in the development of a specific project following the SAGA. The applicant submitted, but effectively let die, a site plan by pursuing no action on it, and by their own admission they decided not to pursue any development of the parcel due to economic conditions. So again, it appears to me that the only expenditures that occurred since they pursued their own stand-down by their own choice has been to market the parcel for sale. Even if it can be successfully argued that the expenses incurred by the applicant associated with the 2004 rezoning and the 2005 proffer amendment met the third condition, in my view, at best those approvals by the BOS were for a general rezoning from one category to another, not a rezoning to a specific project or use where commercial apartments would be built versus might be built. So the applicant has no vested right to develop commercial apartments at this point in time. I believe these circumstances are not even slightly close to the regular if not constant development efforts the property owner undertook in the Suffolk case. Again, I tried to articulate that it was regular if not constant expenditures towards the pursuit of that development project in the Suffolk case. That didn't happen here. For those reasons, I believe the applicant has not achieved a vested right to build commercial apartments on their property or any other uses that are no longer permissible in the B-2 zoning district. They can still build any B-2 uses allowable today, just not those uses that are no longer permissible by virtue of changes in the zoning ordinance. I believe the Zoning Administrator made the right decision and that decision should be upheld in this case.

Dr. Ackermann: I offered a second to this. In fact, I was going to propose a motion; Mr. Apicella did it, made a proposal. I believe the Zoning Administrator made the correct decision. It seems like there were plans perhaps for some commercial apartments but those plans I think lapsed on the part of the developer. He took no action on it. We're asked by the spokesman for the applicant to, I felt, read a lot into the ordinance... not the ordinance, the state code. That is definitely open for interpretation. One thing I learned very much by going to the seminar that Mr. McRoberts offered, was that that code, so many words of it, part of it need to be determined by court cases, because folks will not agree on those. I'm asked in my position here to give my opinion on this and make a decision and I would decide to support the Zoning Administrator in her determination. Thank you.

Dr. Larson: Any other discussion?

Mr. Grimes: Yes. I unfortunately can't support the motion based on the documentation that we received and the discussion points today. While Mr. Apicella cites some great points, when we come back to the proffers themselves and the ordinance change, once it referenced the General Development Plan... and again, we spoke that the proffers and the zoning change allows them to develop the project for anything that's allowed in the B-2 at the time of that zoning change. That allowed for commercial

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apartments. The plan that was presented showed commercial apartments in addition to retail. It doesn't mean they have to build them, but they can build them. Also, the proffers were revised in '05 from '04 on this specific site, and provided by proffer number 13, cash contribution directly related to residential units. To me, the adding of 13 points specifically that the zoning ordinance was changed to allow for some type of residential development on this property. Because it was B-2, that residential happens to be commercial apartments. So, from my perspective, there is a project that they were pursuing to have this zoning ordinance changed to allow for this type of use on this site and that the owner of this property pursued this project in good faith based on that significant affirmative government act. Now we can discuss and argue whether or not it's extensive obligation or substantial expense or diligent pursuit, at the time that they applied to have this rezoning done, and it was granted, they were diligently pursuing the project. They don't control the economy. We have so many projects that have gone on hold because of the economy. A lot of this kind of development stopped. Aquia Towne Center is a great, great project you can look at that was approved and it just died on the vine because of the financial market at the time. So I don't feel that we should be penalizing this owner based on the change in zoning when they originally went after this project and presented plans that showed what they intended to develop on this site. So for those reasons, I just can't support the motion as presented right now.

Dr. Larson: Any other discussion?

Dr. Ackermann: May I...

Dr. Larson: You may respond, sure.

Dr. Ackermann: I take it that the County has changed the ordinance for a good reason and does not want to approve commercial apartments at the present time. Because they were approved... or they were proffered in that ordinance back in 2005, I personally don't see without any development work on it, which I don't see any, how we can pull that out 10 years later and say this is what I want to do.

Ms. Brown: I'm going to support the motion, because I agree with that. So I will be supporting the motion.

Dr. Larson: I think I'm going to have to agree with Mr. Grimes. I think there was a project. The ordinance specifically calls out the GDP several times and I was... I've been trying to figure out... I mean, the ordinance only used the term residential once as well as the proffers, but again, at the time the only possible meaning could have been is commercial apartments in that zoning area. So I think that, I think the plan is specific enough to satisfy that. I also believe even though the developer's representative didn't agree, I think that since we are dealing with a vesting case we have to consider all three prongs in order to determine if vesting is appropriate here. So I also believe that they have spent a significant amount of money in diligent pursuit of their project between the time that they acquired the property and the time that the zoning ordinance was changed, and I think that's basically the litmus test. So I'm going to have to oppose the motion.

Mr. Apicella: Mr. Chairman, if I may. Again, I'm going to give you my Planning Commissioner's perspective. All ordinances associated with a rezoning are going to include a reference to a GDP, because all rezonings require a GDP, every single one of them, regardless of whether there are going to be uses that ultimately occur. Again, the County's requirements, not just in its application but in the code, require a GDP, an impact statement, and a TIA in most cases. The difference, as I mentioned before, is the standing of that GDP. A GDP that's not proffered does not have to be followed. A GDP

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that is proffered has to be followed. So, if your logic is that just because it includes a GDP, then any and every rezoning is going to result in a vesting right for the applicant. So I just ask you to keep that in mind, if that's your nexus for deciding that in this case they have a vested right. Again, bottom line is, if that's the reason, every single rezoning will result in a vesting.

Dr. Larson: I think the reason I'm opposing the motion is I think they had a project, a specific project. And I think that the County Board of Supervisors reconvened the following year to change their original motion to adjust to what the project had evolved to. So I believe they had a specific project. Any other comments before I call for the vote? Okay. The motion is to uphold the Zoning Administrator's determination. All those in favor say aye.

Mr. Apicella: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mr. Kim: Aye.

Dr. Larson: All those opposed say no. No.

Mr. Grimes: No.

Mr. Davis: No.

Dr. Larson: Alright, let's show of hands. Those in favor raise your hand. Okay. Those opposed? Okay, the motion passes 4 to 3. Alright, could we have the secretary read the next case?

2. A15-04/15150842 - H. Clark Leming for Gary E. Newton - Appeal of a Notice of Violation dated July 1, 2015 of Stafford County Code, Section 28-35, Table 3.1, "District Uses and Standards," for the unlawful operation of a junkyard on Assessor's Parcels 55-4D, 55-4E, 55-4G, and 55-4H. The property is zoned A-2, Rural Residential, located at 324 Brooke Road.

Mrs. Musante: You have the application and the owner's consent form, copy of the violation notice dated July 1, 2015, aerial photos from 1937 to 2014, County Code Section 28-295, Virginia State Code Section 15.2-2311, the land use criteria from the Commissioner of revenue, email from an adjacent property owner dated September 9, 2015. The applicant is appealing a Notice of Violation dated July 1, 2015 regarding Section 28-35, Table 3.1 "District Uses and Standards," for the unlawful operation of a junkyard on Assessor's Parcels 55-4D, 55-4E, 55-4G, and 55-4H. After investigating a complaint, a notice of violation was issued to the owner of Assessor's Parcels 55-4D, 4E, 4G, and 4H located on Brooke Road for operating an illegal junkyard on the property. The property owner has exercised the right to appeal the notice of violation and has submitted justification of the appeal. The applicant has submitted background information that cites the years the property was purchased and a statement that the applicant has continuously operated a junkyard business on the property and has bought, sold and stored inoperable motor vehicles and farm equipment on the property since 1979 and has not expanded or enlarged since that time. The applicant also states the belief that the notice of violation was issued in error and has submitted documentation he believes substantiates the claim that County Zoning determined the junkyard operation on the property was "grandfathered" and was a lawful nonconforming use. For the uses on Brooke Road to be considered 'grandfathered' or what is referred

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to in present day terminology as legally non-conforming, the uses needed to be legally permitted on the property when the operation was started and could not have been expanded since the time that the zoning ordinance changed to no longer permit the use on the property. The County first established a zoning ordinance and zoning scheme for properties in 1964. The applicant began purchasing the parcels in 1972 and acquired the last parcel in 1979. According to county records, at the time the applicant purchased the property, it was zoned R-1, Suburban Residential and A-1, Agricultural. The zoning ordinance in effect at the time that the first parcel was purchased permitted a junkyard in the M-1, Light Industrial district as a permitted use. In 1978, the Board of Supervisors adopted a comprehensive rewrite of the zoning ordinance and zoning scheme for the county. The zoning ordinance was amended to permit a junkyard in the M-2, Heavy Industrial zoning district with approval of a special use permit and the property was rezoned to A-2, Rural Residential. At no time was the property in question zoned to permit the use of a junkyard; therefore, it could not be considered a lawful use. The applicant also stated the use has not been expanded since it began. Pursuant to Section 28-274(b) of the zoning ordinance, any expansion of a non-conforming use is not permitted and is a violation of the zoning ordinance. The aerial imagery from the County GIS files show the history of the property from 1969 to 2014. The imagery identifies the property as being vacant in 1969, which is prior to the purchase of the property but after the adoption of the zoning ordinance regulating the use. The imagery does not clearly show the storage of equipment on the property until after 1983. From 1983 to 2014, the imagery does show an expansion of the area that was used for the storage of junk and is in conflict with the statements submitted by the applicant concerning the operation of the junkyard having started in 1979 and that the use had not been expanded or enlarged since that time. The applicant also claims the comments found in the County's computer software program are determinations made by a zoning administrator or other administrative officer pursuant to Virginia Code Sec. 15.2-2311 (c) . This section of the Virginia Code states: In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical error. The statements submitted are comments entered into an electronic case log and are not the result of a written order, requirement, decision or determination made by the zoning administrator or other administrative officer. The zoning ordinance defines a written order as: Written order, requirement, decision, or determination. A letter written by the zoning administrator or administrative officer to an individual, sole proprietorship, partnership, corporation, or any other legal entity regarding the permissibility of a specific use or density. A zoning verification is not a written order, requirement, decision or determination. It outlines the procedure for obtaining a zoning determination (Section 28-295). A comment in an electronic case file does not satisfy the definition of a written order or comply with the procedure. Staff can only believe the comments concerning the farming equipment were the result of information given by the applicant at the time, since the property had been and is still in the land use taxation program. That program requires the property to comply with certain criteria. The farm equipment would have been considered accessory and permitted on the property. According to the statements submitted, the applicant asserts that there had always been a junkyard operated on the property. However, this is contradictory to the county records. The Zoning Administrator authorized the issuance of the notice of violation for an illegal junkyard based on the facts that the use was established after the County adopted zoning regulations regulating the use, the property was never zoned to permit such use at the

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time it was established, the use is not currently permitted within the A-2, Rural Residential zoning district. Staff also believes the comments in the electronic case file was in error and are not a written order, requirement, decision or determination pursuant to Virginia State Code Section 15.2 -2311, and that the notice of violation was issued correctly.

Dr. Larson: Are there any questions for staff?

Ms. Brown: Yes.

Dr. Larson: Go ahead.

Ms. Brown: Do we have...

Mrs. Musante: Sorry, Dana, Susan's going to be answering those questions and I didn't realize she walked out, so...

Ms. Brown: Okay, I'll hold.

Mrs. Musante: Okay.

Dr. Larson: We'll come back to the questions for staff part. Will the applicant or his or her representative please come forward and present their case? And this time you'll be limited to your 10 minutes, Mr. Leming.

Mr. Leming: Okay, well, I'm still Clark Leming, here on behalf of the applicant and appealing party here. And you'll be happy to know that, at least I think, this case is more straightforward than a vesting case. There are two issues here. And the second one operates independently of the first. The first is whether or not there is a lawful, non-conforming use on the property. And what you have before you is an affidavit from Mr. Newton indicating that prior to the time that he purchased the parcels, that the parcels were owned by his wife's aunt and that the Newton family conducted this business on the properties going back into the 1950s and predating the 1964 zoning ordinance. Now I have another affidavit here that I will submit in a moment from Mr. Ferris Belman, a former Supervisor in Stafford County. Mr. Belman is 89 years old now and had hoped to be here tonight. Mr. Belman is familiar with this operation and the prior investigations on the property and I will share you and ask that you receive it because he cannot be here tonight. But let's talk about what we're dealing with here. If anybody can tell anything from these aerials, more power to them, I can't. But the evidence that you have before you in the form of the affidavits from Mr. Newton and Mr. Belman are that these uses predated the zoning ordinance. I would point out further that the zoning ordinance adopted in 1964 is not self-effecting. That ordinance is like your zoning ordinance today. It does not in and of itself rezone property. Now, how does the property get rezoned? At some point what the County Board of Supervisors has to do is to adopt a massive rezoning so that everything in the County is zoned somehow. I find no record of that at all. We do know that in 1978 there was a comprehensive rezoning in Stafford County and the County sought to bring zoning districts into compliance with the then Comprehensive Plan. So, the evidence that Mr. Newton places before you, and I will, with your permission, Mr. Chairman, I will give you Mr. Belman's affidavit. In the affidavit he addresses two points. The first is the use of the property and Mr. Belman establishes that he has lived in the area all of the relevant period of time. He's lived there since 1956 and that's the date he used when he says he observed these uses on the property and that they have been continuous. Now there may be some other speakers here tonight that would buttress that. So that's point number one. What we have is a use that

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was established before there was a zoning ordinance. That counts. Once a zoning ordinance becomes into effect and whenever the Board of Supervisors rezoned this property, and we don't know when that was, it becomes a lawful non-conforming use, because you've got a zoning ordinance all of a sudden. So that is point number one. Now the second has to do with Virginia Code Section 15.2-2311 and if it would be helpful, I have copies of that ordinance. I will call a couple of things to your attention. The first has to do -- I'll wait till you have that in front of you -- there are three sections to this ordinance; A, B, and C. Under A, that's the right to appeal. That's the right to appeal an administrative decision of any kind, be it from the Zoning Administrator or any other administrative officer, but I want you to note the breadth of that. Any person... an appeal to the Board may take any person aggrieved... and I'll skip ahead... by any decision, any decision of the Zoning Administrator or from any order, requirement, decision, or determination. Now where does this written order come in? It comes in at the center portion of sub-section A, which was added in the early 90s to require that for written orders or decisions, that those include an appeal notice, that you have a right to appeal it. So, what's contemplated by the statute is that there are other things besides written, formal orders that come out, but the language is very broad. Any decision, any order, any order, requirement, decision, or determination. Now, if we skip ahead to the section that Melody read to you a moment ago, it says, in no event shall a written order... again, now we know what a written order is, it tells us in subsection A, or requirement, decision, or determination made by a Zoning Administrator or other administrative officer be subject to change, modification, or reversal, basically by anyone, where the person aggrieved has materially changed his position in reliance on that. Now, what happened here? What happened here? And you have the documentation in front of you that a decision was made. There were three complaints that were brought to the County in 1999, 2005, and 2007. In each case, what the notation says, and you have the copy of this, what the notation says is that the use was found to be grandfathered, also non-conforming. And the complaints in each case were dismissed. The first one that you have before you actually has some detail. It talks about an investigation made by the Assistant Zoning Administrator, who at that time was Ms. Hudson, who later became the Zoning Administrator. Dan Shardein was the Zoning Administrator at that time. And use was determined to be grandfathered on the property. Same notation, not as much detail, occurs in 2005 and 2007. Now, Ms. Musante read to you something about a county ordinance. It says oh, well all of this has to be in writing. Guess when that ordinance came into effect? 2010. So, even if it has any applicability, and I don't think frankly that the County can do anything to diffract from the breadth of the state statute, but you don't have to deal with that issue, because we've got three pronouncements, these are in the County's records, these are in the County's Hansen record system, saying that this is a grandfathered use on the property and the complaints about the junkyard were dismissed. So, the County did make a determination. That is a decision. That is a decision that the complaint is unfounded and they entered it into their records, and all of that predates whatever the County tried to do in 2010 to further explain that. So, they categorically meet the requirement of the state statute. They are decision, they are a determination. It does not have to be in writing and... although it is. Somebody... picture this... somebody had to sit there and type this information into the Hansen system. That's why it appears there. That's why it still appears there. So, two grounds then. And Mr. Belman, in his affidavit, addresses this too. He was aware of the complaints. That was his neck of the woods. Numerous discussions with County zoning staff regarding the complaints, familiar with the staff's processing and investigation of the complaints in each instance. County zoning staff thoroughly investigated the nature, extent, and history of the junkyard operation on the property and resolved each complaint by determining that the junkyard was grandfathered and was a lawful non-conforming use. So, those are the two points and they operate independently of each other. Number one, the evidence that you have before you from Mr. Belman and the current property owner is that this use predated the zoning ordinance and certainly predated whenever the County actually got around to rezoning properties. Number two, you have a state statute that says... oh, and I've also given you substantial information

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about some of Mr... the other issue is what is the material reliance? It comes down to spending money. He continued, based on, and these all predate the last determination, or postdate the last determination made by the County, expenditures and sales in reliance on the County's constant position that he was a lawful, non-conforming, that is grandfathered, use. So, that qualifies he has materially relied on those determinations. They certainly weren't obtained by fraud. There they are, right in the zoning materials. And Mr. Belman was well familiar with the investigations and has indicated to you that the staff thoroughly investigated you... investigated them at the time before they made these determinations. So, on that basis I ask that you reverse, overturn the zoning violation. It cannot stand because it was a lawful non-conforming use and because the County can't change its mind again and again and again and again. The County has said what it is and they're bound by that determination under state law. I'll be happy to answer any questions you have, Mr. Chairman.

Dr. Larson: Thank you. Could you stand by just a second, Mr. Leming? We don't seem to have these... at least I don't... have the letters he's talking about, from the County, that...

Mr. Grimes: There's several exhibits listed, C and D.

Dr. Larson: ... the grandfathering language.

Ms. Brown: The inspection reports.

Mr. Grimes: Right, but I have one.

Ms. Brown: I've got three.

Dr. Larson: Where are they?

Ms. Brown: They were in my packet. Let me see. I'm trying to find them now; I've been looking at them.

Mr. Grimes: Right, I have one; right. My 5 of 16 begins the appeal application.

Dr. Larson: Alright, this is my 5 of 16.

Ms. Brown: Yeah, it's not 5 of 16. I'm looking here.

Mr. Leming: I have 13 of 16 and 14 and 15.

Ms. Brown: There were three. There was 99, 2005, and 2007.

Mr. Grimes: There we go, got it, yep; 12 and 13.

Dr. Larson: Okay, thank you.

Mr. Grimes: Apologies. It's in there.

Ms. Brown: What numbers did you say, because I have one that says 15. Is that what you... did you say 15?

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Mr. Grimes: Page 12, page 13, page 14 and page 15.

Ms. Brown: Fifteen, yeah okay.

Dr. Larson: I still don't see the grandfathering words here. I guess I need better glasses.

Mr. Grimes: (Inaudible - microphone not on).

Dr. Larson: Oh this is from the Commissioner of the Revenue. Mr. Leming, is it your contention that the Commissioner of the Revenue has the authority to make zoning decisions?

Mr. Leming: This is from... this information is from the County's Hansen system. I'm not sure where you're getting...

Dr. Larson: In the lower right hand corner of page 13 of 15 it says it's from the Commissioner of the Revenue I believe.

Mr. Leming: I don't see that on my... it says due to information from the assistant code administrator...

Dr. Larson: And the Commissioner of the Revenue.

Mr. Leming: ...that's Ms. Hudson, and the Commissioner of Revenue. That's the source of information. You know, you investigate, the Commissioner of Revenue keeps information about land uses on his cards, because that's what's needed to assess districts. No further actions will be pursued. That's no further actions by the Zoning Administrator will be pursued on this. The complaint is investigated, of course, by the zoning office, but part of their investigation, obviously, was to run over, as I have done many times, to the Commissioner of Revenue to find out what they may have on their old manual card system about prior uses of property.

Ms. Brown: I don't know if you all got the email that I got today from the Commissioner of Revenue's office. I think it was passed out before our meeting. It was from Bart Stevenson and also included Scott Mayausky. They did check the cards today. They could find no reference to this. They didn't know what we were talking about, but they did do a physical check today of the cards and they put it in writing.

Dr. Larson: So, Mr. Leming, did the applicant get a copy of these?

Mr. Leming: Of these?

Dr. Larson: Yes.

Mr. Leming: Yes he did. He came down to the County to find out what the status was and what had happened.

Dr. Larson: Back in the year that these were issued? 2007?

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Mr. Leming: He can tell you. He can come up and tell you when the first time, but he's the one that gave me the information. So yes, he has received them and was aware of the determinations, probably through his Supervisor too.

Dr. Ackermann: These are all dated January 8, 2015.

Mr. Leming: That's when they were certified, Dr. Ackermann. At the top... what we did was go over so that there would be no question about the authenticity of these records and we had them certified. That's what the notation is on the top.

Dr. Larson: They're not signed by anybody.

Mr. Leming: No, they're not, but they don't have to be. They don't have to be because the Virginia Code section specifically refers to any order, decision, determination. It does not have to be in writing. Keep in mind, the county ordinance does not take effect till 2010 and all of these predate that.

Ms. Brown: Mr. Chairman, I have several questions for staff before I can ask questions of him.

Dr. Larson: Go ahead, well, let's try to deal with Mr. Leming now that we have him up at the...

Ms. Brown: Yeah, but I can't ask him the questions I need to know unless I talk to staff.

Dr. Larson: Are there any other questions for Mr. Leming while he's up?

Mr. Apicella: I'm going to have the same issue. I need to hear from staff before I ask questions of Mr. Leming.

Dr. Larson: Okay. Go ahead with your questions for staff.

Ms. Brown: Okay, well, I'll go first then. Is the inspector considered an administrative officer for the zoning department?

Mrs. Blackburn: Yes.

Ms. Brown: Okay. Second things is, does Mr. Newton have a business license for the junkyard?

Mrs. Blackburn: Not to my knowledge.

Ms. Brown: Okay. And then my last question is regarding legal non-conforming uses. When a property is sold...let's just assume for the moment that there is a legal non-conforming use. When the property sells and changes hands, does that legal non-conforming use convey with the property or does it end?

Mrs. Blackburn: It conveys with the property.

Ms. Brown: Okay. Okay, that's it.

Dr. Larson: Other questions?

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Mr. Apicella: I'll let somebody else ask questions if they have some.

Dr. Ackermann: I just have one.

Dr. Larson: Go ahead.

Dr. Ackermann: There's a letter included from a, maybe Henry and Carol Sitzman, a letter from a resident, and it says that the number of reported complaints have been extensive from surrounding property owners. Junk, including abandoned autos and trucks, have been leaking oil and gas into the ground and adjacent creek. This has been verified by aerial photos and ground visits from Stafford Planning and Zoning office personnel. Is that correct? Has Stafford Planning and Zoning office personnel visited the site and have they... did they note leaking oil and gas into the ground waters?

Mrs. Blackburn: To the best of my knowledge, County staff has visited the site. I am not aware of any of the leaking oil and gas into the ground.

Dr. Ackermann: Thank you.

Mr. Apicella: Mr. Chairman, as with the previous agenda item, I reviewed the material and the relevant case laws. So, with that in mind, the material indicates that the applicant rented the subject parcels prior to the establishment of the zoning ordinance. When did the zoning ordinance come into effect?

Mrs. Blackburn: The first zoning ordinance was adopted in 1964.

Mr. Apicella: And when did the applicant first start purchasing some of these parcels which were R-1, A-1, now A-2?

Mrs. Blackburn: 1972.

Mr. Apicella: So, the applicant didn't become the property owner of record until after the zoning ordinance came into effect?

Mrs. Blackburn: Yes.

Mr. Apicella: When someone owns a property and they want to establish a use, what do they normally have to do?

Mrs. Blackburn: You can answer that one.

Mr. Apicella: When someone owns a property and they want to establish a use, what do they have to do?

Mrs. Musante: They come into the Public Works Department and fill out either a zoning application or a commercial change application, depending on what the business is.

Mr. Apicella: Okay, and what's the definition in the county code for a junkyard?

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Mrs. Musante: A junkyard, according to the zoning ordinance, is the use of land within 100 feet of any state road or more than 200 feet in any location for the storage, keeping, or abandonment of junk, including scrap metals or other scrap materials. The term junkyard shall include the term automobile graveyard.

Mr. Apicella: So, from the County's perspective, the applicant's using their parcel as a junkyard?

Mrs. Blackburn: Yes sir.

Mr. Apicella: And at what point does a few pieces of farm equipment become a junkyard?

Mrs. Blackburn: That's a very good question. I do not have an answer for that one.

Mr. Apicella: Okay. Subsequent to the zoning ordinance being established and the applicant purchasing the parcel, was the junkyard a by-right use?

Mrs. Blackburn: No.

Mr. Apicella: Could they have gotten a CUP or special exception or any other formal County approval to operate a junkyard in that zoning district?

Mrs. Blackburn: No.

Mr. Apicella: So, the bottom line is, under no circumstances could they operate a junkyard on any of their parcels since they were not appropriately zoned for a junkyard.

Mrs. Blackburn: Correct.

Mr. Apicella: Is the County policy clear in identifying the specific uses that can be conducted in that zoning district?

Mrs. Blackburn: Yes.

Mr. Apicella: Did the applicant ever request authorization by proceeding forward with a building... what did you say?

Mrs. Musante: It's either a zoning permit or a commercial change permit, and the answer is not to my knowledge.

Mr. Apicella: Okay. Which office is responsible for conducting site inspections when the County receives an allegation of a violation?

Mrs. Blackburn: It will depend on the violation.

Mr. Apicella: Okay, well, in this case.

Mrs. Blackburn: If it is a zoning violation, it would be the Planning and Zoning Department. If it is an erosion and sedimentation control issue, it would be handled by the Public Works Department. It would just depend on what the incident or circumstances were.

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Mr. Apicella: Okay, and who, when an inspector goes out and does an inspection, who decides whether to take action, to not take action, or note comments on the inspection report?

Mrs. Blackburn: The normal operating procedure is an inspector will go out and investigate either a complaint or a situation, and come back with their findings. Pictures are normally taken, and if there is what appears to be a violation and they did not talk to the property owner -- sometimes that happens -- they will talk to the property owner discussing what was going on and then from those findings either write them a notice, tell them to rectify the situation, and most of the time it is discussed and it is part of their training that if they see violations, they know that they can write notice of violations for them. And if there is a question, they come back and discuss it and it is usually the Zoning Administrator who will decide.

Mr. Apicella: Okay. And in all of the violations that were referenced in the material that was submitted, they were brought by persons other than the applicant. The applicant didn't, kind of, self-report, so to speak?

Mrs. Blackburn: Correct.

Mr. Apicella: Was the applicant or any of the persons involved in these instances given an opportunity to appeal the findings of the inspector? Was there a formal appeal process noted and provided?

Mrs. Blackburn: Yes, that is part of the application... part of the notice of violation piece of paper.

Mr. Apicella: So, who gets that appeal? Who would get that notice that they can appeal the inspector's determination? I'm not talking about this.

Mrs. Blackburn: Oh, I'm sorry.

Mr. Apicella: I'm talking about the inspection reports. Somebody went out and did an inspection. They wrote a comment in the inspection report. They either chose to take some action, or not take some action following whatever is put on that form. Is there some notice of appeal that's given to anybody as part of that process? So there's no appeal process as part of the...

Mrs. Blackburn: Not for an inspection report.

Mr. Apicella: Okay, that's kind of important. So, from the County's perspective, to what extent do comments written in an inspection report constitute a formal, specific, binding, and appealable decision by the Zoning Administrator, or other administrative officer under the zoning ordinance?

Mrs. Blackburn: In my opinion it does not warrant that.

Mr. Apicella: Okay. It does not. Is it County policy for a Zoning Administrator to authorize an otherwise illegal non-conforming use and vest a right in such an impermissible use under the County's zoning ordinance via notation or comments in an inspection report? I'll ask it one more time. Basically what I'm trying to say, there's this inspection report that makes some kind of comment. Is it County policy to use that vehicle to identify and authorize an otherwise illegal non-conforming use and vest a right in that impermissible use, using that inspection report? Is that a vehicle?

Mrs. Blackburn: Not normally, no.

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Mr. Apicella: Okay. Based on the County's definition of a written order, requirement, decision, or determination, what would have been required to allow the applicant to use their parcel for a junkyard?

Mrs. Blackburn: To request a written determination by the Zoning Administrator on that particularly zoned property.

Mr. Apicella: And did the applicant ever seek and obtain such an authorization?

Mrs. Blackburn: Not to my knowledge.

Mr. Apicella: To what extent does the applicant fall under the provisions of Section 14 of the County code?

Mrs. Blackburn: Section 14 of the County code is for junk. It is not administered by the Zoning Administrator or part of the duties of the Zoning Administrator. That would have to be something that would be handled by the people who administer that code.

Mr. Apicella: And just for reference, so everybody knows, Section 14 is with regard to policy on junk dealers, is that right?

Mrs. Blackburn: Yes. Yes.

Mr. Apicella: Last question. From the County's perspective, does acquiescence constitute formal approval to operate an illegal use? It's out of one of the court decisions. Acquiescence means, because you didn't enforce it, does that mean that they can do something illegal?

Mrs. Blackburn: Not to my knowledge, no.

Mr. Apicella: Okay, thank you.

Dr. Larson: Okay, any more questions for staff?

Ms. Brown: Just one. I'm just wrapping my head around this still. When Mr. Newton purchased the properties, they were zoned R-1, Suburban Residential and A-1, Agriculture. So, when he purchased the property, there was no expectation that it was going to be zoned, you know, for junk in one light or anything like that.

Mrs. Blackburn: Not to my knowledge, no.

Ms. Brown: So he would have had at the time he purchased, if he wanted to start a junkyard, he would have had to apply for a CUP or something like that, or a zoning change?

Mrs. Blackburn: He would have had to apply for a rezoning.

Ms. Brown: Okay.

Dr. Ackermann: I just have one question too, and this may not have anything to do with the case, but if I were to make a complaint to the Zoning Department, what would I expect to get back?

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Mrs. Blackburn: You would expect to get back, if you made inquiry and a complaint about something going on in the County and gave your name, because we do take anonymous complaints, we would call you back with our findings. We would have an inspector go out and inspect the property and call you back with what we found, whether it was unfounded or whether it was found. It may in some instances require additional information from you, from the complainant, which we have had on various issues, but that would be the standard operating procedure.

Dr. Ackermann: And, getting to Mr. Apicella's question, could I appeal your decision? I mean, if you tell me that no, this is proper to do on this property, how could I appeal that?

Mrs. Blackburn: I would probably advise you that you needed to request a determination on that particular subject and then I would write it and then we would go from there with due process.

Dr. Ackermann: Okay, thank you.

Mr. Grimes: I have a question to follow-up on Mr. Ackermann's question. You provide a response to the complainant? What form does that take? Is that in writing?

Mrs. Blackburn: Normally it is a phone call.

Mr. Grimes: So it's not documented anywhere? It's not put down in writing? It's no email? There's... we have any documentation of what was stated to the complainant?

Mrs. Blackburn: It is normally done in a phone call. It is documented that the inspector called, responded to the complainant, told them of the findings. Hopefully they will have written... they're supposed to write it in detail form and we have that record of what is going on with that complaint.

Mr. Grimes: So, and I'm curious, giving these past violations and some of the notes, what was the response to the complainants? What was sent back to the complainant? It's okay, there's no issue, it's fine?

Mrs. Blackburn: No, that we were investigating the situation.

Mr. Grimes: Right, but once the determination was made.

Mrs. Blackburn: That we were going forward with the notice of violation.

Mr. Grimes: Well, no, in the example of, let's say, the violation from 19... the investigation from 1999.

Mrs. Blackburn: I don't know, because I was not here and I have no records of this property, other than what is in the printout from the computer.

Mr. Grimes: Okay, so how about 2006?

Mrs. Blackburn: Again, I was not here. I do not know. All I have is the record that was printed out in Hansen.

Mr. Grimes: So there is no record of any of the responses to the complainants on any of these cases?

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Mrs. Blackburn: Not on those early ones, no; not that I have found.

Mr. Grimes: Okay.

Dr. Larson: I have a question for staff. On the first inspector report, it's page 13 of 16 on my handout, it's... I'll just read what it has for comments. It says: remove inoperable vehicle from front/side yard, remove inoperable vehicles, including farm equipment, tractor trailer, etcetera, from front/side yard. So it sounds like the notes say they want removal of vehicles. Due to information from assistant code administrator and Commissioner of the Revenue, no further actions will be pursued on this complaint of this property at this time. Area had been noted as grandfathered for junk vehicles and farm equipment already on property. So there are a couple of things there about, okay, grandfathered for things already there. It doesn't say anything about running a junkyard. It doesn't say anything about bringing in new vehicles. It says stuff that's already there. The other thing that I can't figure out is who wrote this. I mean Steve J. Maniack Jr. wrote it, but who was he?

Mrs. Blackburn: I do not know.

Dr. Larson: He may... it sounds like he was an inspector. I... there are things here, failed, failed, passed, and they have code... they have inspection types. Do you have any ideas what those inspections are? Right at the bottom of this thing? CS300, inspection type, well they're all CS300 or C...yeah, CS300.

Mrs. Blackburn: No, I do not know. The only thing I can surmise is that it is a code for the computer system for zoning violations.

Dr. Larson: So again, I'll specify, even this were something that could be relied on, is some sort of official decision, and I guess I would also ask, where is the official decision? Was there ever anything? I mean, they keep saying it has been grandfathered, but when was it grandfathered?

Mrs. Blackburn: I do not know. As I've stated, this is the only information I have on this piece of property concerning this.

Dr. Larson: And this says grandfathered for the junk vehicles and farm equipment already on the property as of 4/12/1999. The other... the next one has no comments except the only comment it has is, site is grandfathered. And then the last one, and again, the only meaningful things are really under the comments as far as I can tell. Inspected site, checked County records to find the junkyard, the junkyard on site has been declared a grandfathered use. ACS. Whatever ACS is.

Mr. Grimes: That's the initials of the gentleman.

Dr. Larson: Oh, Arthur C. Singer, got it. Okay, thank you. Any other questions for staff? Mr. Leming, I think we probably still have questions for you.

Mr. Kim: If you don't mind, Mr. Chairman, can I ask...

Dr. Larson: Please.

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Mr. Kim: Okay, so Mr. Leming, Dana, you made a good point, does your client have a business license or maybe some kind of W-2, because this is all wishy-washy on what's in front of us, so maybe something more substantial like a W-2, a business license, like a LLC, Incorporated.

Mr. Leming: He's not incorporated. He does have cards, and he operates as a business from the property of selling, purchasing equipment, trying to refurbish it, selling it. It's an ongoing business.

Mr. Kim: But what I'm asking is...

Mr. Leming: He does not... as far as I know, you don't have a license, do you? I don't believe he's ever... I don't believe the issue of a license has ever been brought up or brought to his attention.

Mr. Kim: Well, I'm only asking for the purposes of trying to establish when he became... when it was a junkyard, because I think that's where my confusion is.

Mr. Leming: Right.

Mr. Kim: Maybe some kind of tax return or something that states it was a junkyard.

Mr. Leming: He files a tax return every year, but the business does not have a separate tax return because he's not incorporated. So it's a personal tax return. As far as the use on the property is concerned, it's not our contention in response to something Ms. Brown said, that the use on the property began when he purchased the property, or that when he purchased it he sought out to establish a... the County's term is junkyard, and we'll come back to that in a minute...

Mr. Kim: I'm sorry...

Mr. Leming: ... but that the property was ongoing and operated by his family on the property.

Mr. Kim: I understand, I mean there's... I don't want to say there's two different stories here, but we're hearing one thing from the County and one thing from you. So I want something more substantial like, you know, that would state that this was a junkyard in 1972. You know, I don't know, maybe not a tax return because he doesn't have a business license or he's not incorporated, so, something, maybe I'm just not thinking of it that could say, hey, this was a junkyard.

Mr. Leming: You know you're talking about a very long time ago, and the best evidence that I have... we did a freedom of information request incidentally with the County to be sure that we had absolutely everything that the County ever had. It goes to all parts of the County, including the Commissioner of Revenue on this. But, the best information that we have come up with as to how the County construed the operation on the property concerns these notes. Now, if there were just one of them, then perhaps that would be a little easier to dismiss; but we have a series of them here that all arrive at the same conclusion. And the last one is probably actually the broadest. This is the one that occurs in... at page 15 and it is the one that says, checked County records to find the junkyard and the site has been declared a grandfathered use. So that is absolutely the broadest statement that I think we have found on the property. And I would suggest this to you Mr. Kim, all across Stafford County at that day and time, there are junkyards. So as far as I know, they're all still operating. You may be familiar with one out in the Widewater area called Pick-a-Part, which was a junkyard pre-dating Aquia Harbour and was a non-conforming use. We have a couple more along Route 1 that are there and pre-date the zoning ordinance and continue. And this is another one, and it certainly was not an unusual thing in those

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days for people to try to eke out a living through this kind of operation. And the Newton family has done this for years and years and years and years. I think, probably, in the absence of the kind of information that I think you're seeking, you have an affidavit from an esteemed and very well respected Supervisor of this County, who not only has lived in the area and has given you a sworn statement that this operation was in existence in the 1950s, and he's been there the whole time, and that he was privy to these investigations. You know, when a complaint comes in, a landowner knows about it. You know, in all likelihood they're going to go out to the property and talk to him about it, and he knows that there's a complaint. So of course the landowner follows-up to see what was the disposition, and that's how Mr. Newton came to collect all of these records, which we went back and verified. So, what you have... now as far as what a determination is, there is no requirement under state law that a determination or a decision be in writing. The only reference is to a written order, and that is what requires the 90 day notice. And as I indicated, that particular code provision was added to this statute in the early 90s, but the other part of it stayed the same. It's sandwiched around this addition to the statute. The County's attempt to provide additional requirements for what constitutes a determination, making the whole thing necessary for in writing. That doesn't come about until 2010, and I have the meeting minutes from the Board of Supervisors hearing that established that. But all of these pre-date that. So even... I'm sorry, go ahead.

Mr. Kim: Oh no, if I can have one more question. I'm looking through the inspector's notes, I'm looking specifically at page 4 of 16.

Mr. Leming: Page 4...

Mr. Kim: Of 16.

Mr. Leming: Okay, let me back up.

Mr. Kim: It says application information and right there it says existing junkyard not screened as required. I kind of... maybe looking at the pictures, maybe I missed it... but is there an actual screen that's required? I mean, if it is a junkyard and it's grandfathered in, at least, does it fit the requirements of what a junkyard needs to be, a screened... now I don't know how true this is, it says existing junkyard not screened as required.

Mr. Leming: I guess it's good you asked that question, because in our supplemental material we told you about yet another, and this may be what you're referring to, about another incident involving the County and this property in 2013. And I included that record, same thing, Hansen record with my supplemental material to you. In 2013 the County came up with a series of violations, including screening and those were... those ended up in General District Court for enforcement. Mr. Newton didn't appeal those. They were in General District Court, they were contested in General District Court when the County sought to enforce them. There's a notation on the Hansen report from 2013 that the property is a non-conforming use, an established non-conforming use, which is why the County in 2013 decided to go this other way. Well, the cases were dropped. They were dismissed in General District Court. The County did not pursue screening and a couple of other violations that they were trying to enforce. And then the County came back later, now this is the first that I've heard that this is... that this pertains to a complaint. It may be a longstanding complaint, but I have no... I certainly had no impression this was a new complaint. So the County then came back after dismissing the screening and the other violations that were found in 2013 and reinstated... actually this is the very first time the County has ever found him in violation for having an invalid and unlawful use on the property. The County has never, even in 2013, contested this record of findings, that this was a

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grandfathered lawful non-conforming use on the property. They sought to do other things to mitigate it which I think is what your question goes to, but abandoned that. And we were in discussions with the County at that point and we were not made privies to why the County dropped those cases, but they did. So nothing ever happened with screening or some of the other things that they found Mr. Newton in violation of at that time. That's the only time Mr. Newton's ever been found in... cited for any kind of violation for the County ever in 2013. And those were dropped and now we have this one.

Ms. Brown: I have questions.

Dr. Larson: Go ahead.

Ms. Brown: Is Mr. Newton still operating the junkyard?

Mr. Leming: Is he still operating... how do you mean operating?

Ms. Brown: Is he buying and selling junk?

Mr. Leming: Yes he is. In fact, the documentation that I provided to you indicates... these were printouts that we could get from some of the vendors that he does regular business with... they had computerized records which go back several years, but are pretty current, that were provided to you.

Ms. Brown: I did some research last night trying to find out if he had a junk business and I only found two things. One was a Dies Plus, which was some kind of metal thing, and then there was also a welding repair business and he actually had, looks like, possibly a license for that. I don't know, he had some kind of NAICS code, I'm not sure what that is, but advertising it. I didn't find anything, anywhere for any reference to a junkyard or dealings. I did contact the Commissioner of Revenues office and I think I'd like to read this for the record. This morning I contacted Bart Stevenson and I told him about our hearing tonight and I wanted him to talk to our Commissioner of Revenue, Mr. Mayausky, who was out of town but he contacted him anyway. He sent him this email this morning. It says: Scott, Dana Brown contacted me this morning about a BZA appeal hearing taking place tonight. The parcels in question are Gary Newton's Brooke Road parcels 55-4E, 4D, 4G, and 4H that are currently being used as a junkyard. Dana has notes in the file for this case stating that in April of 99 an inspector from the code office wrote that "per the Commissioner of Revenue's office this parcel is grandfathered and no further action is needed." He goes on to say: I assume the note is pertaining to whether or not the property is grandfathered for some sort of junkyard type use. I am familiar with the parcels in question; however, I'm not sure about the note from 1999. I have researched all of our records here to include... I'm not sure how to pronounce this... P-R-O-V-A-L, proval old land cards and file room notes. We don't have any information that sheds any light on the comments from 1999. Dana wanted me to contact you to see if you remember anything about this case since you are so old and were here at that time. And he gives my contact information. A couple of hours later he responded from his meeting I think in Richmond, he says, I don't know anything about the 1999 note. So...

Mr. Leming: Which would be logical because he wasn't in office at that time.

Ms. Brown: But they checked the land cards that you referenced earlier.

Mr. Leming: You know, I've checked... I've tried to check the land cards any number of times too and they're not very easy to find anymore.

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Ms. Brown: Well he said he looked at them and the file room notes and he said there was nothing to indicate that.

Mr. Leming: Well, you know, Ms. Brown, the only thing that we know is what is contained in these County documents. That's the only thing we know. We didn't go anywhere, we didn't create any of this information that's been provided to you. This came out of the County's files.

Ms. Brown: But it's referencing something from the Commissioner of Revenue's office which says they don't have anything to substantiate that.

Mr. Leming: Well, that may be a basis... that may be a basis for how the determination should have been made in the first place. The problem is, at this point, is that a determination was made regardless of what it was based on. The code section that you're dealing with here, even if it's a mistake, even if it's dead wrong, the County still does not get to change its mind.

Ms. Brown: Well there is a reference that a clerical error can be corrected. I did find that in there.

Mr. Leming: What clerical error?

Ms. Brown: Well the note, because obviously the Commissioner of Revenue's office knows...

Mr. Leming: Three times? Three clerical errors?

Ms. Brown: They reference the same comment each time they went. They just looked back and looked at... that was the original comment in 99. In 05 they reference the same thing and in 07. Okay, so there it was... it looks like to me a clerical error because the Commissioner of Revenue's office has no record of this, even though, what I think is a clerical error, referenced it.

Mr. Leming: I would love to try that issue in a court.

Dr. Larson: Ladies and gentlemen, we're getting pretty late here. Mr. Leming, I'll let you respond to that last comment however you'd like to and then I'd like to do something else here.

Mr. Leming: Okay. If this were a single occurrence I might be inclined to dismiss it, but it's not. And there's no indication on the face of any of these County records that they were based on the prior entry here. So far as I can tell, there may have been, so far as you can tell, there may have been an independent investigation that was conducted at each point in time. The important point is this; that the County received a complaint, conducted an investigation... that is clear here, that is clear from Mr. Belman's affidavit. An investigation was conducted, and what the County found is that the complaint, which was about the non-conforming use and the legality of it, was that the complaint was unfounded because the property had been declared a grandfathered use. Now under 2311, that doesn't sound like a clerical error. Under 2311 it's not fraud, it's not misfeasance, there wasn't anything illegal that was done. These were entries that were made after a complaint, a lawful investigation, and a finding by the County.

Dr. Larson: Mr. Leming, I'm going to have to interrupt you, I'm sorry. I will leave the public hearing open. You will have a chance to continue next time. I don't know if anybody in the public now stood and raised your hand at the beginning, but if you'd like to come down and make a comment, now is

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your opportunity. You'll just have to swear to tell the truth. Before you start, could you hereby swear or affirm that all the testimony before this Board shall be nothing but the truth?

Mr. Dixon: Yes sir.

Dr. Larson: And your name and address please.

Mr. Dixon: Jonathan Dixon.

Dr. Larson: Go ahead please.

Mr. Dixon: Okay. This is the first I've really heard of Mr. Newton's junkyard, quote/unquote. I've never really discussed that with him. I've had him work on my tractor for the past 15 years. There's really no one in the area that works on old tractors. White Oak Equipment works on new stuff, not old, 50s tractors. So, over the years I've taken my stuff to him. He's got a lot of parts there. Most the stuff that I've seen in his yard is heavy equipment and tractor parts, not really cars. I own a parcel next to Pick-a-Part. Back when Douglas Boswell owned it, it went along the whole ridge. And whenever he died, they got rid of all the stuff on my parcel and consolidated it, but... so I'm familiar with old junkyards. I mean there was a lot of 60s cars, Mustangs, Cougars, those are junkyard cars. Really everything I've seen at Gary's is heavy equipment. Like I say, it's got a lot of parts on it and he fixes my stuff, so I'm surprised at the junkyard terminology. As far as gas and oil, I heard them say there were aerial photographs of gas and oil. How in the world you do that? That didn't really make any sense. But at any rate, I see a lot of gas and oil coming out of Pick-a-Part in Widewater crossing the road, looks like a rainbow and goes into that creek. So I'm surprised you haven't followed up on that. That's disappointing, as a property owner down there. But I've never seen anything on his parcel like that. But one thing I was wondering was, you would think follow the money. If there was a problem with what Mr. Newton was doing over there, you would think the problem I would have with my parcel in Widewater is depreciation of the value of the property. No one wants to pass a junkyard to get to my lot. So that's what you think the problem would be. So, I spent like an hour today at the courthouse and I got a copy of the plats. I looked at the surrounding properties around him and was surprised that really all of the properties are agricultural properties. That guy's has got house, a lot that didn't perk in 1978 so he built a barn on it. That guy's got a large parcel. That parcel's been there since the 50s, it's a large parcel. That guy had a decent size parcel until he cut an acre off for a family member right next to Gary. And that was done, all these people have been there since the 50s and even the 80s. And if you look at their purchase price and their value now, they've had a lot of appreciation on their property, so what Gary's doing hasn't depreciated anyone's property. So, I really don't see where it's hurting anything and actually fixing farm equipment, that's all agricultural all around him except for Johnny-come-lately who built a house in 2010, actually he has a very good appreciation. He bought the lot for 65,000 and he's got a house worth 400,000, so, I really don't see where really the non-conforming guy is the guy on the lot that's complaining next to him. Gary's more conforming with the neighbors than he is. He's fixing farm equipment. Surrounded by farms. And he fixes mine. So follow the money. There's no depreciation, so where is the harm.

Dr. Larson: Thank you, sir. Your time is up.

Mr. Dixon: Thank you.

Dr. Larson: Anybody have any questions for this witness?

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Mr. Dixon: And I've got that, if you want to look at it. It's got all the values and the size of the parcels, and all their tax map information that gave me the values. And Mr. Leming is right on the... my father-in-law, Jim Persinger, back there who was a Supervisor, he just died of Parkinson's, but he taught me most of what I know about properties and you knew Jim Persinger, and actually that's the same thing he taught me, it would be a, from what Jimmy always told me, a non-conforming but continuous use property. So, that's doing no harm to anybody.

Dr. Larson: Thank you Mr. Dixon.

Mr. Dixon: Thank you.

Dr. Larson: Would anybody else like to say anything? Okay, seeing none and given the hour of 10:32, I would like to leave the public hearing open and resume this case next time. I wonder if I could get a motion to that effect. Unless you want to continue. I think I'm going to want a motion either way.

Ms. Brown: I'll make a motion to continue tonight.

Dr. Larson: Second?

Mr. Kim: I'll second that.

Dr. Larson: Those in favor raise your hand. Okay, I guess I'm the only one that's tired. Okay, we continue. Okay Mr. Leming, you still have the floor.

Mr. Leming: And I will just touch briefly on the prior speaker's comments. We did do a... we did have Mr. Newton do a complete inventory of the property, and this may actually be a fairly important issue. I heard one question about definition of junkyard previously and we have a list of every piece of equipment on the property. And I don't... it's not something that I thought you want to peruse, but this in an inventory of every piece of equipment on the property and we did some totaling of these numbers. There are 250 pieces of farm equipment and farm vehicles on the property. That constitutes about 90% of the items on the property. Now there are, there are seven inoperable passenger vehicles on the property. There are other farm lifts, trailers, fork lifts, trucks, backhoes, other equipment, and tools and machinery used to repair, refurbish and disassemble them for resale and recycling. This is an operation that found its root in a day and time when this was commonplace, and times have changed. Times have changed and there are some people that don't like these, but the law is very clear. If you have established one of these and I don't see how anyone can contest the evidence that is before you about when these uses were originally established by the Newton family in the 1950s, as long as those uses continue. And Mr. Newton was a young man, believe it or not, in the 1950s, a kid. A family business, he took it over, purchased the properties. It's all that he knows and he's done the best. I've looked at the property. I've walked the entire property. I've not seen any evidence of oil leaking or anything that I would consider to be an environmental hazard. He actually has the pieces of equipment separated so you that you can walk around them, so you can see them, so he can get to them, so he can work on them. There are some things that have been there a long time. There is a regular activity on his part of taking things to scrap. If he can't fix it, that's the next step and you have a long record of items that he has submitted for scrap and a long item of purchases, of the things that he needs to refurbish these equipment, these pieces of equipment and hopefully sell them. So, this is something that you couldn't do today, but if it's established and it predates the ordinance, he gets to continue to use it, to do it. Now you add to that, add to that the fact that we have... we didn't invent these records. These come from the County's record system, Hansen, which is the system, if you don't know, that

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tracks all zoning applications, all site plan applications. This is where all the entries are made on this Hansen system here and we have three entries indicating that complaints are dismissed, alleging that this was an illegal use on the property, and that the property has been grandfathered. I don't know what the source of that information was, but that was the decision that was made. The decision that was made was not to... to drop the complaint because it was a grandfathered use on the property. So I submit to you that, on those grounds, that the law compels you to find that there is a lawful non-conforming use on the property and/or that the County has made determinations on which Mr. Newton has relied. And the County is now barred from going back and changing its mind and saying, oh, what we said before wasn't right. It is not a non-conforming use, and your code section is very clear on that. It doesn't matter unless these decisions were obtained by fraud or misfeasance, or as Ms. Brown noted, clerical error, which I certainly don't think this can be construed, not three times, not a clerical error. Who's a cleric? Cleric's are secretaries. These were inspectors that made these entries.

Dr. Larson: Mr. Leming, another part of the non-conformity part of the code is that the non-conformity not be increased.

Mr. Leming: Yes, and you have two affidavits before you that these uses occurred on all four of these parcels, going all the way back into the 1950s. Now, there was a reference to aerials. I can't tell anything about the aerials before the 1990s. I mean, they're just blurs to me. So what you have before you are sworn statements by reputable people who were there and that's about, and in response to what Mr. Kim had said, that's about the best evidence that you're going to find for something like this. No one is going to have 1972 tax returns or any other official documentation. But this was a pretty common place and Stafford has more than its share of junkyards. It won't have any more junkyards, it won't have any more trailer parks. But in the 1950s and before that and up until that, they were fairly commonplace here.

Mr. Apicella: Mr. Chairman?

Dr. Larson: Yes.

Mr. Apicella: May I ask just a couple of brief questions? So, is it your contention then that a vesting right is achieved by someone who didn't own the property when that use changed?

Mr. Leming: You said vesting; you mean a non-conforming use?

Mr. Apicella: No, vesting. Under 2311(c) it's vesting, right?

Mr. Leming: 2311(c)? Well, it is... the literature doesn't describe that as a vesting in the same way that it is used at 2307. But you have a point, that it's the same kind of issue. What it does is to lock the County in to the prior determination, assuming that the determination was obtained lawfully and there has been material alliance on it. It's not exactly the vesting test, you know. Maybe the determination constitute a SAGA, but...

Mr. Apicella: So if somebody used the parcel to dump garbage and they didn't own the property, they weren't even a renter of the property, somebody bought the property thereafter, it's your contention then that people could continue to dump garbage on it?

Mr. Leming: Wow, that's way...

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Mr. Apicella: I'm just trying to follow the logic here because 2307 is clear, that the vesting right accrues to a... to the landowner, not to a...

Mr. Leming: Mr. Apicella, I think that the evidence that you have before you is absolutely clear that the same operation...

Mr. Apicella: It's not the operation. Who owned the property, who owned the property pre-zoning and then after zoning.

Mr. Leming: Ms. Brown, I think, already asked Mrs. Blackburn the question.

Mr. Apicella: What question?

Mr. Leming: It doesn't matter who owns the property once a use is established. It conveys... it runs with the property.

Mr. Apicella: It matters under 2307; why doesn't it matter here? They're both about vesting.

Mr. Leming: No. This is...

Mr. Apicella: I can read you 2307.

Mr. Leming: You have a different statute that's very clear, Mr. Apicella.

Mr. Apicella: I'm at least glad we have it in the record. I'm also trying to clarify, because before you said it didn't really... the fact that... I'm not quite sure whether the issue of whether it is or it isn't a written determination matters. First you said it didn't matter. Then in your final argument you said it did matter. So you said they were either grandfathered, or they were allowed to use the property as an illegal use because they got a written determination that said they could do that. Is that what you're now saying?

Mr. Leming: Once again, you misconstrue what I say, so I'll try again.

Mr. Apicella: Okay, please.

Mr. Leming: It does not matter whether the determination is in writing or not, unless it's a violation and 2311(a) is very clear on that. If you slip down to 2311(c) it refers, again, to a written order. We're not contending this is a written order. We're contending this is a determination. Now it's nice that it's right there in writing, but you know one of the most famous Supreme Court cases has to do with an oral determination. The case is Lilly versus Caroline County, and in that case the Zoning Administrator, Mike Finchum, who's still in Caroline County, he's the Planning Director, stood up at a Board of Supervisors meeting and said... gave a pronouncement as to the issue that was before the Board of Supervisors, and said that's my determination, you know, if you want to appeal it. And it was. It was an oral determination.

Mr. Apicella: Great. You just said that the judge said that that could be appealed.

Mr. Leming: Mm-hmm.

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Mr. Apicella: Okay. So if it's a non-written determination, how would somebody know they can appeal it if there's no appeal proffered?

Mr. Leming: Well, you've got two sides to the same coin, Mr. Apicella. On the one hand you have complaints. If the complaint had been founded and there was a violation, then you would have had a written order, and that would have been something that would have contained the language and the landowner could have appealed that to you guys. Now, the other side of that same coin is we have complaints that were unfounded. Now my position is that is just as much a determination as if a violation had been found, and Virginia Code Section 15.2-2311 does not require that a determination have an appeal period running with it or notice of the appeal. That's only for a written order on the plain face of the statute.

Mr. Apicella: Just one more point, because I think you were alluding to it and maybe I'm overreaching here, but the courts have also said that mere acquiescence of an illegal use doesn't authorize an illegal use.

Mr. Leming: Yeah, that means you do nothing. But in this case there were investigations and findings that it was a grandfathered use. So that's not acquiescence.

Mr. Apicella: And it's your view that those findings are binding, specific, and hold the weight of allowing the applicant in this case to continue that use?

Mr. Leming: On this use, on this issue. It certainly is sufficient for this. Remember the narrow issue before you is, is the violation valid. Is there an unlawful use on the property. So, you know, the analysis comes down to whether or not there is a lawful, non-conforming use on the property and whether or not the use on the property predates the zoning ordinance and has been continuous. That's the evidence that you have before you.

Dr. Larson: Well, there is one other issue and let me just read the relevant part of the zoning ordinance, Section 28-274. A non-conforming use shall not be expanded or extended into any other portion of the structure... normally these things deal with structures... which was not occupied by the non-conforming use at the time of the adoption of this article or any amendment thereto. The non-conforming use of land, which does not involve a structure or which is an accessory to the non-conforming use of a structure, shall not be expanded or extended beyond the area it occupies at the time the adoption of this article or any amendment thereto. So, the non-conforming use of the land cannot be expanded either.

Mr. Leming: We don't take issue with that. If the evidence that you have before you is that this use occurred on all four of these parcels continuously.

Dr. Larson: Right, and I would accept Mr. Belman's affidavit of course, but what I have before me is some visual evidence to indicate that it has expanded, in photographs that I can actually see, which is the more recent three photographs, looks like it has expanded.

Mr. Leming: I think that the evidence that you have before you, number one, I've already indicated, I couldn't make much of the photographs at all. They're taken at different times a year. There are a number of deciduous trees on the property. If the... remember the... in fact, the property is largely wooded, even now. Underneath the trees is where the equipment is parked. If you have winter photographs the trees are going to be... things are going to be more visible. If you're taking photographs in the summer or when the trees have their foliage, then it's not going to be visible. The

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purpose of these photographs was not to spy on Mr. Newton to see whether or not he had expanded his use or not. And the photographs are...

Dr. Larson: But if I look at the imagery in the year 2000 and then I compare that to the other two pictures, especially the most recent picture, and especially in 55-4G, and actually 55-4H, oh and 55-4... actually the only one that looks relatively similar is 55-4D.

Mr. Leming: Which pages are you referring to?

Dr. Larson: Page 2 of 9, and 3 of 9, and 4 of 9.

Mr. Leming: Well, and that one is in... that one is taken in 2012, right?

Dr. Larson: Right.

Mr. Leming: Okay.

Dr. Larson: Yeah, 2012, 2010...

Mr. Leming: You have fairly good ones; 2012, 2010 seems fairly consistent.

Dr. Larson: And the year 2000.

Mr. Leming: And the year 2000 seems consistent.

Dr. Larson: I would disagree.

Mr. Leming: Well, I do see more foliage, but I see equipment on the back... it looks like the parcel... I mean I see equipment on all four parcels.

(Inaudible - microphone not on).

Mr. Leming: You know, there was a comment made earlier, I think by you, Dr. Larson, with regard to the equipment in that first determination, the equipment is on the property at this point in time. There is no non-conforming use that is required to be that stagnant. Non-conforming uses constitute businesses. What you have here, I think it's reasonable to say, are four parcels that were involved in the use. And the evidence, I don't know what you make of any of the photographs prior to the last one we discussed, but what you have is a non-conforming use. The evidence before you is that it was established on all four parcels. I don't think that means that the equipment that was there when the non-conforming use was commenced, you can't do anything with it or can't go anywhere. And that's not the business. The use is what is established, the non-conforming use is that these properties may be used, these parcels may be used, from the County's standpoint, as a junkyard, there's some issue with that, because most of it is farm equipment. I'm not sure you meet the formal definition of a junkyard here, but it's a business. You know, the Pick-a-Part place in Widewater that you heard testimony about is not static. It's a non-conforming use also. You know, that one was determined by a court to be a non-conforming use and you all heard part of that case and actually ruled against the property owner and court reversed you. Now, the issue was there was not the non-conformity per se, it was whether or not they were not a non-conforming use and had to go back and apply a certain portion of one of the earlier zoning ordinance to enclose part of their operation. That's what came through you all and went up to

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the Circuit Court on appeal and the Circuit Court reversed it. Your decision was 4 to 3. Now, in that business, Pick-a-Part doesn't just sit there. The parts are not stagnant on the property. It's an ongoing operation. It's the use that runs with the property. It's the use that continues.

Dr. Larson: If I could just ask a question along those lines, how would in that definition of non-conforming use and how it applies, how would you expand a non-conforming use? When the code says do not do that on a parcel, how would you expand a non-conforming use if it's already established?

Mr. Leming: The way you'd expand it in these circumstances would be a larger, additional parcels is the clearest way, or if you went beyond the particular type of operation that he has going on here. You know, if all of a sudden it became something different. If he moved in a large crusher on the property, like has happened at Pick-a-Part, you know. And what we did with Pick-a-Part was to go back and establish they've been crushing on that property since the 1970s and that's what permitted that use to continue. That's not the case here. That would be a very clear expansion of the use here, because he's never done it. You know, what the... the testimony that you have before you is that he purchases the equipment, he refurbishes it if he can, he repairs it, he sells it, he scraps some of it, but that that is the use that was established on property. He doesn't crush it there. So that would clearly be an expansion and obviously if he did some other business on the property beyond that, you know, this is the only non-conforming use on the property. Any other business would have to comply with the zoning ordinance. We're not claiming any other non-conformities, just this particular use. But I think that's what is meant by an expansion. You know, non-conforming uses are not meant as a straightjacket. A non-conforming use is simply a recognition by the law that once established, unless it was discontinued for a period of two years, that notwithstanding the change in the zoning ordinance they get to continue it. So that's what the law is, but it doesn't mean that you can't carry on your business. There would be no point to that. So I don't think expansion... I don't think expansion can be analyzed from the standpoint of aerials. You know, if you did aerials for the same place in Widewater as was testified to a few moments ago, at one point you may have seen cars stacked up on top of cars in a massive area. It doesn't look like that now. It's changed. There are other areas that have come back in to the property and are now used, but that's not an expansion; it was part of the original area then some of the cars were gone and some of them came back. It's an ongoing operation. So it's the use that is non-conforming and it was established. I think the evidence before you is that it was established on each of these four parcels and it continues to this day.

Dr. Larson: Any other questions for Mr. Leming? Thank you Mr. Leming.

Mr. Leming: Yes sir. Thank you. And thank you all; I know it's late.

Ms. Brown: I had one, I'm sorry.

Dr. Larson: Say again?

Ms. Brown: I had one for Mr. Leming.

Dr. Larson: Oh, one more.

Ms. Brown: How many businesses are being operated on the property right now?

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Mr. Leming: I don't know. I know that there is a repair... I mean he repairs... well, it's all... what's part of the original operation is the collection of equipment, also the repair of equipment, the transport of equipment, the sale of equipment, sale of parts. Those are the ongoing businesses that are part of the non-conforming use. Now, I will tell you there are also pigs on the property, but this is an agricultural district, so there is a pig pen. They're not running lose on the property; there is a pig pen on the property. But this is an A-2 property. So that's the only other thing that he's doing on the property that I'm aware of.

Ms. Brown: Thank you.

Mr. Apicella: Mr. Chairman, with due deference you asked the question and staff raised the issue in their report. I think it would be helpful if they kind of responded to, because they pointed out that this was an issue, the expansion; maybe they can give some clarity to why they put it in there or what the code says about the expansion of a non-conforming use. Can you read what it says?

Mrs. Blackburn: I think Dr. Larson had said something about this. It's under section 28-274 of non-conforming uses, sub-paragraph b. A non-conforming use shall not be expanded or extended into any other portion of a structure which was not occupied by the non-conforming use at the time of adoption of this article or any amendment hereto. The non-conforming use of land, and this is what you had said, which does not involve a structure or which is an accessory to the non-conforming use of a structure shall not be expanded or extended beyond the area it occupies at the time of the adoption of this article or any amendment hereto.

Mr. Apicella: Thank you.

Ms. Brown: I just want to clarify with staff. The parcels were not all acquired at one time, correct?

Mrs. Blackburn: According to the records that we have found, that is correct.

Dr. Larson: And do you know what ordering they were acquired and how and what years and those kinds of things?

Mrs. Musante: What we have in the staff report is the original parcel was purchased in 1972, extending to 1979, but I do not have which parcel was purchased first.

Mrs. Blackburn: We can get that information for you.

Dr. Larson: Okay. Any other questions for staff? Go ahead.

Mr. Kim: I actually, sorry... I agree with the appeal of the violation simply because there's a long history of Mr. Newton being there. I know there is some non-conforming issues and expansion of it, but as a junkyard, or as a Pick-a-Part or... not Pick-a-Part, but as you get old equipment and take parts out to make use again, I think, I mean, if we're okay with doing motions because of the time, I would like to offer a motion to appeal the notice of the violation for A15-04/15150842.

Dr. Larson: Okay, that's a motion to repeal, is that what you're saying?

Mr. Kim: No, no. I'm sorry, I motion to approve the appeal of the notice of violation of A15-04/15150842.

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Mr. Grimes: I would second approving the appeal of the notice of violation. I believe based on the affidavits and some of the other statements that this non-conforming use has been there for quite a while. I drove by the site. I understand there might be some concerns with the way it may appear from the road that offends certain sensibilities, but that's the business, the business of taking large pieces of equipment and parting them out and working on them, repairing them. It's not pretty, but it's been done on that site for a long time, so I have to support the motion to approve the appeal.

Dr. Larson: So that would be overturn the Zoning Administrator's determination?

Mr. Kim: Yes, to overturn the Zoning Administrator's notice of violation.

Dr. Larson: Any other discussion?

Mr. Apicella: Mr. Chairman, I'm not going to support the motion. I believe the notice of violation in this instance should be upheld, and with all due respect to the applicant, and I appreciate the longstanding nature that they've been in the County doing the business that they have, but it appears to me that the way in which they are currently using this parcel, it fits the meaning of a junkyard. I'm not quite sure why that's in dispute under the County code; 250 pieces of farm equipment sure sounds like a junkyard to me, scrap metal, inoperable vehicles. Given that based on the record, I believe the applicant has been operating an unlawful non-conforming use since they first purchased the property in 1972. I think the key point here, in my view, is that they were not the actual landowners of the subject parcel when the zoning ordinance came into effect in 1964. They were the renters and I kind of use the argument that, again, somebody could dump garbage illegally on a parcel and continue that use under the logic that was proffered. As a result, since they were not the property owner, they're not entitled to grandfathering. Based on my reading of the code and case law, a vesting right can only be obtained by a landowner, not someone who does not own the property. Subsequent to the effect of the zoning ordinance in 1964 and the purchase of their first parcel in 1972, it doesn't appear from the record that the applicant assertively requested authorization from the County to operate a junkyard, whether legal or not on the subject property. Again, as we talked about in the record, even if you have authorization to do something on a piece of property, you actually still have to ask permission to do it by getting a permit. Never requested here. Additionally, no time since the County's zoning ordinance came into effect has the operation of a junkyard been permissible in the zoning category that this property sits on. So, based on all the relevant court cases, as well as County policies and definitions, I don't believe that the notations in the inspection reports rise to the level of being a formal, written, specific, binding, and appealable decision that would allow the applicant to operate an otherwise unlawful junkyard in contravention to the County zoning ordinance and the specific uses allowable on the subject parcels. So, given all these factors, I don't believe the applicant has achieved a vested right under section 15.2-311(c) to operate an unlawful junkyard on their property. Consequently, I believe the notice should be upheld. I would offer though that they do have a way of trying to turn this otherwise unlawful illegal use on this parcel to a lawful use by going through the right process, which is a rezoning. Thank you Mr. Chairman.

Mr. Kim: If I can rebut that. I absolutely agree that, if I understood this correctly, it was a junkyard before the purchase from the Newton family in 1972. Am I correct on that? So it was still used as a junkyard from the 50s, the 60s. So... and if the Zoning Administrator told us that it doesn't... if you can word that better for me.

Mr. Grimes: The use conveys with the property.

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Mr. Kim: Yeah, the use conveys with the property and that's the main reason why I am in favor of the motion. If it was Mr. Newton purchased the property in 1972, prior to 1972 it was a house or a farm, I would absolutely agree with you, but... Go ahead.

Mr. Apicella: I would agree; an authorized use conveys with the property. It was never an authorized use. That's my point. And they weren't the property owner. They were only renters on the property, and it wasn't until years, 8 years after the zoning ordinance changed that they actually buy the property. They had 8 years between the time... and they never even asked for permission during those 8 years to use the property as a junkyard. I think I do hear you say though that there might be some agreement that it is a junkyard.

Mr. Kim: Oh yeah, I absolutely agree with that.

Dr. Larson: Okay, I'm not going to support the motion for a totally different reason, and I'm going to read it out of the zoning ordinance. Under Section 28-274, I'm going to omit the part that talks about an accessory to a non-conforming use because it sort of dilutes what I'm... it's an or statement so you can do that. The non-conforming use of land which does not involve a structure shall not be expanded or extended beyond the area it occupies at the time of the adoption of this article or any amendment thereto. And I think I see definitive evidence in the aerial photos, and granted they're not detailed well, but I think there's definitive evidence to show that the operation has expanded since the year 2000. So I can't support the motion because of that.

Ms. Brown: I'm not going to support the motion either for most of the reasons that Steven cited. I don't believe when the property was purchased, when they went from renters to purchasing, is there anything on their deed or anything that said that they have authorization to run a junkyard and have zoning other than the, is it the R-1 and the A-1 that they were supposed to have? I don't think that the notes in the Hansen system are official. I said that the Commissioner of Revenue's office disputes that and this says that the Commissioner of Revenue's office, you know, said this. They have no records to indicate anything like that. And also, just as a point of reference in here, it does say that they don't want to pursue it, or they will not be pursuing it at this time. It doesn't say this is forever and we're not going to revisit this, but I just still, I don't think that that's a determination at all, so I will not be supporting it.

Dr. Larson: Any other discussion? Okay, I think I'm going to ask for show of hands. Those in favor of the motion raise your hand (Mr. Kim and Mr. Grimes). Those opposed? Okay, the motion is defeated. Okay. Alright, any Unfinished Business?

Ms. Brown: Well, can we make a motion to uphold the decision of the Zoning Administrator?

Dr. Larson: We could.

Ms. Brown: Okay. Or do we need to? I don't know.

Dr. Larson: Not sure we need to. Go ahead.

Ms. Brown: Okay. I make a motion to uphold the decision of the Zoning Administrator and that's it.

Dr. Larson: Is there a second?

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Mr. Apicella: For clarification, I think it's a notice of violation.

Ms. Brown: Okay.

Dr. Larson: Is there a second?

Mr. Apicella: I'll second Mr. Chairman.

Dr. Larson: Those in favor raise your hand. Those opposed? Okay, motion passes 5 to 2 (Mr. Kim and Mr. Grimes opposed). Alright, Unfinished Business? None. Other Business?

UNFINISHED BUSINESS

OTHER BUSINESS

Mrs. Musante: Mr. Chairman, I just wanted to let everyone know that I did order Mr. Poss' plaque.

Dr. Larson: Yes.

Mrs. Musante: It is not ready. I'm hoping to have it ready for the October meeting unless it is your wish that we just mail it as soon as I receive word that it's completed.

Dr. Larson: No, I'd like you to bring it to the meeting so that people can see it, then we'll mail it after that.

Mrs. Musante: Okay. It should be ready by the October meeting.

Dr. Larson: Okay. Thank you.

Ms. Brown: I did have something just real quick on just clarification for my own self. With all this new variance law changes that we had come July 1, can somebody please just real quick clarify for me again what the ex parte communications pertains to for us? Special exceptions, or variances, or appeals? Is it just variances? Is it all of the above?

Mrs. Musante: We had that discussion this afternoon with our County Attorney and I don't have a clear answer right now, so...go ahead.

Mrs. Blackburn: We can tell you it's not for special exceptions.

Ms. Brown: Okay, when can we know?

Mrs. Blackburn: And we know it's for variances. I don't...

Dr. Larson: We knew that.

Ms. Brown: I was sure on the variance pretty much, but...

Dr. Larson: And we knew the special exception part.

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Mrs. Blackburn: It's the appeals that are the situation. I think our legal staff was going to look into it and as soon as we can get any information about it... we are not the only ones that really don't know what it says and we have gotten different reports from different places. How are you handling this? How are you handling this? It's not real clear language.

Ms. Brown: Will we have anything before our next meeting?

Mrs. Blackburn: Oh I'm hoping so.

Mrs. Musante: Oh absolutely.

Mrs. Blackburn: I'm hoping by the end of the week and we'll just email you.

Ms. Brown: Maybe before the next meeting or at the next meeting you think? Before? Okay.

Dr. Larson: Okay, any other business? So, to the minutes. Any comments on the minutes of August 25th?

ADOPTION OF MINUTES

August 25, 2015

Mr. Apicella: Mr. Chairman, I'm going to abstain.

Dr. Larson: Okay. I went through it; I have no comments. Is there a motion to adopt these minutes?

Dr. Ackermann: I make a motion to adopt the minutes as presented.

Mr. Kim: I second that.

Dr. Larson: Those in favor say aye.

Mr. Kim: Aye.

Mr. Grimes: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mr. Davis: Aye.

Dr. Larson: Aye. Opposed? Abstentions? Okay.

Mr. Kim: Mr. Chairman, can I, just to put it in the members ears, if I can make, it's an, I guess in other business. Can we maybe somehow digitize this? We have old Blackberrys... I mean, not Blackberrys. Old iPads or even our personal, I have an iPad and a tablet. I don't know how the staff feels, but this is just to put it in your ear to think of it and the rest of the members if we can somehow digitize this, this

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would be better. Might save a tree or two. But if you guys want to do it this way I'll be glad to go with the team.

Mr. Grimes: There was a discussion when you weren't here.

Mr. Kim: Oh that was probably...my bad. I'm sorry.

Mr. Grimes: And the cause for the iPad lost.

Mr. Kim: Okay then, never mind.

Dr. Larson: Well, the deal was that it was an all or nothing thing, so if you got iPads it would be used for everything and there were some members of the Board, more than one, that preferred paper copies to...

Ms. Brown: I'll admit it, I was one.

Dr. Larson: And I'll admit it, so was I, but all it took was one, but there were actually two of us and there may have been more, but...

Mr. Kim: Thank you.

Dr. Larson: Okay, so Zoning Administrator's Report?

ZONING ADMINISTRATOR'S REPORT

Mrs. Blackburn: I have none at this time.

ADJOURNMENT

Dr. Larson: Okay, do I have a motion to adjourn?

Mr. Grimes: I move to adjourn.

Dr. Larson: Second?

Mr. Kim: Second.

Dr. Larson: Those in favor say aye.

Mr. Kim: Aye.

Mr. Grimes: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mr. Davis: Aye.

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Mr. Apicella: Aye.

Dr. Larson: Aye. Opposed?

With no further business to discuss, the meeting adjourned at 11:10 p.m.