



**CITY OF RICHMOND**

DEPARTMENT OF  
PLANNING AND DEVELOPMENT REVIEW  
BOARD OF ZONING APPEALS

**BOARD OF ZONING APPEALS**

**MEETING MINUTES**

**WEDNESDAY, JUNE 6, 2018**

On Wednesday, June 6, 2018, the Board of Zoning Appeals held a public hearing in the Fifth Floor Conference Room, 900 East Broad Street, at 1:00 p.m.; display notice having been published in the Richmond Legacy Newspaper on May 23 and 30, 2018 and written notice having been sent to interested parties.

Members Present:            Roger H. York, Jr., Vice-Chair  
                                     Rodney M. Poole  
                                     Kenneth R. Samuels, Sr.  
                                     Mary J. Hogue

Staff Present:                Roy W. Benbow, Secretary  
                                     William Davidson, Zoning Administrator  
                                     Brian P. Mercer, Planner II  
                                     Neil R. Gibson, Assistant City Attorney

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The Chairman called the meeting to order and read the Board of Zoning Appeals Introductory Statement, which explains the proceedings of the meeting. The applicant and those appearing in support of an application speak first, followed by those appearing in opposition.  
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**CASE NO. 21-18**

APPLICANT:                Oregon Hill Neighborhood Association, Inc.  
                                     Oregon Hill Home Improvement Council, Inc.  
                                     E. Kelley Lane  
                                     Jonathan Brent Raper

PREMISES:                801-815 WEST CARY STREET  
                                     104-110 SOUTH LAUREL STREET  
                                     812 GREEN ALLEY  
                                     (Tax Parcel Number W000-0293/013, W000-0293/012,  
                                     W000-0293/011, W000-0293/010, W000-0293/009,  
                                     W000-0293/008, W000-0293/015, W000-0293/016,

W000-0293/017, W000-0293/018, W000-0293/041, W000-0293/006)

**SUBJECT:** An appeal of the Oregon Hill Neighborhood Association, Inc., Oregon Hill Home Improvement Council, Inc., E. Kelley Lane, and Jonathan Brent Raper that the orders, requirements, decisions or determinations of the city zoning administrator administering the zoning ordinance related to height, setback, yard and parking of the pending POD application for 801-815 West Cary Street, 104-110 South Laurel Street, and 812 Green Alley, City File #867, including without limitation such orders, requirements, decisions or determinations contained in the March 1, 2018 signed comment letter. The specific section numbers of the Zoning Ordinance being appealed are 30-438.3, 30-438.5, 30-440.6, 30-630.3, 30-710.1, 30-710.3, 30-710.4, 30-1220.19, 30-1220.123 and 30-1220.137.

APPEAL was filed with the Board on March 23, 2018, based on Section 17.20(a) of the City Charter.

**APPEARANCES:**

**For Applicant:** Andrew McRoberts  
J. Brent Raper  
Parker Agelasto  
Kelley Lane  
Donald R. Traser  
Charles Pool

**Against Applicant:** Jennifer Mullen  
Mark Baker  
Kevin O'Leary  
Lory Markham  
Larry Cluff

**PLEASE SEE COURT REPORTER TRANSCRIPT AT THE END OF THESE MINUTES FOR COMPLETE DETAILS OF THE CASE.**

**RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS that an appeal of the Oregon Hill Neighborhood Association, Inc., Oregon Hill Home Improvement Council, Inc., E. Kelley Lane, and Jonathan Brent Raper that the orders, requirements, decisions or determinations of the city zoning administrator administering the zoning ordinance related to height, setback, yard and parking of the pending POD**

application for 801-815 West Cary Street, 104-110 South Laurel Street, and 812 Green Alley, City File #867, including without limitation such orders, requirements, decisions or determinations contained in the March 1, 2018 signed comment letter be denied based on the record before the Board.

ACTION OF THE BOARD: Denied (3-1)

Vote to Deny

affirmative: York, Poole, Samuels

negative: Hogue

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CASE NO. 19-18 (CONTINUED FROM MAY 2, 2018 MEETING)

APPLICANT: Carver Homes LLC

PREMISES: 808 ½ and 810 WEST CLAY STREET  
(Tax Parcel Number N000-0352/030 & 016)

SUBJECT: A building permit to construct a new single-family detached dwelling (#808 ½).

DISAPPROVED by the Zoning Administrator on March 21, 2018, based on Sections 30-300 & 30-413.5(1) of the zoning ordinance for the reason that: In an R-7 (Single-And Two-Family Urban Residential District), the lot area and lot width requirements are not met. Lot areas of three thousand six hundred square feet (3,600 SF) and lot widths of thirty feet (30') are required. For zoning purposes, one (1) lot having a lot area of 6,038.94 square feet and a lot width of sixty feet (60') currently exists; lot areas of 2,946.97 square feet (#808 1/2) and 3,073.97 square feet (#810) and a lot width of 29.65 feet (#808 ½) are proposed.

APPLICATION was filed with the Board on March 16, 2018, based on Section 15.2-2309.2 of the Code of Virginia.

APPEARANCES:

For Applicant: Cory Weiner  
Alex Lugovoy

Against Applicant: H. Charleen Baylor  
Doug Kleffner

**FINDINGS OF FACT:** The Board finds from sworn testimony and exhibits offered in this case that the applicant, Carver homes LLC, has requested a variance to construct a new single-family detached dwelling at 808 1/2 W. Clay Street. Mr. Cory Weiner, representing the applicant, testified that a former owner combined what were previously two single-family lots into a single lot of record. Mr. Weiner stated that in addition a deck had been constructed across the common property line. Mr. Weiner further stated that the intent is to construct a single-family home which conforms to the R-7 district regulations. Mr. Weiner indicated that the proposed home will be architecturally sympathetic to other dwellings in the block. Mr. Weiner pointed out that the R-7 lot width is 30 feet and that the lot in question is 29'8" in width. Further the lot area is consistent with that in the block. Mr. Weiner noted that relevant setback and parking requirements will be met.

Mr. York noted that if the variance is approved that the property is limited in occupancy to three unrelated individuals living as a family under a common lease.

In response to question from Mr. Poole, Mr. Weiner stated that the proposed common property line has been adjusted by approximately 4 inches from the original property line to meet the required setbacks.

Speaking in support, Mr. Alex Lugovoy testified that he had discussed the proposed project with surrounding neighbors and had received no objections. Mr. Lugovoy noted that the vacant lot represented a missing tooth in the block.

In response to question from Mr. Poole, Mr. Lugovoy confirmed he was aware of the fact that the property may be occupied by maximum of three unrelated people.

Speaking in opposition, Ms. Charleen Baylor, testified that the Carver Neighborhood Association was opposed to the requested variance. Ms. Baylor stated that the applicant had failed to meet with them to discuss the revised plans since the previous continuance. Ms. Baylor contended that the plans in actuality have not been revised and still reflect a five bedroom configuration. Ms. Baylor further contended that the dwelling will be utilized for student housing which is a continuing problem for the Carver Neighborhood. Ms. Baylor stated that what is being proposed is a rooming house.

Speaking in opposition, Mr. Doug Kleffner stated that the revised plans have merely reflected a change in the names of two rooms which were shown on the previous plans as bedrooms. Mr. Kleffner also expressed concern over the fact that there had not been sufficient contact between the applicant and the neighborhood association.

The Board finds that the applicant failed to show an extraordinary or exceptional situation whereby strict application of the lot width and lot area requirements unreasonably restricts its use or that there is a clearly demonstrable hardship bordering on confiscation of the property. The granting of a variance in this case would constitute a special privilege or convenience to the owner and would not be in harmony with the intended spirit and purpose of the ordinance and the powers of the Board.

BY THE BOARD OF ZONING APPEALS that a request for a variance from the lot area and lot width requirements be denied to Carver Homes LLC for a building permit to construct a new single-family detached dwelling (#808 ½).

ACTION OF THE BOARD: (4-0)

Vote to Deny

affirmative: York, Poole, Samuels, Hogue

negative: None

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CASE NO. 22-18

APPLICANT: Kylan & Suzy Shirley

PREMISES: 610 WEST 26TH STREET  
(Tax Parcel Number S000-0804/004)

SUBJECT: A building permit to construct a new single-family detached dwelling (#612).

DISAPPROVED by the Zoning Administrator on April 11, 2018, based on Sections 30-300, 30-412.4(1) & 30-412.5(1)b of the zoning ordinance for the reason that: In an R-6 (Single-Family Attached Residential District), the lot area, lot width, and side yard (setback) requirements are not met. Lot areas of five thousand square feet (5,000 SF) and lot widths of fifty feet (50') are required. For zoning purposes, one (1) lot having a lot area of 9,176 square feet and a lot width of sixty-two feet (62') currently exists; lot areas of 4,588 square feet and widths of 31.00 feet are proposed. A side yard of five (5) feet is required; 3.5' is proposed along the northern property line for the existing dwelling (#610).

APPLICATION was filed with the Board on April 11, 2018, based on Section 15.2-2309.2 of the Code of Virginia.

## APPEARANCES:

For Applicant:           Kylan & Suzy Shirley  
                                  Bryson Lefmann

Against Applicant:   None

**FINDINGS OF FACT:** The Board finds from sworn testimony and exhibits offered in this case that the applicants, Kylan and Suzy Shirley have requested a variance to construct a new single-family detached dwelling at 612 W. 26th Street. Ms. Suzy Shirley testified that she works at the Veterans Affairs Medical Center and her husband is an architect. Ms. Shirley stated that they are very invested in the Wooden Heights neighborhood. Ms. Shirley explained that formally 610 and 612 W. 26th Street existed as two lots of record that were combined through a deed of convenience. Ms. Shirley indicated that the request is to reestablish the original lotting configuration. Ms. Shirley noted that the proposed lot is consistent with other lot widths and lot sizes in the block. Ms. Shirley stated that the lot coverage and setback requirements will be met. It was noted that there was no objection from surrounding neighbors and that a presentation was made to the neighborhood association but the association did not take an official vote.

Speaking support, Mr. Kylan Shirley stated that the proposed design is consistent with massing and form of the surrounding houses. Mr. Shirley indicated that there will be two-story monolithic massing including a front porch that addresses the street. Mr. Shirley stated the siding will be fiber cement. Mr. Shirley noted that the proposed dwelling will be consistent with the architecture of other dwellings in the block.

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

pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.

RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS that a request for a variance from the lot area, lot width, and side yard (setback) requirements be granted to Kylan & Suzy Shirley for a building permit to construct a new single-family detached dwelling (#612), subject to substantial compliance with the plans submitted to the Board and provision of cementitious siding.

ACTION OF THE BOARD: (4-0)

Vote to Grant Conditionally

affirmative: York, Poole, Samuels, Hogue

negative: None

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Upon motion made by Ms. Hogue and seconded by Mr. Samuels, Members voted (3-0) to adopt the Board's May 2, 2018 meeting minutes.

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Upon motion made by Mr. Poole and seconded by Mr. York, Board Members voted (3-0) to resume utilization of the zoning ordinances special exception powers. Mr. Poole noted that in the judge's decision regarding 1903 E. Marshall Street the Boards special exception powers were confirmed.

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The meeting was adjourned at 4:15 p.m.  
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\_\_\_\_\_  
Vice - Chairman

  
\_\_\_\_\_  
Secretary

1 VIRGINIA

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CITY OF RICHMOND

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BOARD OF ZONING APPEALS

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CASE NO. 21-18

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CITY HALL

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900 EAST BROAD STREET, 5TH FLOOR

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RICHMOND, VIRGINIA

15

JUNE 6, 2018

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1:00 P.M.

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22 REPORTED BY:

23 JACQUELIN O. GREGORY-LONGMIRE, RPR, LSR

24

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JANE K. HENSLEY - COURT REPORTERS  
(804) 739-3500



## APPEARANCES

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## Board Members:

Roger H. York, Jr., Chairman

Kenneth R. Samuels

Mary J. Hogue

Rodney N. Poole

Roy W. Benbow, Secretary

## Zoning Administrator:

William C. Davidson

Brian Mercer, assistant

## Counsel for the Applicants:

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## Counsel for 805 West Group, LLC:

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## P R O C E E D I N G S

1  
2 MR. YORK: Ladies and gentlemen, this is a  
3 regular monthly meeting of the Board of Zoning  
4 Appeals in the City of Richmond, Virginia. The Board  
5 is comprised of five of your fellow citizens who are  
6 appointed by the Circuit Court and serve without  
7 compensation.

8 Three affirmative votes are required to approve  
9 any variance or grant in the field. The Board is  
10 assisted by its secretary, who has no voting power.  
11 The zoning administrator and his assistant are also  
12 present, as well as a representative of the City  
13 Attorney's Office but do not vote.

14 The Board's powers are very limited and are set  
15 forth in the Code of Virginia, the city charter, and  
16 Richmond city code. The Board does not have the  
17 power to rezone property but may only grant variances  
18 from specific zoning requirements as they apply to a  
19 particular property or grant appeals from decisions  
20 of the zoning administrator or grant certain  
21 exceptions to the zoning regulations.

22 The Board's proceedings are informal, but we do  
23 adhere to certain rules. We ask that those persons  
24 expecting to testify in each case be sworn in when  
25 the case is called.

1           The cases will be heard in the order in which  
2 they appear on the docket. First we hear the  
3 applicant, then others who wish to speak in favor of  
4 the applicant, and finally from persons in  
5 opposition.

6           In the case of a variance, a special exception  
7 request, the applicant, proponents, or persons  
8 aggrieved under 15.2-2314 of the Code of Virginia  
9 shall be permitted a total of six minutes each to  
10 present their case. The Board will withhold  
11 questions until conclusion of the presentation.

12           Rebuttal may be permitted at the discretion of  
13 the Board but shall be limited to correction or  
14 clarification of factual testimony already presented  
15 and rebuttal should not exceed five minutes.

16           In the case of an appeal over the decision of  
17 the zoning administrator, which is the first case we  
18 have today, the appellant or applicant's  
19 representative and the zoning administrator shall be  
20 permitted a total of ten minutes to present their  
21 case-in-chief and their rebuttal.

22           The appellant or applicant's representative and  
23 zoning administrator shall be required prior to their  
24 presentation to declare to the Board how many of  
25 their allotted minutes shall be devoted to their

1 case-in-chief and in rebuttal. I will be keeping  
2 track of it, and I'll warn you when you're reaching  
3 your rebuttal time.

4 Following the presentations of the appellant and  
5 zoning administrator, other interested parties shall  
6 be permitted a total of ten minutes to present their  
7 views.

8 Interested parties are defined as a property  
9 owner, other than the appellant, whose property is  
10 the subject of an appeal and the neighborhood  
11 constituency consisting of neighbors and neighborhood  
12 associations.

13 After all the cases have been heard, the Board  
14 will decide each case. After your case is heard,  
15 you are welcome to stay through the remainder of  
16 the docket to hear the Board's deliberation or you  
17 may leave. If you choose to leave, please do so  
18 quietly.

19 The Board will notify each applicant in writing  
20 as to the decision of the Board.

21 All right. As I said at the beginning, this is  
22 not a political body. This is more like a court,  
23 since the members are appointed by the Circuit Court.  
24 And in this particular case, the Board's authority is  
25 limited to deciding whether the zoning

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administrator's interpretation of the applicable zoning requirements to the subject property was correct. And all of the testimony received today has to be focused on his decision, as well as the issues raised by the applicant.

The applicant will go first and will get ten minutes to speak, followed by the zoning administrator, and then anyone who wishes to speak in support of the applicant, another ten minutes. And then after that, anyone who wishes to speak in support of -- or the owner of the subject property, followed by people who wish to speak in support of the zoning administrator's position.

MR. BENBOW: Excuse me, Roger. You didn't mention the rebuttal and the ten minutes for the neighborhood associations and the neighborhood --

MR. YORK: Yeah. I'm going to explain that.

MR. BENBOW: -- are collective.

MR. YORK: We would encourage you in order to avoid repetition and make sure that the issues are all raised, keeping in mind that this is how much material we've already received, so we're very well-versed on what's going on today.

If you could choose a spokesperson to go first among the neighborhood group, that would make sure

1 that what you want to get across to us is taken care  
2 of.

3 All those to be heard in this --

4 MR. BENBOW: The rebuttal, they need to state  
5 their case-in-chief and the rebuttal time.

6 MR. YORK: Yeah. I said that already.

7 MR. BENBOW: But you need to get it from them.  
8 Okay. You want to swear them in?

9 MR. YORK: Yeah, after I swear them in.

10 All of those people who wish to be heard in this  
11 case, please stand and raise your right hand.

12 (All participants expecting to testify were duly sworn.)

13 MR. YORK: Thank you.

14 The applicant will come first and let me know  
15 how much of his time he wants to reserve for  
16 rebuttal, but before he does that, we have an issue  
17 that we have to decide amongst ourselves.

18 The applicant's attorney has submitted a rather  
19 lengthy letter, which I've only had a chance to scan,  
20 that raises a number of issues or elaborations or  
21 issues, for example, on the timeliness of the appeal,  
22 which is not mentioned at all in the application, as  
23 well as greater elaboration on the merits of the  
24 zoning administrator's decision.

25 And I don't have that in front of me, but the

1 rules that we have, Mr. Poole has them.

2 MR. POOLE: If you'd like, I can read it. These  
3 are the application instructions.

4 "If additional grounds for your appeal are  
5 presented to the Board of Zoning Appeals, which were  
6 not a part of your appeal application, the zoning  
7 administrator will not have been given all of the  
8 relevant information on which to base a final  
9 decision. This may result in a continuance of your  
10 case or exclusion of the subject information  
11 altogether from your testimony before the Board of  
12 Zoning Appeals.

13 "You may supplement your application with any  
14 information you deem appropriate, including, but not  
15 limited to surveys, site plans, floor plans,  
16 elevation drawings, pictures, et cetera."

17 That's the relevant language. And, quite  
18 frankly, I think the first thing we should do is ask  
19 the zoning administrator, have you had time to read  
20 this?

21 MR. DAVIDSON: I'm on page 9.

22 MR. YORK: Of what you've read so far, are you  
23 prepared to --

24 MR. DAVIDSON: Well, I guess, one concern I have  
25 is that we're citing specific previous Board cases



1 that I don't know may even be applicable in this  
2 situation.

3 They say that I ruled something back in 2003,  
4 but I don't have that case in front of me, so I can't  
5 tell you whether it was cited the same --

6 MR. YORK: Well, it looks like we have --

7 MR. DAVIDSON: I mean, the first five pages are  
8 talking about vesting law and whether the party, the  
9 aggrieved --

10 MR. YORK: The 30- and 60-day rules.

11 MR. DAVIDSON: The 30, 60 appeal period.

12 MR. YORK: The other angle of this is even if we  
13 choose to continue it, we can either not accept it or  
14 alternatively, we could continue it. But to the  
15 extent that there are any -- and, again, I've only  
16 scanned it -- any new arguments that are presented,  
17 they clearly are beyond the 60-day time limit, right?

18 MR. POOLE: I'm not sure which 60-day time limit  
19 you're --

20 MR. YORK: The one that over which you can't  
21 change a decision of the zoning administrator.

22 MR. POOLE: Well, there are two different issues  
23 there. I think one of the things I would like to  
24 know as an individual member is, does the applicant  
25 intend to argue items that are contained within his

1 June 6th letter?

2 MR. MCROBERTS: Mr. Chairman, if you'd call the  
3 case, I certainly can address that as I arrive.

4 MR. YORK: We have to decide whether we're going  
5 to accept testimony.

6 MR. BENBOW: Exactly.

7 MR. POOLE: Well, I'm on page 3, so I'm not  
8 prepared to even consider issues that are -- if we're  
9 going to give -- if it's the decision of the body  
10 that we're going to consider material here, at the  
11 very minimum, we have to continue the case, in my  
12 view.

13 And, secondly, I would admonish the applicant to  
14 adhere to the rules and that if we choose to continue  
15 the case, that this is the last material that will be  
16 submitted.

17 MR. MCROBERTS: Yes, sir.

18 This is in direct response to the application  
19 packet. The packet that we just received, many  
20 materials in there, we'd never seen in advance of  
21 just recently.

22 At this time there are not five BZA members and  
23 so we would exercise our right under the charter to  
24 defer this case.

25 MR. YORK: Actually, you have the right, if

1           there are only three members, not four members.

2           MR. MCROBERTS: Ah, I thought it was less than  
3 five.

4           MR. POOLE: No.

5           MR. YORK: However, you could still choose to  
6 defer the case for 30 days.

7           MR. MCROBERTS: I think that would make sense.  
8 Honestly, I think that there are substantial legal  
9 materials that are in here. None of this is new  
10 facts beyond what you'll be hearing from folks  
11 speaking in favor of the application, as is their  
12 right. It's mostly legal argument. It's in response  
13 to zoning administrator's packet.

14           MR. YORK: I mean, I very quickly read through  
15 it, and you're right, I don't see any new facts, but  
16 I see lots of additional arguments and citations.

17           MR. MCROBERTS: Yes, sir.

18           MR. YORK: And as Chuck said, he hasn't had a  
19 chance to make sure that his inconsistencies have  
20 been verified and so forth and so on.

21           MR. DAVIDSON: One other matter. The letter  
22 references saying that he represents applicants in  
23 the matter with Donald Traser, but I believe that  
24 applicant is not on this docket.

25           MR. YORK: We have two vers- -- we received two

1 versions of the application letter, one with and one  
2 without, and I asked Roy about it and, apparently --

3 MR. BENBOW: Chuck ruled that it did come in --

4 MR. YORK: It come in too late?

5 MR. BENBOW: -- but it wasn't timely filed.

6 MR. DAVIDSON: It was added after the 30-day  
7 time period.

8 MR. YORK: Yeah.

9 MR. MCROBERTS: Your Honor, we were told that we  
10 can amend our application, so we did. And in the  
11 application that was requested by the zoning  
12 administrator, we added Mr. Traser.

13 MR. YORK: Is that extra person critical to your  
14 case?

15 MR. MCROBERTS: I think that he brings more to  
16 the table, but there are the two other individual  
17 applicants that, I think, are similarly situated.

18 MR. YORK: That doesn't prohibit him from being  
19 able to speak.

20 MR. MCROBERTS: And I think that he probably  
21 will, but it sounds like, to me, a deferral or a  
22 continuance would make sense and we support that.

23 MR. POOLE: Mr. Chairman, I would suggest that  
24 the attorney for the developer, the owner, be heard  
25 from before we make a decision, one way or the other.

1 MR. YORK: Do you have a copy of this letter?

2 MS. MULLEN: No, sir, I do not.

3 Mr. York, members of the BZA, I'm Jennifer  
4 Mullen with the law firm of Roth Jackson here on  
5 behalf of 805 West Group, LLC, which is the owner of  
6 the properties in question, subject of this appeal.

7 We would request that this matter be heard based  
8 on the information that we were provided in the  
9 original application and be heard on its merits. We  
10 think this is probably an additional attempt to delay  
11 the development of this property. It has been stayed  
12 based on this BZA appeal.

13 With the additional information, I'm not sure  
14 what the letter provides, but the language with  
15 respect to the 60-day rule is very specific in the  
16 state code and that is one that moves through the  
17 charter, as well as the city ordinance itself, and  
18 the city attorney has opined as to that, which was  
19 also in your packet.

20 MR. POOLE: Would you refresh my memory on that,  
21 Ms. --

22 MS. MULLEN: Yes, sir. So --

23 MR. POOLE: -- Mullen? Excuse me.

24 MS. MULLEN: So there are -- there are multiple  
25 issues, obviously, with respect to an appeal. One is

1 that you have standing, which I'd be happy to talk  
2 about at length as well. And the second is if you  
3 are time-barred. And time-bar has two components.  
4 One is with respect to a 30-day rule and this falls  
5 under 15.2-2311.

6 And the 30-day rule is based on a 30-day appeal  
7 period from the appellants based on when they  
8 received notice and that is flawed in multiple ways  
9 based on their provisions in their packet.

10 They did receive notice and a full upload of all  
11 documents from the City in January, and that  
12 information contained the same information that was  
13 in the October 23rd, 2017, letter.

14 That same information was in the January 22nd  
15 comment letter and yet they waited until the March  
16 letter, which just said that the zoning office had no  
17 further comments and the POD was acceptable for  
18 approval.

19 So they waited until that letter to appeal it,  
20 even though the decision had been made in October and  
21 again in January with the same decision, no new  
22 information in March.

23 The 60-day applies when you are aggrieved. We  
24 have materially, my clients, did everything they were  
25 supposed to do under the law. They requested a

1 zoning conformance letter, with specific plans  
2 attached. They received the detailed zoning  
3 conformance letter, October 23rd of 2017. They  
4 relied on that letter, and they bought the property.  
5 It was a material change in their position. They  
6 acquired the property based on that letter and then  
7 they went forward and expended further resources,  
8 developed a plan of development set, submitted that  
9 application to the City, received comments, revised  
10 that, and then only after that did they receive the  
11 March 23rd, I believe, notice of the appeal.

12 So that 60-day rule is one that is a thing  
13 decided. And there is case law out there, as well as  
14 a code provision, meaning that the zoning  
15 administrator cannot change his determination with  
16 respect to those items that are included in that  
17 October 23rd decision letter.

18 MR. YORK: The problem is the applicant has  
19 cited a bunch of cases dealing with the 30- and  
20 60-day issue, and, of course, we haven't had an  
21 opportunity to review those cases arguing that it's  
22 not as clear-cut as you're suggesting.

23 MS. MULLEN: Well, and I think just not only am  
24 I suggesting, but their own city attorney has  
25 suggested that in the packet and so there are --

1 MR. YORK: Yes. That's true.

2 MS. MULLEN: It does become a thing decided.

3 And not only does the zoning administrator have the  
4 presumption of correctness, but they have to -- the  
5 appellants have to provide a preponderance of the  
6 evidence in order to rebut that preponderance -- to  
7 rebut his presumption of correctness, which they have  
8 not.

9 And not only is it time-barred, but they do not  
10 have standing, so every single argument that they  
11 have in that packet, which I can go into in more  
12 detail, you have to have a two-part test: One is  
13 proximity, which may be where they're located. They  
14 only provided their addresses.

15 MR. YORK: Yeah. You're bordering on --

16 MR. POOLE: I guess --

17 MR. YORK: -- testifying here on this case.

18 We're familiar with it.

19 MR. POOLE: Here's what I was trying to ask you.  
20 And I understand the distinction between the 30- and  
21 the 60-day. I'm addressing the issue of whether we  
22 can accept this material.

23 MS. MULLEN: I would say no. The application is  
24 very clear. The rules are very clear with respect to  
25 the Board of Zoning Appeals. The 60-day rule is a



1 thing decided, so that 60-day rule is the thing  
2 decided.

3 Now, bringing in additional information, again,  
4 I don't know what the letter says or what it purports  
5 to allege, but that 60-day rule is a thing decided  
6 and so continuing it just continues to stay the  
7 ability to develop the property, which I think is the  
8 ultimate goal of the appellants.

9 MR. POOLE: Thank you.

10 MS. MULLEN: Thank you.

11 MR. YORK: There's some pretty meaty stuff in  
12 this letter. The question is, do we give them a  
13 chance to consider it, or do we just decide that  
14 we're just going to proceed based on the --

15 MR. POOLE: Whoa, whoa. There are two issues  
16 that I have. Our rules say please provide the  
17 materials ahead of time, not on the day of the  
18 hearing. I mean, that's one thing that I think is  
19 applicable to this issue.

20 We make the rules as to how these cases are  
21 presented. This is part of our application process.  
22 It's part of what we give to every applicant and make  
23 it known to every applicant.

24 I understand that Mr. McRoberts' argument is he  
25 said he didn't see what was in the packet until

1 later. I get that. So there's arguments on either  
2 side of it. But if Ms. Mullen is right and that is  
3 that this whole issue is time-barred, if that's what  
4 the decision of this Board is, then all the other  
5 issues are irrelevant.

6 MR. YORK: But in the past we have in order to  
7 avoid ruling on a timeliness issue and avoid the  
8 problem of having a case appealed and then sent back  
9 to us in case we lose on the merits, we've already --  
10 in the past, we have always considered both. Even if  
11 we reject on the timeliness issue, we still go ahead  
12 and hear the merits, keeping in mind, as you said, we  
13 have an opinion from the city attorney that confirms  
14 his -- that agrees with his decision that the 60-day  
15 rule applies here.

16 MR. POOLE: Well, and I think that's applicable  
17 as evidence before this Board, but I don't think  
18 that's dispositive of the issue. I think that it  
19 weighs heavily in favor of the zoning administrator  
20 who already carries a presumption of correctness, but  
21 it's up to us to decide that issue. It's our  
22 decision-making process is to consider all of the  
23 evidence and then decide is it or is it not  
24 time-barred. If we decide that, then the remainder  
25 of the case is irrelevant.

1 MR. YORK: Well, if we have the hearing today  
2 indicating that we're not going to accept this as  
3 part of the record and the applicant's attorney gets  
4 up and starts arguing his position on the 30- or  
5 60-day rule, are we going to stop him when he starts  
6 to cite case law?

7 MR. POOLE: I think the applicant has the right  
8 to argue whatever he wants to argue in his ten-minute  
9 period of time. I don't think you can limit anybody  
10 from arguing.

11 The question is, is this paper considered? I  
12 think it puts us in a very untenable position.

13 MR. YORK: Well, the zoning administrator --

14 MR. POOLE: It puts the zoning administrator in  
15 extraordinarily untenable position, which is why I'm  
16 concerned about the timing of the presentation of  
17 this, particularly given Ms. Mullen's allegation that  
18 this is part and parcel of a continued effort to  
19 delay this process. That's something she'd have to  
20 prove and something that I'm sure that Mr. McRoberts  
21 would disagree with.

22 I think it's up to the Board to decide what to  
23 do, A, as to whether to move forward, and then, B, or  
24 to continue the case. I think that's the issue that  
25 we have to decide.

1 MR. YORK: And the applicant didn't even raise  
2 the 30-, 60-day issue at all in the application.

3 Does that mean he can't provide any testimony  
4 about it?

5 It's not even mentioned.

6 MR. BENBOW: Can I make a suggestion?

7 Why don't you check to see if the zoning --  
8 because he's the one that really needs to be looped  
9 into this. If he's willing to go forward on the 30-  
10 to 60-day issue exclusively --

11 MR. YORK: Well, it goes further than that,  
12 though. There are arguments that are made that he's  
13 been inconsistent as interpretation and how can he --

14 MR. BENBOW: It's up to him.

15 MR. YORK: -- respond to that?

16 MR. BENBOW: It's up to him.

17 MR. YORK: I mean, he would have to leave here  
18 and go dig through his records.

19 MR. BENBOW: Why don't you ask him that.

20 MR. YORK: Would you respond to that?

21 Did you read that part?

22 MR. BENBOW: Could you address the 30- to 60-day  
23 issue?

24 Are you in a position to address that today now?

25 MR. DAVIDSON: Well, I mean, I already presented

1 my position on that but as far as what my stance is  
2 and what the city attorney agreed with.

3 MR. BENBOW: So is that a yes, that you're in a  
4 position to go forward?

5 MR. YORK: On that part of it?

6 MR. BENBOW: Correct.

7 MR. DAVIDSON: It's in the packet.

8 MR. BENBOW: Okay.

9 MR. DAVIDSON: I mean, discussion about that  
10 this information wasn't available when they just  
11 received it, I'm not sure what that means, but I  
12 mean, the Board got the packet. I'm presuming the  
13 applicants, the appellants got the packet.

14 MR. YORK: But as far as of the merit part of  
15 the case, you're saying, though, you wouldn't be  
16 prepared to be able to address some of the issues  
17 that have been raised?

18 MR. DAVIDSON: Well, I mean, there are specific  
19 items that are cited that I can't speak to because I  
20 don't have the cases in front of me, number 1.

21 It could be that they're not even related,  
22 whether those sections were cited. I mean, I don't  
23 know. And the other situation would be that if they  
24 weren't cited, then maybe you then would have to call  
25 into question were -- and have those properties

1 vested under that statute because they didn't cite  
2 it.

3 MR. YORK: The problem is, if we rule on just  
4 the timeliness issue and just that issue alone is  
5 appealed, then it could end up coming back to us  
6 later for the merits issue and drag this out even  
7 longer.

8 MR. POOLE: Well, I don't think it's any secret  
9 that no matter which way this case is decided, it's  
10 going to be appealed. I don't think that's the  
11 issue.

12 MR. YORK: But we still have to do what we think  
13 is the right thing regardless of the results.

14 MR. POOLE: It strikes me that most of the  
15 argument made in the letter of March 15th, which the  
16 applicant relies on as the explanation of his case,  
17 does not address the issue of timeliness of the  
18 filing, so I think he failed to raise that issue in  
19 his appeal.

20 So I think we can decide the timeliness issue,  
21 but it's up to the Board. I'm just one member of  
22 this Board.

23 MR. YORK: Well, if you're saying that you think  
24 we can decide the issue, but are we going to allow  
25 the applicant to testify on that issue?

1 MR. POOLE: I think the applicant has ten  
2 minutes to say whatever the applicant wants to  
3 provide to us. If we don't understand it and can't  
4 rely on his testimony, that's up to us. We get to  
5 weigh the evidence. That's our job.

6 MR. YORK: So would you make a motion then that  
7 we consider testimony on the 30- and the 60-day issue  
8 and not the merits of this case at this point, at  
9 this time so the zoning administrator could have a  
10 chance to look into the challenges that are raised in  
11 the letter, the subsequent letter?

12 MR. POOLE: I would make that motion for  
13 purposes of discussion.

14 MR. YORK: Someone second for the purposes of  
15 discussion?

16 MR. SAMUELS: For the purpose of discussion.

17 MR. YORK: All right.

18 MR. POOLE: You know, I think that if this Board  
19 determines that this appeal is not timely, as far as  
20 I'm concerned, there's no need to address anything  
21 else.

22 MR. YORK: Well, like I said, the only reason  
23 we've done that in the past is to avoid it -- not  
24 that that has ever happened, but to avoid it being  
25 sent back to us at a later date and forcing us to

1 deal with it again, but that's -- I mean, it's up to  
2 the Board to decide.

3 There's a motion before us to consider arguments  
4 pertaining to the 30-day interpretation and the  
5 60-day interpretation and not to hear testimony with  
6 regard to the basic merits of the case.

7 MR. POOLE: Call the question.

8 MR. YORK: Call the question.

9 All those in favor?

10 MR. POOLE: Aye.

11 MR. SAMUELS: I would say aye.

12 MR. YORK: All right. What are you voting?

13 MS. HOGUE: I think I --

14 MR. YORK: Well, we got three votes.

15 MS. HOGUE: Yeah. I -- yeah. So I think I  
16 would like to hear the merits.

17 MR. YORK: All right. You've heard the  
18 discussion. What that means is that the testimony we  
19 have today has to be limited to the legal issues  
20 involved with whether the application was filed  
21 within 30 days of the decision of the zoning  
22 administrator and then, subsequently, if more than  
23 60 days have passed, which under state law formulizes  
24 the zoning administrator's decision.

25 So, as I said before, we'll hear from the



1 applicant first and he'll get ten minutes and then  
2 we'll hear from the zoning administrator, and then  
3 we'll hear from anyone else in the audience who feels  
4 they can provide any relevant testimony on these  
5 legal issues, followed by the attorney for the  
6 property owner and, finally, if there's anyone here  
7 who supports the zoning administrator, they would get  
8 their shot.

9 So, Mr. McRoberts, it's up to you now.

10 MR. BENBOW: Do you want to clarify exactly what  
11 the discussion is limited to?

12 MR. YORK: I just did that.

13 MR. BENBOW: Okay.

14 MR. YORK: The 30-day issue and the 60-day  
15 issue.

16 MR. MCROBERTS: Honorable Members of the BZA --

17 MR. YORK: Oh, before you start, do you want to  
18 limit some time for rebuttal?

19 MR. MCROBERTS: Two minutes.

20 MR. YORK: All right. I'll let you know when  
21 eight minutes are gone.

22  
23 **STATEMENT BY ANDREW R. MCROBERTS, ESQ.**

24 MR. MCROBERTS: All right. Thank you.

25 Honorable Members of the BZA, there's nothing in

1 my letter that isn't, A, legal argument that, as  
2 Mr. Poole said, I'm entitled to make or is addressing  
3 issues already in the appeal, which, of course, we're  
4 entitled to raise, so we would, certainly, object to  
5 being denied the opportunity to address the merits.

6 But on the 30- and 60-day issue as stated in the  
7 letter, there's nothing in the letter that I wasn't  
8 planning on telling you, but I, certainly, wanted to  
9 be clear for the record.

10 First of all, the applicants are aggrieved.  
11 They all own or have easements within the same block.  
12 They own fee simple property within the same block or  
13 within a block. All of them are affected by this  
14 proposed project, including loss of light, air,  
15 traffic, et cetera.

16 Second, the application was timely on the 30-day  
17 issue. First of all, the 30 days only begins to run  
18 from the order, requirement, decision or  
19 determination. It has to be one of those things.

20 The Supreme Court has said time and time again  
21 that to be an order, requirement, decision,  
22 determination, or as I call it an ORDD, then you have  
23 to meet the term of art that the Supreme Court has  
24 said an ORDD must be. It's not just any  
25 determination. It's no scrap of paper signed by the

1 zoning administrator. It's not even things that are  
2 zoning verification letters, for example.

3 And that leads us to the October and the January  
4 letters. In the Crucible case, Board of Supervisors  
5 of Stafford County versus Crucible, a very similar  
6 letter to the one was considered. And in that case  
7 the Supreme Court said that's not an ORDD. Why?  
8 Because it did not approve the project, it did not  
9 give the applicant or the recipient of the letter any  
10 rights that they didn't have under the zoning  
11 ordinance anyway, didn't state that they could do  
12 anything other than what they could have done anyway.  
13 In other words, it wasn't a fundamental approval.

14 That's contrasted with the recent Supreme Court  
15 case of Board of Supervisors of Richmond County  
16 versus Rhoads, in which case there was an actual  
17 zoning approval. It was an attached zoning  
18 confirmation to a building permit that actually  
19 allowed the applicants -- changed their rights,  
20 allowed them to build a garage, put them in a place  
21 different than they were before receiving the zoning  
22 determination.

23 One is an ORDD in the Rhoads case; one is not in  
24 the Crucible case. This is much, much similar to the  
25 Crucible case. In that case it's a zoning

1 verification; in this case it's a zoning  
2 verification. Those things are nothing like the ORDD  
3 in the Rhoads case.

4 Since they are not ORDDs, they, one, don't  
5 trigger 30 days. And then, two, they can't lead to  
6 60-day rights under 2311.C.

7 As far as the timeliness issue, there's also a  
8 due process and fundamental fairness issue. In the  
9 case of Ripol versus Westmoreland County, a Judge Jay  
10 Swett addressed this very same issue and said  
11 aggrieved applicants that have substantial property  
12 and contractual rights which need to be addressed by  
13 the BZA on appeal, because the zoning administrator  
14 erred, need to be heard even though the date of the  
15 memo in question was far longer -- far before the  
16 30 days had expired.

17 In that case, they appealed within 30 days of  
18 when they found out about the Zeigler memorandum in  
19 the Ripol case, because the fundamental fairness,  
20 said Judge Swett, and because of the fact that they  
21 determined that they appealed in a timely fashion  
22 after they received notice of the zoning matter, then  
23 that was timely. And that's 82 Va. Cir. 69 of 2010,  
24 Circuit Court case.

25 The Supreme Court in Lilly versus Caroline

1           County addressed a similar issue in which the Lillys,  
2           who were present at the planning commission meeting  
3           and the meetings in which the ORDD itself was a  
4           verbal determination given by the zoning  
5           administrator. The Lillys claimed, "We didn't get  
6           notice and, therefore, we shouldn't have had to  
7           appeal within 30 days."

8           The Supreme Court cited the findings of the  
9           trial court in which they said, "You knew within  
10          30 days, and, in fact, you received notice from the  
11          zoning administrator that you had the right to  
12          appeal." And because of that, they rejected the  
13          Lillys' argument.

14          We are the reverse. Our applicants did not know  
15          until such time. As a matter of fact, the only  
16          applicants that knew anything about this as far as  
17          the zoning determinations that are at issue here was  
18          OHNA, the Oregon Hill Neighborhood Association, and  
19          OHHIC, which did, in fact, receive the January letter  
20          on January 29th. They didn't even know that the  
21          October letter existed until much later, March 20th.

22          And there are three individual applicants who  
23          are named that didn't know of either or any of these  
24          zoning determinations until well after March 1st, and  
25          because of that, it, certainly, was timely from the

1 date that they learned of that and became aggrieved.

2 I'm going to turn to 2311.C. 2311.C, first of  
3 all, does not even apply in the City of Richmond.  
4 The City of Richmond is controlled by the city  
5 charter ultimately. 17-19 allows for aggrieved  
6 applicants to appeal to the BZA. It curiously and  
7 very significantly omits any kind of reference to  
8 2311.C language, vested rights regarding any kind of  
9 recipient of zoning administrator determinations, and  
10 it, certainly, is not binding on the BZA in this  
11 case.

12 The Supreme Court has said time and time again  
13 that where there is a charter on a subject matter,  
14 that charter controls. It is, basically, an  
15 amendment of the general law and it applies instead  
16 of the general law. And so 2311.C simply doesn't  
17 apply.

18 Second of all, 2311.C requires reasonable  
19 reliance by the developer. Reasonable reliance.  
20 There is no case law on what "reasonable reliance"  
21 means, but I would say the reasonable reliance,  
22 certainly, doesn't say that a general letter like the  
23 one back in October, that even the zoning  
24 administrator said in an e-mail, "It's a general  
25 letter. I didn't have even a complete site plan at

1 the time."

2 Those letters, if you look through the October  
3 and the January letters, they, one, don't approve  
4 anything. They ask the developer for more  
5 information, different information. They reserve the  
6 right to change their opinion. They also say several  
7 times the zoning is not compliant with the law. And  
8 in the October letter, they specifically said the  
9 height is in violation of the zoning.

10 So I don't see how the developer can say, "Oh,  
11 I'm relying on these," if, in fact, there are so many  
12 things that are unknown and uncertain. And the staff  
13 reserves the right to change what they're saying to  
14 the developer. There's no reasonable reliance.

15 Moreover, if you suggest that the January letter  
16 is a more specific, less general letter and maybe  
17 that's an ORDD, the fact is this appeal and all of  
18 the concerns that were raised were raised well within  
19 the 60 days. There has to be a 60-day period after  
20 the issuance of the ORDD. And before then, the  
21 zoning administrator by 2311.C, if it applies, has  
22 the right to change their opinion or reverse it or  
23 withdraw it. How can you reasonably rely on  
24 something the zoning administrator says if he can  
25 simply pull the rug out from under you? And he

1 could.

2 And so, as a result, that not only were these  
3 issues raised in March and, perhaps, as early as  
4 February, we do know that the developer and the  
5 developer's attorney was aware of our concerns. We  
6 know that the developer's attorney received the  
7 March 15th letter the day it was given to the City.  
8 We know that the developer's attorney received the  
9 March 23rd appeal, the date that it was given and  
10 filed in there. Both of those were within the  
11 60 days from January.

12 So our position is neither of those letters is  
13 an ORDD. At most, maybe January is an ORDD, but we  
14 don't think so, but even if it is, the appeal and all  
15 of the complaints that the developer knew about  
16 happened within the 60 days. At that point they've  
17 got to understand that the BZA could overturn the  
18 zoning administrator, that the fact and ultimately a  
19 court could overturn the zoning administrator.

20 And, lastly, the mention of the stay. I think  
21 that the developer's attorney mentioned a stay.  
22 Certainly, that also applies.

23 How can you have a 60-day time frame run when  
24 there's a stay of the zoning matter itself?

25 MR. YORK: Two minutes.



1 MR. MCROBERTS: Okay. The bottom line is, the  
2 stay applies. The Black's Law Dictionary defines a  
3 proceeding, not just as litigation, but also any  
4 matter, any sort of a course of conduct. And that  
5 involves, also, the right to appeal and to rely.

6 With that, I'll close, and thank you very much.

7 Answer any questions.

8 MR. YORK: Should we ask questions?

9 MR. POOLE: I would like to ask him questions.

10 MR. YORK: I'm sure you would.

11 MR. POOLE: Any other member would like to go  
12 first?

13 MR. YORK: Well, I would like to start off by  
14 asking a question.

15 You were citing the charter as trumping the Code  
16 of Virginia. Does it always trump the Code of  
17 Virginia?

18 MR. MCROBERTS: It trumps the Code of Virginia  
19 where it's covering the same subject matter.

20 MR. YORK: Mr. Poole.

21 MR. MCROBERTS: Well, actually, I think the last  
22 time I was before this Board, I think I made a  
23 similar argument on behalf of the Better Housing  
24 Coalition and I think the BZA accepted the argument  
25 that day.

1           But, you know, the Supreme Court has said that  
2           when there is one subject matter addressed one way in  
3           the statute and it's addressed a different way in the  
4           charter, the charter controls. It's a specific --  
5           cite specific cities, specific amendment of the  
6           general law.

7           MR. POOLE: A question, Mr. McRoberts. The  
8           Certificate of Zoning Compliance, which was issued in  
9           October, was issued as a part of the zoning ordinance  
10          of the City of Richmond. There's a specific section  
11          of the zoning ordinance that permits that letter to  
12          be requested, paid for, and received and relied upon.

13          Do you --

14          MR. MCROBERTS: I don't believe the Code says  
15          anything about reliance, Mr. Poole. And all of my  
16          arguments about their lack of reasonable reliance go  
17          directly to that.

18          I mean, the Supreme Court itself really defines  
19          what an ORDD is and what it is not. And in this  
20          case, you had something that even the letters  
21          themselves called -- they didn't call it  
22          determination or something that's going to be relied  
23          on. What they said was, Here's some quote,  
24          information, unquote. They said, here are comments  
25          quote, unquote. I'm sorry, information, comments,

1 that sounds very much like the Crucible zoning  
2 verification letter, just like these zoning  
3 verification letters.

4 MR. POOLE: In this Crucible case, was there a  
5 specific section of the zoning ordinance that  
6 permitted Certificate of Zoning Compliance?

7 MR. MCROBERTS: There is a specific code section  
8 that requires the zoning administrator to issue  
9 opinions when asked and so that's what happened in  
10 that case, the landowner or -- actually, they hadn't  
11 purchased it yet.

12 The Crucible, who had, basically, they wanted to  
13 do a military training center and they went to the  
14 Stafford zoning administrator and said, Hey, we want  
15 to do this military training school with weapons  
16 tactics and secret stuff and tanks and who knows what  
17 all. And the zoning administrator looked into --

18 MR. POOLE: Armored personnel carrier?

19 MR. MCROBERTS: Perhaps so, Mr. Poole.

20 I do know that the zoning administrator looked  
21 into this. It's required by law to, actually,  
22 address those inquiries when they come in and issue  
23 what determination within -- or an opinion or  
24 whatever within 60 days if, in fact, that applied.

25 And so in that case, he did. He looked into the

1 zoning ordinance in Stafford and all it said was, a  
2 school is a place where education happens. It's,  
3 basically, just that simple. And he said, "Well, you  
4 are training people about military tactics and  
5 weapons and training is education and it's a school,  
6 so schools are allowed by right in the A-1 zone."  
7 And so he said so.

8 Well, at some point thereafter they purchased  
9 the property. Those little stakes that appear at the  
10 corners of property happened at that point in time  
11 and the neighbors called up the county and said,  
12 "What's going on next door? I see the stakes and  
13 whatnot."

14 And they said, "Oh, well, there's going to be  
15 military training."

16 At that point the Board of Supervisors got very  
17 concerned and, in fact, raised the appeal. And so at  
18 that point, this very issue about timeliness of  
19 appeal was raised and they said, "Look, we received  
20 this statement from the zoning administrator that our  
21 military training center was permitted by right in  
22 the A-1 zone months and months ago. I mean, what --  
23 you know, this is not timely."

24 And the Supreme Court said, "I'm sorry. This  
25 thing that you're talking about, this zoning

1 verification letter, did not approve any project,"  
2 just like this one. It didn't change the rights of  
3 the recipient, just like this one, and it didn't  
4 actually leave the applicant anywhere that they  
5 wouldn't have been under the ordinance originally.

6 MR. POOLE: How is it, it didn't change the  
7 rights of the owner in that the owner relied on the  
8 Certificate of Zoning Compliance to then acquire the  
9 property?

10 Why wasn't that a change in position?

11 MR. MCROBERTS: Well, it may very well have been  
12 a change of position. What the Supreme Court said  
13 was, the optional --

14 MR. POOLE: Well, why wouldn't that have been in  
15 reliance on the Certificate of Zoning Compliance,  
16 which is permitted under the Richmond Zoning  
17 Ordinance?

18 MR. MCROBERTS: Well, two things, Mr. Poole:  
19 First of all, the Supreme Court held that it wasn't  
20 an order, requirement, decision, determination in the  
21 first place. So reliance or no, it didn't matter.  
22 It simply was not the kind of thing that is an  
23 official ORDD under the zoning statutes.

24 And then second, as far as reasonable reliance,  
25 the Supreme Court time and time again has said the

1 zoning verification letter in Crucible is not an  
2 ORDD. They said that the zoning approval in the tax  
3 approval in Norfolk is not an ORDD. And the Supreme  
4 Court said about eight or nine times different things  
5 are not ORDDs, including a number of zoning  
6 verifications where people went to the zoning  
7 administrator and were told one thing and then  
8 supposedly changed their position and then argued  
9 that it was an ORDD and they were wrong every time --

10 MR. POOLE: But didn't you just --

11 MR. MCROBERTS: -- until the Rhoads case.

12 MR. POOLE: In the Rhoads case, you just in your  
13 initial argument --

14 MR. MCROBERTS: Yes, sir.

15 MR. POOLE: -- made a reference to the fact that  
16 the letter was attached, the determination letter was  
17 attached to the building permit.

18 Is that what you say is the distinction?

19 MR. MCROBERTS: Well, distinction is that it  
20 actually does the three things that the Crucible  
21 court sets out needs to be there in case of an ORDD.  
22 It was, in fact, an approval of the project in case  
23 there was a garage that was being applied for by  
24 right in the zoning district and the zoning approval  
25 was given. Okay? So it changed what they could do.

1           Second of all, it actually changed their rights.  
2 Before they got that, along with the building permit,  
3 they couldn't build a garage and now they can.

4           And then thirdly, it, actually, changed the  
5 interests, the legal interests of the recipient and  
6 so they were actually --

7           MR. POOLE: Help me with that. What legal  
8 interest changed?

9           MR. MCROBERTS: What legal interest changed is  
10 they had no right under the zoning ordinance to build  
11 that garage and then afterwards they did.

12           And those are the three things that the Crucible  
13 Supreme Court case says need to be there in order to  
14 find an order, requirement, decision, determination.

15           As I said at the top of my discussion, not  
16 everything that looks like a zoning determination or  
17 a document that is signed by the zoning administrator  
18 with zoning information -- and to use the words in  
19 the October and January letter, information and  
20 comments, is, in fact, an order, requirement,  
21 decision, determination. It has to meet the term of  
22 art the Supreme Court has set out.

23           MR. POOLE: What's really bothering me here is  
24 that when the City puts forward in its zoning  
25 ordinance a mechanism for a particular party to come

1 to the City and ask for a Certificate of Zoning  
2 Compliance, which is exactly what happened in this  
3 case, that then they can't rely on it.

4 Help me understand why the ordinance is there  
5 and why it shouldn't apply in this case.

6 MR. YORK: Before he answers that question, may  
7 I ask him a question?

8 MR. POOLE: Sure.

9 MR. MCROBERTS: Yes, sir.

10 MR. YORK: You're wandering around about the  
11 question of whether the language in the vesting  
12 provision would help in this case and you're saying  
13 it didn't apply and you talk -- I know we're not  
14 supposed to consider this, but you talked about the  
15 fact that our charter trumps the state code.

16 And the case you talked about is interesting  
17 because the -- it's in Alexandria and their --  
18 Alexandria's city code is also identical to that of  
19 Richmond. The language is also word for word the  
20 same. However, that case was in 1999 and the vesting  
21 law has been dramatically changed since then, and I  
22 was under the impression that if the code and the  
23 charter deal with the same issue, whichever is more  
24 specific rules. And in this case the vesting law, as  
25 it now stands, subsequent to this case that you cite



1 is infinitely more specific and more detailed and  
2 much more draconian than that provision that's in our  
3 city code.

4 So convince me that that's not the case.

5 MR. MCROBERTS: Well, the Lindsey case is not a  
6 vesting 2311.C case, so I want to be clear about  
7 that. It's cited for the proposition that where you  
8 have a charter that addresses a subject matter and a  
9 state --

10 MR. YORK: Yeah, I understand.

11 MR. MCROBERTS: -- you know, a state code matter  
12 that the charter amends the state code.

13 MR. YORK: Okay.

14 MR. MCROBERTS: So as far as to address your  
15 issue, there's no question that the state, 2311.C, is  
16 more specific on that particular topic. As I said,  
17 it's the only thing that addresses it. The charter  
18 is silent. And so for that reason, I would say that  
19 it doesn't apply.

20 Further on that point, Mr. Chairman, is the fact  
21 that the General Assembly knows how to say, even  
22 within 15.2-2311, well, notwithstanding any other  
23 charter provision, special law, et cetera -- as a  
24 matter of fact, if you look in 2311.A, it says that  
25 specifically regarding the 30-day notice requirement

1 that's required to be embedded in each written ORDD.

2 What it says is, "notwithstanding any charter to  
3 the contrary, you have to send the notice."

4 So the General Assembly knows exactly how to go  
5 into 15.2-2311 and say, "Forget what the charter  
6 says. Here's what you need to do."

7 They didn't do that in 2311.C. And so that's my  
8 answer to your inquiry, Mr. Chairman.

9 MR. POOLE: Can we go back to my question?

10 MR. MCROBERTS: Yes, sir.

11 MR. POOLE: Because the most recent case, the  
12 Rhoads case, talks about 2311 being passed by the  
13 General Assembly for the specific purpose of  
14 relieving the draconian -- and I disagree with you  
15 that 2311 is to solve the draconian result rather  
16 than to put a draconian result. It was there to --

17 MR. YORK: It depends on whether you're a  
18 developer or a neighbor.

19 MR. POOLE: Well, that's true. That's true.  
20 It's whose ox is being gored. I agree. I  
21 understand.

22 But the 2311 case, the Rhoads case, really talks  
23 about an applicant who comes and does what he is  
24 supposed to do with respect to finding out whether  
25 you can use a piece of property to go ahead and

1           acquire it.

2                   Time after time after time when we have various  
3 cases before this Board, we either admonish  
4 particular applicants for not having in common asked  
5 a particular question of either the zoning  
6 administrator or the secretary of the zoning -- of  
7 the Board of Zoning Appeals. You know, you need to  
8 ask.

9                   And that's exactly what this applicant -- excuse  
10 me -- this owner did. They came to the zoning  
11 administrator and said, "Here's our project," gave  
12 them some plans. "Is this permissible within the B-3  
13 district because it's zoned B-3?"

14                   And one of the key issues that was determined in  
15 that letter was the issue with respect to whether  
16 it's a transitional site and the determination of the  
17 zoning administrator was very specific. "This is not  
18 a transitional site." And so a determination was  
19 made. And that's going to be a key element in the  
20 arguments of this entire case is the transitional  
21 site and that decision was made and relied upon by  
22 this specific owner.

23                   Help me understand why the Rhoads case doesn't  
24 apply to that?

25                   MR. MCROBERTS: Because the Rhoads was an ORDD.

1 It's completely unlike the letter that was issued in  
2 October.

3 First of all, the zoning administrator himself  
4 when this matter was raised by us on March 15th said  
5 in an e-mail, my memory of the October memo, it was  
6 general at best and we received a site plan that  
7 wasn't final.

8 Second of all, it didn't meet this Crucible  
9 test. It was just like the zoning verification in  
10 Crucible. And just like in Crucible, I have no doubt  
11 the developer attempted to rely or says that they  
12 relied on it, but I would say they purchased some of  
13 the property in December. They purchased the rest of  
14 it after this BZA appeal was filed and after they got  
15 notice of the fact that it got filed.

16 So -- but back to your question, it's not  
17 something that the developer should have relied on  
18 because it simply didn't meet the Supreme Court's  
19 test. There are seven or eight cases that start with  
20 Crucible and go all the way through, I think,  
21 James versus City of Falls Church and Norfolk 102.

22 And in every single one, there was exactly that  
23 kind of reliance. The developer landed on a  
24 recipient of the piece of paper that was signed by  
25 the zoning administrator saying, "Yes, this

1 complies," in fact, or in verbal, said, "Gosh, I  
2 relied on this. I change my position. I have a  
3 problem with this."

4 And in every single one, the zoning  
5 administrator was allowed to change their position  
6 and the Supreme Court said, "That's not an ORDD.  
7 It's not an order, requirement, decision,  
8 determination."

9 MR. POOLE: Why isn't it with respect to the  
10 issue of transitional site?

11 MR. MCROBERTS: Okay. Because it's part of a  
12 large memo that says a number of different things,  
13 including staff reserves the right to change their  
14 views and to submit jurisdictional comments. It is  
15 not described as an actual determination. It's not  
16 of the type of affirmative, clear statement of the  
17 law that you would find in, for example, an order,  
18 requirement, decision, determination that says  
19 something at the top, determination of the zoning  
20 administrator and then, actually, states what it is  
21 and then gives the notice at the bottom.

22 MR. POOLE: I know you've read that letter  
23 carefully.

24 MR. MCROBERTS: I have.

25 MR. POOLE: And you noticed that the zoning

1 administrator uses different typeface when he makes  
2 the determination with respect to the transitional  
3 site.

4 MR. MCROBERTS: When he gives information and  
5 comments, because that's what he calls it.

6 MR. POOLE: When, at least as I perceive it --

7 MR. MCROBERTS: Yes, sir.

8 MR. POOLE: -- he makes a decision that I think  
9 meets that O-R-D definition. That's where I'm having  
10 my most trouble here, Mr. McRoberts.

11 MR. MCROBERTS: Well, and I would say that what  
12 you just described is exactly like what happened in  
13 Crucible. They came and said, "Hey, can we do a  
14 military training school? We want to know because we  
15 want to rely on what the code says." The zoning  
16 administrator said, "There's nothing in the  
17 definition of school that excludes a military  
18 training center. So, yes, you get to do that."

19 MR. POOLE: But that's not what this zoning  
20 administrator said. The zoning administrator said,  
21 "I've looked at this issue. I've determined that  
22 it's not transitional and transitional doesn't  
23 apply."

24 And that's the crux of this case.

25 MR. MCROBERTS: Well, Mr. Poole, I would agree

1 that's one of the cruxes of the case. I would say,  
2 though, that I would argue that there's no difference  
3 between what the zoning administrator did here and  
4 there because in both cases they were required to  
5 open up the zoning ordinance, determine what the  
6 zoning ordinance said, apply to a proposal by the  
7 applicant or landowner. And in both cases, the  
8 applicant says they changed their position in  
9 reliance on it.

10 I would argue that's not reasonable reliance  
11 because of the Crucible case, all those cases leading  
12 through Norfolk 102. And because the thing that they  
13 received is nothing like the only thing that the  
14 Supreme Court has ever held to be an ORDD and that is  
15 an actual approval of a project with a zoning  
16 approval of it. That's the only thing that the  
17 Supreme Court has ever said is an actual ORDD. And  
18 lacking an ORDD, there can be no 30-day clock ticking  
19 and there's no 60-day clock ticking.

20 And, certainly, I had other arguments, you  
21 recall, about the 30 days, the fact that there's a  
22 due process fundamental fairness issue, that until an  
23 aggrieved neighbor actually knows about it, how can  
24 the clock run on them?

25 How can they lose their rights?

1           How can somebody get vested rights to apply the  
2 ordinance in a way that's erroneous when, in fact,  
3 the neighbor, all they want to do is enforce the law?

4           I mean, I would argue that this exception is a  
5 very narrow one and the Supreme Court has been very,  
6 very judicious about how they mete out exceptions to  
7 the law.

8           And in this case, because we have two very  
9 clear examples, one, a zoning verification letter  
10 that this -- the October and November letters meet  
11 that definition of what Crucible says is not an ORDD,  
12 and because it's nothing like the Rhoads versus Board  
13 of Supervisors case where it clearly is an ORDD, that  
14 there is no ORDD, therefore, there is no 30- or  
15 60-day clock ticking.

16           Further, I would say that if you look at the  
17 October letter very carefully where it talks about  
18 the transitional issue, Mr. Poole, which you say is  
19 the crux, it's not in the portion that's actually  
20 addressed to the applicant at all. It's addressed  
21 from Mr. Saunders to Leigh Kelley. It's an internal  
22 memorandum, if you look. It's attached. And there's  
23 an internal memorandum in which Mr. Saunders  
24 addresses the transitional site issue.

25           Okay. And then in the letter --



1 MR. POOLE: Are you telling me that the zoning  
2 administrator in a different typeface didn't make the  
3 specific statement that this was not a transitional  
4 site?

5 Am I reading that wrong?

6 MR. MCROBERTS: He did in January. Yes.

7 MR. POOLE: No, in October.

8 MR. MCROBERTS: In January he said that in the  
9 letter.

10 MR. POOLE: In October.

11 MR. MCROBERTS: In October he said it in the  
12 memorandum that was addressed from Mr. Saunders to  
13 Mr. Kelley. I don't know if Leigh is a man or a  
14 woman. I apologize.

15 MR. POOLE: He's a man.

16 MR. MCROBERTS: Okay. So from Mr. Saunders to  
17 Mr. Kelley is an internal staff memo. And so what  
18 Mr. Saunders says there is not, "please look at this  
19 memorandum which is incorporated herein by a  
20 reference," or whatever. He says, you know, "See the  
21 attached information," is what he calls it. In other  
22 words, the actual language about transitional site in  
23 October didn't actually get addressed to the  
24 applicant in any -- I mean, the developer landowner  
25 in any way.

1           What it says is, "Here is some information for  
2 you." Information is an internal memo from  
3 Mr. Saunders to Mr. Kelley. It's not actually a  
4 determination, decision or anything that's addressed  
5 to them. Mr. Saunders describes it as information.  
6 In other words, "Hey, we've had this internal  
7 discussion. You might want to know about it."  
8 That's hardly an ORDD and it's, certainly, not even a  
9 zoning verification letter on that issue like it is  
10 in Crucible.

11           And then when you get to January, Mr. Poole, the  
12 zoning administrator does, in fact, address the  
13 transitional site issue in the body of the document,  
14 but, as I said before, even if you want to say,  
15 "Well, okay, that's got to be an ORDD," even if  
16 that's correct, the fact is within 60 days, the  
17 zoning administrator -- excuse me -- the developer no  
18 longer had the right to rely on that. Why? Because  
19 they received our March 15th letter. They received  
20 the March 23rd BZA appeal. We stayed everything.

21           They, certainly, were on notice that they could  
22 no longer reasonably rely on whatever it was, and as  
23 a result, since all of that happened within 60 days,  
24 they simply don't meet the definition for a vested  
25 right.

1 Vested rights are construed very narrowly by the  
2 courts. As a matter of fact, the courts when asked  
3 about vested rights not under 2311.C -- but maybe it  
4 is 2311.C -- but, certainly, in 2307, vested rights  
5 are construed narrowly. The person that is  
6 advocating for vested rights bears the burden to  
7 prove clearly that they complied with the  
8 requirements for the vested right. This is not  
9 something that, well, just, you know, it appears they  
10 do, so okay.

11 It's got to be clear and it's got to be without  
12 question, and the Supreme Court has said that in  
13 Hales versus Blacksburg BZA and in a bunch of other  
14 cases.

15 MR. POOLE: I'm reading from page 3 of the  
16 October 24, 2017, letter signed by the zoning  
17 administrator that says --

18 MR. YORK: What's the date again?

19 MR. POOLE: October 27th (sic).

20 "West Cary Street is identified as a minor  
21 arterial roadway in the City's master plan, which is  
22 a category above collector (secondary), so the  
23 property would not be considered a transitional  
24 site."

25 That sounds to me like more than a memo. That

1 makes no reference to a memo. It specifically says  
2 that the determination of the zoning administrator is  
3 that this is not a transitional site.

4 MR. MCROBERTS: What it says under height in the  
5 October 24, 2017, it says the maximum height is  
6 35 feet. And it talks about the yard requirement on  
7 Laurel, which I'm certainly prepared to address if  
8 needed.

9 "No details were provided to verify that the  
10 height requirement has been met with this proposal.  
11 And it does appear that the portion of the building  
12 in front of Laurel Street exceeds the height limit."  
13 That's what it says about height, Mr. Poole.

14 MR. POOLE: Did I just misread something?

15 MR. MCROBERTS: You may have been addressing the  
16 January -- reading the January memorandum.

17 MR. POOLE: I just read to you from the  
18 October 27th letter.

19 Would you like to see my copy of it?

20 MR. BENBOW: October 24.

21 MR. POOLE: The 24th. Sorry.

22 MR. BENBOW: To Mr. Dave Quinn.

23 MR. YORK: He's the architect?

24 MR. POOLE: It's the letter to the architect  
25 representing the potential owner who asked for the

1 Certificate of Zoning Compliance and paid a fee to do  
2 that. I'm happy to share my copy with you, if you'd  
3 like.

4 MR. MCROBERTS: Yeah. I'm looking for it. I  
5 apologize.

6 MR. POOLE: It's Exhibit A.

7 MR. MCROBERTS: I did see Mr. Davidson's letter  
8 dated October 24, 2017, addressed to the architect --

9 MR. POOLE: Yes.

10 MR. MCROBERTS: -- which addresses --

11 MR. POOLE: It's Exhibit A to Mr. Davidson's  
12 packet. It's specifically referred to in the  
13 argument letter that was submitted by Ms. Mullen as  
14 part of the package.

15 MR. MCROBERTS: It goes on, Mr. Poole, and talks  
16 about the issue here. I'm not quite sure what I was  
17 referring to earlier, but one of these iterations  
18 actually attached the internal memo.

19 MR. POOLE: It may be.

20 MR. MCROBERTS: So that's what I'm talking  
21 about.

22 MR. POOLE: It may be. I haven't seen that  
23 memo, but this is what I'm talking about as far as  
24 meeting the issue of the O-R-D and making a  
25 determination that then a person or entity could rely

1 on. I assume it's an entity since it was addressed  
2 to ADFPLCC.

3 MR. MCROBERTS: Well, I'm now looking at that  
4 language. It's at the bottom of the second page of  
5 that letter and then on top of the third page it  
6 appears under height. And it, basically, quotes the  
7 statute -- excuse me -- the ordinance -- the zoning  
8 ordinance about what a transitional site means.

9 MR. POOLE: Absolutely. It does. And then he  
10 goes on to make a decision in the last phrase.

11 MR. MCROBERTS: And then it says, "And where  
12 that frontage is situated along a major, secondary,  
13 or collector street as designated in the City's  
14 master plan."

15 And then it goes on and confirms that  
16 West Cary Street is not any of those three, but  
17 instead it's a minor arterial roadway in the master  
18 plan. And they justify this by saying it's a  
19 category above collector. Well, they've admitted  
20 that it's not a collector by saying it's a category  
21 above.

22 MR. POOLE: That's not the issue we're talking  
23 about.

24 MR. MCROBERTS: Okay.

25 MR. POOLE: I understand that argument very well

1 and we may end up having to discuss that, but what  
2 we're talking about is whether or not this is an  
3 O-R-D and whether or not you are time-barred with  
4 respect to the application of the decision of the  
5 zoning administrator from this letter. If this  
6 letter is an O-R-D, you're time-barred, in my view.

7 MR. MCROBERTS: There has to be reasonable  
8 reliance and all the other things that I mentioned,  
9 Your Honor -- excuse me -- Mr. Poole.

10 MR. POOLE: Well, I appreciate the --

11 MR. MCROBERTS: You're wearing a dark suit and I  
12 think you got a robe on.

13 MR. YORK: The same issue, just slightly  
14 different, just to make it a lot simpler. Let's  
15 suppose the architect back then at the beginning of  
16 this had written a letter to Chuck simply including a  
17 survey and simply asking the question very simply,  
18 "Is this a transitional site?" That's all it says.  
19 And Chuck wrote back a letter saying, "No. This is  
20 not a transitional site, period." That's all he  
21 said. And then the answer I want from you is  
22 two-fold.

23 First of all, do you think that starts the  
24 30-day clock?

25 And, second of all, if the vesting 2311 applied

1 in this case, would that make a difference?

2 MR. MCROBERTS: Well, again, I mean, this  
3 language, even if it does approve a transitional  
4 site, also says a bunch of things that means that the  
5 zoning ordinance has absolutely been violated here.

6 But to answer your questions, one, if that  
7 hypothetical occurred, it would not be an ORDD for a  
8 number of reasons. The specific reason is it would  
9 be just like the zoning verification in Crucible  
10 again where an applicant or a person that's looking  
11 at buying property comes to the zoning administrator  
12 and says, "Hey, can you tell me if the zoning would  
13 allow me to do this?" Well, that's exactly what's  
14 going on here.

15 And in Crucible, the zoning administrator said,  
16 "Yes, you get to do it."

17 They went out and bought property in reliance of  
18 that.

19 MR. YORK: Subject to a lot of other provisions.

20 MR. MCROBERTS: Right.

21 And in that case the Supreme Court set a test, a  
22 three-part test, basically, which has been applied  
23 throughout all the cases since then, including the  
24 Rhoads case. And until they got to Rhoads, they  
25 didn't actually find one that actually met the test.



1 MR. YORK: But in this case, couldn't you make  
2 the argument that if the zoning administrator had  
3 sent that original letter saying this is a  
4 transitional site and, you know, subject to normal  
5 requirements of B-3 and so forth, wouldn't that --  
6 couldn't it be argued that with respect to every  
7 other zoning requirement, you can still file an  
8 appeal, but with that one particular one you can't?

9 Do you see where I'm going?

10 MR. MCROBERTS: I'm not sure I understand the  
11 question, Mr. Chairman. Maybe you could rephrase it  
12 for me.

13 MR. YORK: Well, can you piecemeal how much of  
14 an appeal you can make?

15 For example, Chuck may have written this letter  
16 in October and there may have been something in that  
17 letter that was not addressed and he doesn't discover  
18 it until a month ago and then you come in and appeal  
19 that decision because of something that he didn't  
20 mention in the original letter. Clearly, you would  
21 have a right to appeal that regardless of what he had  
22 said back in October --

23 MR. MCROBERTS: Well --

24 MR. YORK: -- because it wasn't raised in  
25 October.

1 MR. MCROBERTS: Well, just like in the Crucible  
2 case, in that case the zoning administrator,  
3 basically, told the potential landowner that, you  
4 know, I have the right to change it.

5 Well, in this case so does, if 15.2-2311.C  
6 applied, then the zoning administrator has the right  
7 to change that, too. And they, certainly, don't have  
8 a right to reasonably rely where the definition  
9 itself has not been met.

10 I don't know if that addressed your issue or  
11 not.

12 MR. YORK: So barring a change in the zoning  
13 ordinance or changing the zoning map, there are no  
14 facts that could possibly alter the zoning  
15 administrator's determination.

16 MR. MCROBERTS: He could actually after  
17 receiving our March 15th letter change his mind or  
18 receiving a city attorney memo that pointed out that  
19 he was wrong on part of his determination.

20 MR. YORK: On the law.

21 MR. MCROBERTS: He might have changed it. But  
22 as it is, he's doubled down on an erroneous  
23 interpretation, Mr. Chairman.

24 MR. YORK: All right.

25 MR. POOLE: I'm done.

1 MR. YORK: Now, I have a question and I don't  
2 mean to be impertinent, but the zoning administrator  
3 really has to argue the 30-, 60-day issue or is that  
4 up to us to decide?

5 MR. BENBOW: Yes.

6 MR. POOLE: Yes.

7 MR. BENBOW: Absolutely.

8 MR. POOLE: He has an opportunity to make his  
9 position known. The other members --

10 MR. BENBOW: The developer's attorney.

11 MR. POOLE: The developer's attorney --

12 MR. YORK: Yeah, of course.

13 MR. POOLE: -- has a right to be heard on this  
14 issue and then we make a decision.

15 MR. YORK: Well, it's just that the --

16 MR. POOLE: But by all means, the zoning  
17 administrator has a right to be heard.

18 MR. YORK: -- it's just that a lot of that is  
19 not on the --

20 MR. POOLE: I think even Mr. McRoberts would  
21 agree to that.

22 MR. YORK: Well, of course. I understand that,  
23 but it's not -- it's not a -- the 30- and 60-day  
24 rules are not something that he is responsible for.  
25 He can try to defend the position. I'm not

1 explaining myself properly.

2 MR. MCROBERTS: Well, Mr. Chairman and  
3 Mr. Poole, I would say in response to that issue, you  
4 know, once we received the packet, certainly, we knew  
5 this is an issue that's been raised by the developer  
6 attorney so we're trying to address it, and that's  
7 really all it is.

8 It's legal argument. We believe that they don't  
9 have a 2311.C right for a number of reasons: the  
10 charter issue, lack of reasonable reliance, the stay  
11 of, you know, the zoning itself by the BZA appeal,  
12 and the fact that the original October letter  
13 certainly was not some sort of a specific approval of  
14 anything that meets the ORDD definition. That's  
15 really, you know, to sum it up, I mean, the reasoning  
16 behind it.

17 In this case, the only thing that actually met  
18 those terms was the March 1st determination, which  
19 then may have incorporated earlier statements.

20 MR. POOLE: Is this your rebuttal?

21 MR. MCROBERTS: I'm sorry. I'm just answering  
22 the question that was raised.

23 MR. YORK: I didn't specify that, so he still  
24 has his two minutes.

25 All right.

1 MR. MCROBERTS: Any other questions?

2 MR. YORK: Mr. Zoning Administrator?

3 MR. BENBOW: I don't think he's going to give up  
4 the podium.

5

6 STATEMENT BY WILLIAM C. DAVIDSON

7 MR. DAVIDSON: William C. Davidson, zoning  
8 administrator for the City of Richmond. I think to  
9 bring up an important point in that if you determine  
10 that my letter and the memos and everything else that  
11 went to the developer, whether it went directly to  
12 them, handed to them, mailed to them through a  
13 secondhand person, they will literally have to have  
14 full-scale plans submitted before we can ever do an  
15 ORDD saying that you meet every single requirement of  
16 the ordinance.

17 What they're appealing is that, A, it's not a  
18 transitional site. That decision was made initially  
19 when a letter went out. There were e-mails back and  
20 forth with the architect that it wasn't transitional,  
21 how you applied the yard requirements, which is the  
22 second issue, and the height requirements. I don't  
23 know how you make it any simpler in that they're  
24 asking, "Here's my plan."

25 In the Crucible case it was, "Hey, we do

1 military training. Does this meet the requirements  
2 of a school under your ordinance?"

3 They say, "Oh, yeah, yeah. It's a school."

4 And they said, "Okay."

5 And they thought they were good. They bought it  
6 and then they said, "Oh, oops, we need to change the  
7 regulation and say that's not a school."

8 And so that's what that issue was.

9 The Supreme Court has kind of whittled away a  
10 number of different very -- you know they've taken  
11 certain nuances with different individual cases.  
12 Rhoads cites some of them. We talked about the  
13 Norfolk case. Well, you know, it was that they had  
14 rights because they had a receipt, a cash receipt  
15 saying they could do alcohol sales. They said, no.

16 But in the Rhoads case, it said that the  
17 certificate was a written determination by the zoning  
18 administrator that a particular building plan on a  
19 particular property complied with the zoning  
20 ordinance. It permitted the garage. The only  
21 difference here is that the garage isn't built.

22 But it says your plans are okay, you got a  
23 problem with the height there, but here's how you  
24 apply it and until you meet that height, you're not  
25 going to have the approval, but you could get the

1 approval meeting these standards. It's not a  
2 transitional site, clearly identified. Clearly  
3 identified. It says yard requirements are met.

4 Again, they're challenging the ordinance  
5 regarding specific citations of the ordinance. You  
6 know, I've looked at the site, said it wasn't  
7 transitional. I don't know how I can change my mind.  
8 If I'm erroneous and we determined the 60 days had  
9 run and wasn't ORDD, then even if I'm wrong, they get  
10 to go.

11 Any questions?

12 MR. POOLE: That's what the Rhoads case said,  
13 because the zoning administrator made an error in the  
14 Rhoads case.

15 MR. DAVIDSON: Absolutely.

16 MR. POOLE: And they said that they can depend  
17 on it because of their reliance.

18 MR. DAVIDSON: Right. And I think the major  
19 distinction, as I indicated, was they physically  
20 built the garage and they didn't find out, oh, then  
21 the guy went back out and they said, "oh, oops, how  
22 did you" -- and, apparently, there was a different  
23 zoning administrator, actually, who said, "Hey, you  
24 can't have this."

25 But they said, "Well, we got our permit. We got

1 our certification, but what do you have to do?"

2 MR. POOLE: Just to be clear, you are of the  
3 opinion that with respect to your letter, you  
4 consider that to be a decision, an ORDD?

5 MR. DAVIDSON: Absolutely.

6 MR. YORK: The October letter?

7 MR. DAVIDSON: Yes, because we, actually, had  
8 plans for a development of a specific type and how  
9 you, actually, apply all of the zoning ordinance  
10 provisions to it.

11 Now, it did cite certain things saying you got  
12 to do this, that, and the other thing in order to  
13 comply, but, yes, it said, "This is how you're going  
14 to do it. This is how it will meet the  
15 requirements."

16 MR. POOLE: So...

17 MR. DAVIDSON: Fast-forward to the -- you know,  
18 then the POD is filed in December and, you know, we  
19 comment on the PODs.

20 Well, the original letter that went out from  
21 Mr. Kelley did not have our comments built into the  
22 letter. He sent it out. And our comments followed  
23 up later. You know, the discussion about, "Oh, we  
24 reserve the right to change our mind and, you know,  
25 with new plans and everything else," that's -- I



1 don't think that's in any of my correspondence. I  
2 think that's part of the general letter from the POD  
3 review from Land Use Administration.

4 MR. POOLE: Now, just for clarification, the  
5 section of the zoning ordinance that you made this --  
6 that you issued, your October 24th letter, was the  
7 Certificate of Zoning Compliance section.

8 MR. DAVIDSON: Right.

9 MR. POOLE: And then it shifted to the POD  
10 section, which is the next section of the code. One  
11 is 1020 and one is 1030.

12 MR. DAVIDSON: Right.

13 MR. POOLE: Is that correct?

14 So it's a completely different process. The POD  
15 process is different, correct?

16 MR. DAVIDSON: Absolutely.

17 MR. POOLE: Who makes the decision on the POD?

18 MR. DAVIDSON: The director. The director  
19 approves the POD. It is a separate administrator  
20 process which deals with orientation, site planning,  
21 trees on the property, things of that -- you know,  
22 none of the specific legal ordinance requirements.

23 MR. POOLE: Very good.

24 MR. DAVIDSON: And I think in one of my  
25 e-mails -- and there was a discussion about one of my

1 e-mails said, "Oh, it's a general letter" or  
2 something to that effect, you know, bringing it back  
3 to Crucible. Well, I was at home. I was home on  
4 leave, so I did not know -- specifically remembered  
5 if I had the full-blown plans and the site plan and a  
6 survey and everything else. And it was more of a  
7 general question: Did we have? I don't recall,  
8 blah, blah, blah. I don't recall that we actually  
9 had the plans.

10 And it was then determined that, yes, we had,  
11 actually, had plans and we had reviewed them and  
12 et cetera.

13 MR. YORK: I have a question.

14 MR. DAVIDSON: Okay.

15 MR. YORK: The October letter did leave one or  
16 two things up in the air that wasn't clear.

17 Is it safe to assume that with respect just to  
18 just those matters that when you finally -- at a  
19 certain point in time after that October letter, you  
20 must have received a plan in a final form in which  
21 you made a determination that it complies with all  
22 applicable zoning requirements.

23 Is that the case?

24 In other words, there would have been certain  
25 elements that would have been appealable, even after

1 the October issue: for example, the height issue,  
2 because you hadn't -- you haven't reacted to a  
3 specific plan that there was a problem.

4 MR. DAVIDSON: Well, we had -- we had in general  
5 concept, yes, we had. We had made a decision that  
6 this is how you apply the height to the property.

7 MR. YORK: I'm interested in when that was  
8 documented.

9 MR. DAVIDSON: Well, I think -- I think the  
10 letter said that there was a discrepancy on one of  
11 the corners of the building because of the roof line  
12 or something.

13 MR. YORK: But did you -- was it specific? I  
14 don't have it open.

15 MR. DAVIDSON: And you're asking this  
16 secondhand. You have to, actually, talk to the  
17 person who, actually, made that statement, but my  
18 understanding is that there was not, you know, the  
19 dimensional information, you know, minor information  
20 on the plan that led us to say, definitely, that,  
21 yes, it meets the requirement.

22 MR. YORK: Yeah, I guess what I was getting at  
23 is --

24 MR. DAVIDSON: Like you don't have north arrow  
25 or a strong scale.

1 MR. YORK: -- was there any subsequent,  
2 completely new determination that you made that would  
3 have started the clock again, or are you satisfied  
4 that you covered everything in the original  
5 October 24th letter?

6 MR. DAVIDSON: I mean, those issues were the  
7 only ones that were before us. You know, there were  
8 some minor issues about screening and landscaping and  
9 things of those natures, but nothing else.

10 MR. YORK: All right.

11 MR. DAVIDSON: You know, unequivocally,  
12 determination was made. That definitely is not a  
13 transitional site, number one. In fact, I think in  
14 one of the letters it says that it's designated as a  
15 local street, Laurel Street. If you actually look,  
16 it's not a local street. It's a collector.  
17 Laurel is a collector and Cary Street is an arterial.

18 But, you know, we got a statement at the end of  
19 a lot of those paragraphs. All yard requirements for  
20 the property are met with the proposal. So this  
21 isn't, you know, pie in the sky, hey --

22 MR. YORK: I understand.

23 MR. DAVIDSON: -- if I build it to the ordinance  
24 requirements, then is it okay? Well, obviously, you  
25 got to build it to the ordinance requirements.

1 We're saying this plan you supplied does not  
2 meet this, meet this, meet this, meet this.

3 MR. YORK: Mr. McRoberts, you get two more  
4 minutes.

5 MR. POOLE: Why we don't hear from Ms. Mullen.

6 MR. YORK: Yeah, that's better. Let's hear from  
7 Ms. Mullen.

8 MR. POOLE: Mr. McRoberts wants to hear this  
9 before he gives his rebuttal.

10 MR. YORK: Yes. All right. You get ten minutes  
11 as well.

12

13 **STATEMENT BY JENNIFER MULLEN, ESQ.**

14 MS. MULLEN: Thank you.

15 Good afternoon, again. Jennifer Mullen with  
16 Roth Jackson here on behalf of the owners of the  
17 property.

18 MR. YORK: You want to reserve time for  
19 rebuttal?

20 MS. MULLEN: Yes, please. Two minutes would be  
21 great.

22 Thank you.

23 So, first, I want to start with the standing  
24 issue. Mr. McRoberts opened his set of comments by  
25 saying that they are aggrieved, they own property or

1 easements within the same block and that there is a  
2 general loss of light, air, and traffic, et cetera.

3 So just to bring back what standing requires, it  
4 requires, one, proximity and, two, a particularized  
5 harm. The Friends of the Rappahannock case is very  
6 specific in addressing what that is. And the courts  
7 have been very specific in providing that a general  
8 loss of light, air, and generalized traffic concerns  
9 is not sufficient for that particularized harm. It  
10 has to be different than the public in general.

11 So the appellants, again, have provided their  
12 addresses, so even if you can get through the  
13 proximity, you still need to have the particularized  
14 harm. This cannot be an indirect interest and it has  
15 to be unique to these appellants.

16 And so by providing the three statements by  
17 Mr. McRoberts, as well as the letters that were  
18 included in the packet from the applicant that went  
19 out to seek other association support of the zoning  
20 and -- or support of this appeal with respect to the  
21 zoning administrator's determination regarding the  
22 transitional site as being impactful on all of the  
23 city, again, that's only a generalized statement. It  
24 has nothing to do with the particularized harm of  
25 this property.

1           So I just want to remind you as we go through  
2 this that it's not only standing, but also the time  
3 issue, so the standing piece and they have the duty  
4 to provide that information. They have not provided  
5 that in their appeal packet and nor have they  
6 provided that in their statements today.

7           So to get back to the time-bar and I'll walk  
8 through my presentation I think probably more along  
9 the lines of what has been discussed so far.

10           So with respect to the Crucible case, I also  
11 think it's important -- and we didn't talk about  
12 it -- but Section 15.2-2307 in the Crucible case only  
13 had six provisions that provided a significant  
14 governmental act at that point in time.

15           So when that case was decided, the seventh  
16 provision regarding a zoning determination letter was  
17 not included in the state code. The state code was  
18 changed in order to provide that seventh provision  
19 with a zoning conformance letter.

20           And as Mr. Davidson provided, this property did  
21 provide the zoning conformance letter request with  
22 the specific set of plans, unlike the Crucible case,  
23 which asked for a generalized statement regarding  
24 what the use was and that the use was permitted  
25 within that zoning district. You do not have a

1 vested right, but your zoning district will not  
2 change, but you do have a vested right when you have  
3 very specific items as referenced in the zoning  
4 conformance letter and we did have that.

5 As Mr. Poole pointed out, it was very  
6 specifically referenced regarding the transitional  
7 site. In the decision, we relied on that in order to  
8 provide for our development. We bought the property  
9 and we moved forward with our developmental plan  
10 expending significant amounts of money and meeting  
11 the three-part test for vested rights.

12 The additional piece about the state code and  
13 the charter interaction, I just want to highlight,  
14 too, a portion of the state code provision -- or  
15 excuse me -- the charter provision which has that the  
16 Board may take appeals within a reasonable time as  
17 prescribed by the Board or other general rules.

18 So here we have a general rule of the state code  
19 being 15.2-2311. You also have other provisions of  
20 the city code, which allow for a zoning conformance  
21 letter and allow for appeal period.

22 So to say that the state code will wipe out your  
23 ability to have a provision of the state code that  
24 applies with respect to the 60-day rule, I do not  
25 think that is accurate. And I think that the 60-day



1 rule applies, but it applies in a different way than  
2 Mr. McRoberts has described.

3 The 30-day rule would apply to the provision of  
4 being aggrieved. The 60-day rule applies to our  
5 provision on the October 24th determination letter,  
6 and that is when that clock begins to run, so I think  
7 that that piece is important to note.

8 So as a -- again, as a general comment, we have  
9 two pieces here. You have the provision of being  
10 time-barred, but also the standing piece and the  
11 applicant has not put forward any evidence to  
12 overcome the burden of proof for either of those.

13 This is a case where the owner did follow the  
14 law. The owner requested a specific zoning  
15 conformance letter with respect to a set of plans.  
16 They received that. In reliance on it, they  
17 purchased the property and they moved forward to  
18 provide for a development in accordance with those  
19 plans, submitted their plan of development.

20 That January 22nd memorandum component has the  
21 same information that the October 24th letter has.  
22 The March 1st letter, which checks off on the box  
23 that says it is now consistent with the plans, did  
24 not provide any additional information. The January  
25 letter asked for additional labels to be placed on

1 the plans. It asked for it to show where your bike  
2 parking was located.

3 So I think all of those in total provide that  
4 not only is the zoning administrator correct and has  
5 the presumption of correctness, but that the owner of  
6 the property has followed the rules and this case  
7 should be denied as being both time-barred and the  
8 parties lacking standing to move forward.

9 I'll be happy to answer any questions.

10 MR. YORK: Just, for the record, the Crucible  
11 case was in 2009. When was the Certificate of Zoning  
12 Compliance added to the list?

13 MS. MULLEN: It was also in 2009, but if you  
14 looked at --

15 MR. YORK: It was later.

16 MS. MULLEN: -- the Crucible case, it talks  
17 about the specific components of 2307 and it lists  
18 six pieces. The seventh piece was added after that  
19 case.

20 MR. POOLE: The appeal case takes two years to  
21 get to that level so it was probably an '07 decision  
22 when the old statute was in effect.

23 MR. YORK: I got you. Okay.

24 So there's no question that it was added after  
25 that case was heard?

1 MS. MULLEN: Correct. So the General Assembly  
2 has a seventh provision specifically regarding zoning  
3 conformance letters and a vested rights component  
4 now.

5 MR. YORK: Do you want to argue the issue I  
6 raised before about the -- why the -- the argument  
7 that Mr. McRoberts made about the vesting provision  
8 not applying because our charter has a much simpler  
9 language?

10 MS. MULLEN: So the charter provision that I  
11 think he referenced -- I don't have a copy of his  
12 letter, but I think he said 17-9 so that is --

13 MR. MCROBERTS: 19.

14 MS. MULLEN: I'm sorry, 17-19. And that is the  
15 state code provision of 2309, which allows for a  
16 Board of Zoning Appeals to exist and to provide for  
17 the rules under the Board of Zoning Appeals.

18 MR. YORK: I'm talking about 2311, the vesting  
19 part.

20 MS. MULLEN: Correct. So he's saying that that  
21 section trumps it, correct?

22 So if you take 17-19 --

23 MR. YORK: No. I think what he was saying --  
24 and he can correct me when he comes up here -- our  
25 city charter has some very weak language concerning

1 what constitutes being vested and that he's arguing  
2 the charter trumps the state code, which is much more  
3 specific.

4 MS. MULLEN: Well, so 2311 is with respect to  
5 being time-barred. 2307, actually, deals with your  
6 vesting of your rights.

7 MR. YORK: I'm sorry. I got them confused.

8 MS. MULLEN: That's okay.

9 So there are two separate -- there are two  
10 separate provisions with respect to that.

11 MR. YORK: Because the vesting language is a lot  
12 stronger.

13 MS. MULLEN: Correct. The vesting language --

14 MR. YORK: But it specifically talks about PODs  
15 and zoning compliance letters and so forth?

16 MS. MULLEN: That is correct. That is correct.

17 And I think what Mr. McRoberts is trying to  
18 argue is that the state charter -- excuse me -- the  
19 city charter in 17-19 provides for the Board of  
20 Zoning Appeals to exist and that language is tracked  
21 through the city code, and that provides for certain  
22 rules.

23 But in that same language, it has that they may  
24 be prescribed -- they take an appeal as may be  
25 prescribed by the Board or by general rule. In this

1 case, the general rule is the state code, which falls  
2 under 2311 A, B, and C. And so all of those rules  
3 apply.

4 MR. YORK: Any other questions?

5 MR. POOLE: I want to further elaborate on this,  
6 whether the charter subsumes state law.

7 The charter is passed by the General Assembly.

8 MS. MULLEN: Correct.

9 MR. POOLE: So both the charter and 2311 stand  
10 on the same level.

11 MS. MULLEN: That's correct.

12 MR. POOLE: Is it not the standard  
13 interpretative language of appellate courts that if  
14 there is more specific statute --

15 MR. YORK: And that's what I was saying.

16 MR. POOLE: -- a more specific statute that is  
17 on the same level --

18 MR. YORK: Exactly.

19 MR. POOLE: -- that you apply the more specific?

20 MS. MULLEN: That is correct.

21 MR. YORK: That was always my understanding.

22 MS. MULLEN: Yes.

23 MR. POOLE: Thank you.

24 MR. YORK: We had a -- that happened in the --  
25 remember the Paper Moon case, the topless place?

1 MR. BENBOW: That's been the interpretation  
2 that's been handed down by the law department. I  
3 think it stayed for more than 20 years.

4 MR. YORK: Yeah. But, nevertheless, the Paper  
5 Moon case brought that up and that's how that ruling  
6 came down.

7 MS. MULLEN: Thank you.

8 MR. POOLE: And you reserve two minutes?

9 MS. MULLEN: Yes, sir.

10 MR. YORK: Yes. She was well under her time  
11 limit.

12 All right. Now Mr. McRoberts gets two more  
13 minutes.

14 MR. MCROBERTS: Clarification. The public comes  
15 next?

16 MR. YORK: After you.

17 MR. MCROBERTS: After me. Okay.

18

19 **REBUTTAL STATEMENT BY ANDREW R. MCROBERTS, ESQ.**

20 MR. MCROBERTS: I'm not quite sure why we're  
21 talking about 2307. Certainly, that is a vested  
22 rights provision. It's certainly something that the  
23 developer has not met, so the first time I've heard,  
24 to talk about things that are brought up at the last  
25 minute.

1           2307 would not apply here. Among other reasons,  
2           it requires that the 30-day no longer be applicable.  
3           And, of course, a written determination if, in fact,  
4           October and January are considered determinations,  
5           you have to have the written notice in order for the  
6           30-day clock to even begin running, let alone expire.  
7           And so for that reason, if no others, 2307 doesn't  
8           apply.

9           2307 also applies when there is a change in the  
10          law and there has been a significant affirmative  
11          governmental approval, which has not -- it,  
12          certainly, hasn't happened here until March 1st. And  
13          then, of course, the stay is applicable there. 2307  
14          simply doesn't apply for several reasons.

15          As far as the question, to go back to the  
16          chairman's issue about, well, what if they come in  
17          and said, "Is it a transitional site? Yes or no,"  
18          and Mr. Davidson said, "not a transitional site," how  
19          is that any different than the military school coming  
20          in and saying, "Am I allowed in the A-1 zone as a  
21          school?"

22          "Let me look in the zoning ordinance. Yes,  
23          you're allowed."

24          That's the exact same process. There's no  
25          difference. And so I would, again, suggest that it's

1 simply the requirement for an ORDD that's simply not  
2 met.

3 As far as the Friends of the Rappahannock case,  
4 I'm very familiar with that. My law firm handled it.  
5 I would say that Friends of Rappahannock, it requires  
6 proximity, which I believe developer's counsel  
7 concedes that we do.

8 In addition, we'll be hearing from a number of  
9 the property owners that, in fact, owned the  
10 properties. One owns property right across the  
11 alley. That's going to be impacted by traffic in the  
12 alley. Another one is within 50 feet of the alley  
13 and is, in fact, impacted by the traffic from the  
14 development.

15 As far as specific discrete impacts, it  
16 certainly has to be different than a public in  
17 general. These people are different from the public  
18 in general. They live on the same block and own  
19 interest on that same block.

20 MR. YORK: Okay. Time.

21 MR. MCROBERTS: And so that's it.

22 Are there any questions of me?

23 MR. POOLE: Yeah. I want to go, if I could.

24 MR. YORK: Of course.

25 MR. POOLE: Go back to my argument of what I



1 refer to as my "silo argument." You have an  
2 ordinance in the City of Richmond that permits the  
3 Certificate of Zoning Compliance. The October 24th  
4 letter was written in that silo. It was requested  
5 under that section of the ordinance. Then later  
6 after the acquisition of some -- and I failed to ask  
7 Ms. Mullen and I intend on her rebuttal to ask her  
8 about when all the property was acquired because you  
9 raised that.

10 MR. MCROBERTS: Some in October; some in March  
11 after the appeal.

12 MR. POOLE: You raised that issue and I think  
13 that needs to be addressed.

14 But the POD process is a totally separate  
15 section of the ordinance with a totally different  
16 party that makes the decision. That's why I'm trying  
17 to make the distinction between the October 24th  
18 letter being an O-R-D made by the zoning  
19 administrator. And whatever happens in the POD -- to  
20 my knowledge, the POD has never been approved. The  
21 director of the division that's required to make a  
22 decision on POD, as best as I know, has not said the  
23 POD is approved.

24 So that decision-making process is not even  
25 right for appeal. I'm just looking at the two silos,

1 and I want you to tell me where I'm wrong.

2 MR. MCROBERTS: Well, I would say that in both  
3 that case as well as Norfolk 102, both, the Supreme  
4 Court held, were not ORDDs. There were specific  
5 statutory -- specific legal requirements for the  
6 zoning administrator to respond to the person that  
7 asked.

8 And in both cases, the zoning administrator  
9 said, "Yes, you are permitted."

10 And in both cases the Supreme Court held it's  
11 not an ORDD.

12 MR. POOLE: But in those cases, they did not  
13 have plans that were specific to the location and  
14 specific to what was to be built.

15 MR. MCROBERTS: I would say that it still  
16 doesn't meet the test that the Supreme Court stated  
17 in Crucible and for that reason, it fails. It is  
18 simply not something that changed the rights of the  
19 applicant. It simply is information. It is, you  
20 know, comments and certainly not --

21 MR. POOLE: Then why did the City pass the  
22 ordinance allowing this process to occur?

23 MR. MCROBERTS: Your Honor -- excuse me -- Your  
24 Honor.

25 Mr. Poole, you speak so authoritatively that I

1 really do -- I want to treat you with deference.

2 But I would say that the City does things from  
3 time to time that they believe are appropriate, that  
4 they believe are good processes. And they, in fact,  
5 try to carry them out with the best that they can.

6 My heart goes out to the BZA, to the other  
7 boards and commissions, to the staff. It's a very  
8 difficult job. I normally don't represent applicants  
9 in these kind of situations. I normally defend  
10 zoning administrators, so including in the Board of  
11 supervisors versus Rhoads. And so I certainly  
12 understand the difficulty.

13 But to get back to your issue, cities do things.  
14 It doesn't mean that it complies with the Supreme  
15 Court's definition of what an ORDD is. And that's my  
16 really best answer, is that the City acts in one way  
17 and then the Supreme Court has this very high bar  
18 that the City has to get over and they simply haven't  
19 gotten over here.

20 This is actually very akin to another case that  
21 I cited in my letter that I'll mention at this time.  
22 That is the City of Richmond versus Riverside Owner.  
23 And this was, basically, about the Troutman Sanders  
24 Development down on Brown's Island. Historic tax  
25 credits were applied for, abatements, if you will, of

1 local taxes, and the City had taken the position for  
2 a long time, like -- like the zoning administrator  
3 here. "Well, I'm going to -- even though the  
4 language says this, I'm not going to apply that  
5 language because that really makes no sense to me.  
6 I'm going to instead apply this other language over  
7 here because that's what makes sense to me."

8 In that case it was abatements and it made no  
9 sense to the tax assessor or real estate assessor  
10 that in that case you would take the before  
11 assessment of the entire property and compare it to  
12 the after assessment of the entire property, even  
13 though that's what the ordinance actually said, okay,  
14 and the authority was.

15 What he said was, "Well, that makes no sense.  
16 Only a tiny piece of it is historic. You know, just  
17 a tiny piece of it is the power plant. The rest is  
18 just new construction: Troutman Sanders building,  
19 16 stories; the condo towers, 11, I believe. And so,  
20 you know, I'm going to exclude that value and your  
21 abatement is just this."

22 Well, that makes sense to the tax assessor, just  
23 like Mr. Davidson's interpretation of what a  
24 secondary, et cetera, et cetera, makes sense to him  
25 here. But in both cases, I would suggest that the

1 plain meaning of the ordinance itself controls and  
2 it's up to council to make those changes and not  
3 zoning administrator.

4 If you look at 15.2-2311.C, there are only two  
5 things that he gets to do that are relevant here.  
6 One is interpret and administer the zoning ordinance  
7 as written. The other is to actually grant sort of  
8 a -- you know, other various things like vested  
9 rights or special exceptions to the extent allowed by  
10 the ordinance. That's it.

11 They don't get to make stuff up or take the  
12 place of council and act legislatively, which is what  
13 he's done here. And that's the concern.

14 As far as the --

15 MR. POOLE: I'm very happy that you raised that  
16 very issue.

17 MR. MCROBERTS: Yes, sir.

18 MR. POOLE: Because it is the power of the  
19 zoning administrator, by your own argument, to  
20 interpret the zoning ordinance.

21 MR. MCROBERTS: If interpretation is needed, not  
22 where there is plain meaning.

23 MR. POOLE: I understand.

24 And the ordinance says as -- and it names three  
25 particular types of streets as defined in the master

1 plan.

2 MR. MCROBERTS: As designated in the master  
3 plan.

4 MR. POOLE: As designated.

5 And two of those three are not designated in the  
6 master plan so, but the minor -- the definition of  
7 West Cary Street is in the master plan and it is --  
8 it's in a -- they say there's levels of streets in  
9 the City of Richmond in the 2000 master plan. The  
10 collector is the last of the bunch. The minor  
11 arterial is the next one up. It doesn't define major  
12 or secondary, so doesn't that lead the administrator  
13 then to have to interpret those words?

14 MR. MCROBERTS: No, sir. His job is to look at  
15 the plain language he used in the zoning ordinance,  
16 which says in order to not be a transitional site, it  
17 must be one of those three things as designated in  
18 the master plan. What his job is, is to read that  
19 language, crack open the master plan, and find those  
20 three designations on the street. If it's there,  
21 then it's not a transitional site. If it's not  
22 there, it is a transitional site. And that's our  
23 position.

24 He doesn't have the ability to make stuff up,  
25 which is what he's doing here or to, basically, act

1           legislatively and say, "Well, surely council must  
2           have intended when they amended the master plan to  
3           have these other categories that aren't named."

4           MR. POOLE: So the two words that are not  
5           defined or designated in the master plan have no  
6           meaning?

7           MR. MCROBERTS: They are simply not found and  
8           so, therefore, they're not designated in the master  
9           plan. And when the council changed the master plan,  
10          they had that right to make that determination and  
11          not Mr. Davidson.

12          MR. POOLE: So you say that when the ordinance  
13          is passed and the city council puts two words in  
14          there and says "as designated in the master plan,"  
15          that they didn't have any meaning?

16          MR. MCROBERTS: It actually happened, I think,  
17          in the reverse. I mean, the language there, those  
18          three words were put in the ordinance first and then  
19          the city council went and changed the master plan,  
20          which on its face --

21          MR. YORK: Several times.

22          MR. MCROBERTS: -- which on its face means that  
23          the council intended for those things to continue to  
24          be transitional sites or become transitional sites.  
25          There's certainly been a very -- a strong drive in

1 recent years, Mr. Poole, to protect historic  
2 neighborhoods in more significant ways.

3 MR. YORK: Are we really getting into this?

4 MR. MCROBERTS: And, certainly, the change of  
5 the master plan has directly led to better protection  
6 for historic neighborhoods. And I would suggest to  
7 you that the fact that the city council did away with  
8 those terms was a city council determination, a  
9 legislative one, to simply do away with that  
10 exception to it being transitional.

11 MR. POOLE: I asked him the question. He gets  
12 to answer it.

13 MR. YORK: Well, I know, but you're arguing the  
14 merits of the case.

15 MR. POOLE: No, but --

16 MR. YORK: What if they -- and we don't have  
17 this before us, but, what, for example, if the master  
18 plan said in some supporting documentation along with  
19 the master plan, it had language saying that we are  
20 replacing this old term with this new term?

21 MR. MCROBERTS: Well, then, that would be a --

22 MR. YORK: But we don't know that, do we?

23 MR. MCROBERTS: Well, I mean, I would say that  
24 if the council, in fact, adopted that, that would be  
25 a different set of facts, which are not before us.



1 MR. POOLE: But doesn't the council empower or  
2 doesn't actually state law empower the zoning  
3 administrator to make his own determinations of what  
4 the words mean?

5 MR. MCROBERTS: Well, just like --

6 MR. POOLE: As a matter of fact, aren't they  
7 allowed to open up a dictionary and look at its  
8 common definition in the dictionary in order to make  
9 a determination?

10 MR. MCROBERTS: And I would say the zoning  
11 administrator did, in fact, do that here. What  
12 Mr. Saunders did was in his description of this issue  
13 both in January as well as in the memorandum -- I  
14 mean in October and in the memorandum in January  
15 said, "This is not a major, secondary, collector. It  
16 is something different." That's what Mr. Saunders  
17 said and that --

18 MR. POOLE: You mean Mr. Davidson?

19 MR. MCROBERTS: Okay. Mr. Davidson.

20 I'm probably jumping between October and  
21 January.

22 MR. POOLE: You are.

23 MR. MCROBERTS: But I would say that wherever it  
24 was addressed, it was addressed in that way, that,  
25 specifically, there was a finding by the zoning

1 administrator that it simply didn't meet any of those  
2 three terms in the --

3 MR. POOLE: It went further than that. It said  
4 that it's between a collector and a major and because  
5 it's between that, it meets the definition and is not  
6 transitional.

7 MR. MCROBERTS: But his statement just like the  
8 tax or real estate assessor's sort of policy in  
9 Riverside Owner violated the plain statement in the  
10 code. I mean, he's allowed to interpret if there is  
11 some sort of a question, but there's no question that  
12 those -- if this -- this road, West Cary is not a  
13 major, a collector or secondary. It's not. As a  
14 matter of fact, the zoning administrator had said so.

15 MR. POOLE: And you've heard him testify that  
16 Laurel is a collector?

17 MR. MCROBERTS: But Laurel has to have a yard  
18 and a height limitation for other reasons that really  
19 aren't at issue here. So we're really talking about  
20 West Cary.

21 With the South Laurel issue is the fact that for  
22 some reason the zoning administrator allowed this  
23 sort of half a yard on the block, which makes no  
24 sense because Laurel is a front yard and so --

25 MR. YORK: We're drifting too far away here.

1 MR. POOLE: You're the chairman.

2 MR. MCROBERTS: Then I will not answer that  
3 question further.

4 MR. YORK: In fact, I think you're actually  
5 hurting yourself because you're providing this  
6 testimony, which is giving the other side the  
7 opportunity to come back later.

8 MR. MCROBERTS: Well, you know, I think I've  
9 addressed everything that opposing counsel has said  
10 here. 2307 doesn't apply.

11 I've already addressed the issues of why the 30-  
12 and 60-day, you know, things don't apply for various  
13 reasons, but if you have questions, I would be glad  
14 to answer them.

15 MR. YORK: All right. Now, where are we?

16 MR. DAVIDSON: Do I get a rebuttal?

17 MR. YORK: Pardon?

18 MR. DAVIDSON: Do I get a rebuttal?

19 MR. YORK: Re-rebuttal?

20 MR. BENBOW: No. He hadn't had it yet.

21 MR. YORK: Oh, that's right. I'm sorry.

22 MR. MCROBERTS: I'm sorry. Did the zoning  
23 administrator reserve rebuttal?

24 MR. BENBOW: Yes.

25 MR. YORK: Yes, he did.

1 MR. MCROBERTS: Oh, he did. Okay. Thank you.

2 MR. YORK: And he has about four-and-a-half  
3 minutes.

4 MR. BENBOW: He has about four minutes, four and  
5 a half.

6 MR. YORK: Which I'm sure you won't take that  
7 long.

8

9 **REBUTTAL STATEMENT BY WILLIAM C. DAVIDSON**

10 MR. DAVIDSON: So all I want to provide the  
11 Board is this discussion about 2307. "For the  
12 purposes of this section and without limitation, the  
13 following were deemed to be significant affirmative  
14 governmental acts allowing development of a specific  
15 project."

16 And as counsel for the property owner indicated  
17 and, quote, number 7, which was added, "The zoning  
18 administrator or other administrative officer has  
19 issued a written order, requirement, decision or  
20 determination regarding the permissibility of a  
21 specific use or density of the landowner's property  
22 that is no longer subject to appeal and no longer  
23 subject to change," blah, blah, blah.

24 Well, I'm the zoning administrator. I had a  
25 specific plan. I provided it. There was a

1 discussion that there has to be appeal language in  
2 there, that if any time I write something, there has  
3 to be appeal language.

4 I'm not sure that's really what it says for  
5 everything I do, because there are four types of  
6 these items. And I think I lost it in here.

7 There's a written order, there's a requirement,  
8 there's a decision or determination. To me the  
9 written order or requirement is you did something,  
10 you got to stop it, and if they appeal, they appeal.  
11 I can provide information all the time. That is a  
12 decision or a determination.

13 MR. YORK: Questions?

14 MR. POOLE: Mr. McRoberts raised the issue of  
15 the fact that the master plan is referenced in the  
16 ordinance as to the three types of streets, and you  
17 made a determination that because it was between a  
18 collector and a major arterial, that's why it met the  
19 definition.

20 Am I reading this letter correctly?

21 MR. DAVIDSON: Yes. That has been applied  
22 consistently since I've been here for over 30 years.  
23 The master plans have changed, the way they talked  
24 about them have changed as far as the designations of  
25 streets.

1           In the '60s master plan, there were three  
2 designations: Major, secondary, collector.

3           In the one from the '80s -- I'm not sure the  
4 specific date -- it then has four designations:  
5 freeway, the second one -- well, it's got collector,  
6 also, and it's got collector and above that is  
7 secondary arterial and then the current one -- it's  
8 got five: Local, collector, minor arterial, primary  
9 arterial, then freeway, whatever the case may be.  
10 So, yes, the terms have changed, but the concept is  
11 the same.

12           And how do you apply a statute for something  
13 that doesn't exist in the master plan?

14           That would mean every property -- only unless  
15 it's on the collector street would be -- if you're on  
16 a collector street, you're not transitional, but if  
17 you're on a major road, you are, because it doesn't  
18 say major or secondary.

19           MR. YORK: Mr. Zoning Administrator --

20           MR. DAVIDSON: It didn't make sense.

21           MR. YORK: -- the language --

22           MR. DAVIDSON: It's an obscured result.

23           MR. YORK: Are the parking requirements about in  
24 those cases where something is not defined, you have  
25 to --

1 MR. DAVIDSON: No. General rules of  
2 interpretation, I think it's 30-1020 maybe, 1010,  
3 something like that.

4 1020?

5 MR. YORK: It says that you get to pick the  
6 closest --

7 MR. DAVIDSON: 1210.

8 MR. YORK: And since transitional site is a  
9 definition, in the definition section --

10 MR. DAVIDSON: I'm sorry. 1200, Applicability  
11 of Article.

12 "Certain words and terms used in this chapter  
13 shall be interpreted as set forth in this article,  
14 unless otherwise specifically prescribed elsewhere in  
15 this chapter. Words and terms not defined in this  
16 article shall be interpreted in accordance with such  
17 normal dictionary meaning or customary usage as is  
18 appropriate to the context."

19 So secondary isn't defined in here. Neither is  
20 major. Neither is connector.

21 MR. YORK: So you get to make that decision.

22 Now, are we finished with the zoning  
23 administrator?

24 Now, Ms. Mullen gets her two more minutes and  
25 then we get to hear from the public.

1                   **REBUTTAL STATEMENT BY JENNIFER MULLEN, ESQ.**

2                   MS. MULLEN: Thank you.

3                   Just to address, first, the question of the  
4                   acquisition of the property, nine of the 12 parcels  
5                   were acquired in December. The other three parcels  
6                   were acquired. Subsequently, there was a separate  
7                   owner so there were two separate contracts. One was  
8                   contingent upon the other, so once we acquired the  
9                   nine, we had to acquire the three.

10                  So just so --

11                  MR. POOLE: Both contracts done at the same time  
12                  or one contingent on the other?

13                  MS. MULLEN: One contingent on the other.  
14                  Correct.

15                  MR. POOLE: But done at the same time?

16                  MS. MULLEN: Not done at the same time, no.  
17                  Separate contracts.

18                  Again, just to reiterate, this is an  
19                  October 24th, letter that was followed under the rule  
20                  of law. So they requested the letter, they gave  
21                  specific plans, they received the letter, they relied  
22                  on it, they acquired the property, and they continued  
23                  to expend significant amount of money in the  
24                  development of the property.

25                  This is an interpretation question, as was just



1 described. This is about the application of a  
2 transitional site and getting into the merits of it,  
3 which we're happy to do, if you take a look at the  
4 difference between the '64 and the 2000, I think  
5 Mr. Davidson gave the general overview, but we can  
6 talk about that at length if that is something you  
7 would like to do.

8 But there is also case law that says that the  
9 zoning regulations as with other laws must be  
10 interpreted to not produce an obscured result. So if  
11 you did not interpret it to have something above a  
12 collector but below a freeway as continuing to be  
13 excluded from that transitional site, you end up with  
14 something lower, being the one that's the only one  
15 excluded. So the interpretation question falls  
16 squarely within Mr. Davidson's purview and he has the  
17 presumption of correctness.

18 Back to the Friends case. And I'm going to harp  
19 on this because standing is required. As  
20 Mr. McRoberts said, his firm represented in the --  
21 they know the Friends case because they were involved  
22 in it, but they didn't provide any evidence regarding  
23 the particularized harm at all. All they provided is  
24 the addresses.

25 MR. MCROBERTS: That was opposing counsel. We

1 actually prevailed in the case.

2 MS. MULLEN: So he prevailed in the case, but he  
3 didn't provide any evidence regarding the  
4 particularized harm.

5 MR. MCROBERTS: We defended the case.

6 MR. BENBOW: Whoa, whoa, Roger, what --

7 MS. MULLEN: That is something that is required  
8 to be done in the appeal. That is in the  
9 application. That is required to be provided. They  
10 have not provided anything in the appeal nor have  
11 they provided anything in the testimony to date.  
12 Perhaps, we're going to hear from some additional  
13 support regarding that, but anything regarding the  
14 generalized traffic, related to the height, which is  
15 what is at issue, is a generalized harm. That is not  
16 a particularized harm.

17 So respectfully request that you deny this  
18 appeal and rule in favor of the zoning administrator.

19 Yes, sir.

20 MR. POOLE: He did raise traffic, he did raise  
21 height, but he also raised air and light.

22 Can you address that?

23 MS. MULLEN: Sure.

24 So the zoning district is B-3, so it is B-3.  
25 This was not rezoned to be B-3. The zoning district

1 has a provision that everybody in B-3, you can be at  
2 35 feet in height and then it has additional height  
3 as required or as permitted with certain things.

4 The zoning administrator has made that  
5 determination regarding certain things and we're  
6 talking about West Cary. So if you're saying that on  
7 Laurel, which is close to the neighborhood, you can  
8 have additional height and that would be okay, but  
9 West Cary because it is not a major street in the  
10 1964 and 2000 master plan, that that's not okay, to  
11 me that is counterintuitive.

12 So you also had testimony from when the  
13 applicants requested a petition in order to start a  
14 rezoning of the property and testimony of that issue.  
15 City council said a few weeks ago that they would  
16 have allowed additional height so the buildings on  
17 the property would have been saved. That is again  
18 counter to the light and air.

19 You have a site that allows height. You have a  
20 site that allows additional height and that is not  
21 impacting the light and air of the surrounding  
22 properties at all and nor have they provided any  
23 evidence to that at all.

24 MR. POOLE: Thank you.

25 MR. YORK: Anything else?

1           Okay. Now, we get to hear from the public. And  
2 as I said at the beginning, I'd appreciate it if you  
3 would decide amongst yourselves how you want to use  
4 the time that's allocated so that you can get as much  
5 relative testimony in as possible.

6           MR. BENBOW: Do you want to explain the time  
7 limits so it's fair?

8           MR. YORK: Yeah. Total it's ten minutes, so the  
9 total amount of time. And let me also point out for  
10 the benefit of the people who are here, I just  
11 emphasize that whatever we do in this case, it has  
12 nothing to do with whether we think this is an  
13 appropriate development for this property. Only city  
14 council would make those decisions.

15           Our role is strictly to decide whether this  
16 gentleman over here interpreted the zoning ordinance  
17 correctly.

18           So go ahead.

19

20                           **STATEMENT BY KELLEY LANE**

21           MR. LANE: I'm Kelley Lane, an aggrieved party  
22 in this appeal, owner and resident for over 40 years  
23 of 129 South Cherry Street, less than a hundred feet  
24 from the proposed property.

25           The excess height and density of the project is

1 an adverse impact on me dwarfing my townhouse  
2 residential block, destroying quality of life with an  
3 exorbitant increase in alley and street traffic,  
4 parking, congestion and decrease in light and air.

5 Specifically, the alley is where the entrance is  
6 going to be to the parking and that is less than a  
7 hundred feet away from me on an alley that's already  
8 congested. It's a major negative personal impact on  
9 me, as well as the height of the project. The air is  
10 going to hit that and come into my yard and all sorts  
11 of things like that.

12 Neither as a member of the Oregon Hill  
13 Neighborhood Association nor as a board member of the  
14 Oregon Hill Property Improvement Council, I only  
15 became aware on March 6th when a friend notified me  
16 of the October 2017 and January 2018 letters from the  
17 zoning office. That's when my due process rights  
18 started and that's constitutional and that trumps  
19 everything in the law.

20 Andy Condlin, the developer's attorney, claimed  
21 at a City Council Land Use Hearing on April 17th,  
22 2018, that the October 2017 letter from the zoning  
23 administrator was, quote, a confirmation of the  
24 height and by-right plans and was the basis for --  
25 unquote, and was the basis for purchasing the

1 property.

2 The zoning administrator actually wrote in that  
3 October letter, quote, "Details were not provided to  
4 verify that the height requirement has been met for  
5 the proposal, but it appears that the portion of the  
6 building fronting South Laurel Street within a  
7 hundred feet of the R-7 district to the south exceeds  
8 the height limit for the district, unquote."

9 As a former real estate broker, I know that the  
10 developer proceeded at his own risk because the  
11 October 2017 letter did not approve the building  
12 height.

13 In the zoning administrator's March 21, 2018,  
14 letter e-mailed to Richard Saunders, he states,  
15 quote, "Roy talked to Ms. Markham and they feel a  
16 ZCL, quote -- that's zoning conformance letter --  
17 that was sent gave them approval, but I don't recall  
18 that we had any plans as it was more of a general  
19 statement of allowable height."

20 Factually, the development purchased three of  
21 the properties after March 21st, after our appeal was  
22 sent.

23 The zoning administrator on March 19, 2018,  
24 received the following e-mail from Neil Gibson of the  
25 City Attorney's Office, quote, "I must confess that

1 by reading the city code, he and his clients appear  
2 to have a point --

3 That's us.

4 -- "re: The height of the building. Admittedly,  
5 I have not seen the POD, but from what I have heard  
6 and read, it sounds like the applicant is seeking to  
7 justify a building height of over 35 feet by creating  
8 a yard 35 feet in the air. Is that what the  
9 applicant is actually saying? If so, can the zoning  
10 countenance that?"

11 I urge the BZA to consider on its merits the  
12 timely appeal by the adjacent neighbors with clear  
13 standing.

14 Thank you.

15

16 **STATEMENT BY PARKER AGELASTO**

17 MR. AGELASTO: Good afternoon. My name is  
18 Parker Agelasto. I represent the Fifth District on  
19 Richmond City Council. I've been, frankly,  
20 intimately involved in understanding what the case is  
21 before you, because as a representative on city  
22 council, I have to understand the ordinances that are  
23 then subject to the zoning administrator's  
24 interpretation.

25 And from my position today, I've identified at

1 least six areas that we at city council will have to  
2 amend as a result of the conversations that you're  
3 having today.

4 However, I ask you several items: Mr. Poole,  
5 you constantly through the hearing for an hour and a  
6 half referenced a Certificate of Zoning Compliance.  
7 Can you prove in your packet that an application was  
8 filed for a Certificate of Zoning Compliance?

9 And if so, do you have a response that  
10 specifically responds as to a Certificate of Zoning  
11 Compliance?

12 I do not believe you will find a Certificate of  
13 Zoning Compliance in your packet, which could only be  
14 submitted by the property owner. And under the  
15 rules, if the property changes hands for a  
16 Certificate of Zoning Compliance, the new property  
17 owner has to submit a new application. If the  
18 property changed hands since October, then a new  
19 zoning application would have to be filed for a  
20 certificate.

21 What I do believe, however, you might find --  
22 but I haven't seen your packet -- is an application  
23 for a zoning confirmation letter, which is a quite  
24 different process giving different individuals access  
25 to similar information but does not hold the same



1 weight of law. So I ask you to validate the  
2 information that you have available to you.

3 The height, this is my biggest issue. B-3 --

4 MR. YORK: Well, keep in mind that we're only  
5 addressing the timeliness issue today.

6 MR. AGELASTO: I'm trying to give you this.

7 And my point on the timeliness is that there are  
8 still documents from October and from January that  
9 still had questions about the height and whether or  
10 not it would comply and conform with the zoning for  
11 B-3.

12 I have since 2013 serving on city council  
13 amended the B-3 ordinances and have studied the city  
14 and asked that the Planning Department Development  
15 Review to look at B-3 throughout the city, to begin  
16 rezoning, which they have done in certain  
17 neighborhoods because it is a terrible zoning  
18 category.

19 And in this, there is an exception for  
20 additional height. There is not a single project in  
21 the City of Richmond that has taken advantage of this  
22 additional height above 35 feet in the B-3 category  
23 as is being sought by the current owner of this  
24 property.

25 This is a first impression. What is determined

1 here will set precedent. There is no other  
2 precedent.

3 Have you seen precedent for additional height in  
4 the B-3 category? And if you cannot, then you must  
5 weigh this consideration.

6 The determination on height was still in  
7 question as late as March. On March the 1st, I was  
8 sending e-mails to the zoning administrator asking  
9 about the height. Not once did I get a confirmation  
10 that there was a letter being sent on March the 1st.

11 I have been following this. I have been asking  
12 the questions. At this moment there will be quite a  
13 number of other changes.

14 Timing: Is an application, whether it's for a  
15 certificate, a zoning compliance, or a letter of  
16 zoning confirmation publicly accessible?

17 How would somebody in the public know if there  
18 was a request for an application?

19 They don't, except for FOIA, and they can ask  
20 and depending on who you ask, you might not get an  
21 answer.

22 Secondly, for the determination letter or  
23 however we want to call it, a certificate or an ORDD  
24 or whatever we want, how would the public know about  
25 that?

1 Is it publicly accessible?

2 No. You have to file a FOIA for it. So I've  
3 already gone down the path of helping you, the BZA,  
4 to determine what a 30-day window looks like by  
5 introducing an ordinance that says every single  
6 application for a zoning confirmation letter or a  
7 certificate of zoning confirmation has to be publicly  
8 published on the PDR website and that every letter  
9 that the zoning administrator issues has to also be  
10 published -- published so that the 30-day window can  
11 start.

12 Nobody today can tell you when a 30-day window  
13 starts because it is concealed and basically  
14 bureaucratic.

15 Where is the information?

16 So I'm advising you today, this is first  
17 impression. The height has not been addressed.  
18 There is a city attorney opinion on the height issue  
19 and the plain language reading that contradicts the  
20 zoning administrator's opinion. And if you would  
21 like it, I would be willing to share it with you, but  
22 I have held it in confidentiality since that's what  
23 the city attorney has suggested to me.

24 I understand the city attorney had reached out  
25 to the zoning administrator offering to help

1 represent him in this case, but that was declined.

2 So I'd ask for your consideration. And if you  
3 need additional information, I'm glad to provide it.

4 Thank you.

5 MR. BENBOW: A minute and a half, Roger.

6 MR. YORK: Yeah.

7

8 **STATEMENT BY BRENT RAPER**

9 MR. RAPER: It's going to be quick.

10 My name is Brent Raper. I'm one of the  
11 aggrieved parties in this appeal. I have lived at  
12 127 South Cherry for over 20 years in a home that I  
13 purchased in 1996, just 50 feet, maybe less, from the  
14 project at 801 to 815 West Cary Street.

15 I would be personally impacted by this  
16 out-of-scale development that would dwarf all other  
17 buildings on my block. It would fundamentally change  
18 the character of the neighborhood and diminish my  
19 quality of life in terms of parking, noise, traffic,  
20 safety, air quality and sunlight.

21 I'm not a member of the Oregon Hill Neighborhood  
22 Association or the Oregon Hill Home Improvement  
23 Council, and I received no information from the City  
24 or anyone else regarding the property purchase or  
25 zoning rulings on the 800 block of West Cary.

1           It wasn't until March 20th that I became aware  
2 of the October 2017 and January 2018 zoning letters  
3 for the project.

4           This new ruling by the zoning administrator is  
5 inconsistent with his previous rulings. In 2003 at  
6 the corner site, at 611 to 619 West Cary Street, the  
7 same zoning administrator ruled that it was a  
8 transitional site with a 35 feet height limit.

9           I submit, as part of public record, this zoning  
10 appeals application, case number 6103, signed by  
11 William Davidson, who writes that the original  
12 application was disapproved because no building or  
13 structure shall exceed 35 feet in height.

14           The development at the corner of 701 to 703 West  
15 Cary was also not allowed to exceed 35 feet --

16           MR. YORK: We already have -- we actually have  
17 all this already in our records.

18           MR. RAPER: In conclusion, I am a legitimately  
19 aggrieved party who submitted a timely appeal. My  
20 block is a neighborhood. Residents have gardens.  
21 They have pets. Handicapped people use the  
22 alleyways, and we always have lots of foot traffic,  
23 already have lots of foot traffic by VCU students.

24           Currently, most of the structures on the block  
25 are turn-of-the-century two-story houses.

1           Please consider the merits of this case and  
2           overturn the inconsistent adverse rulings of the  
3           zoning administrator.

4           Regarding sunlight, the proposed building will  
5           literally shade my tomato plants.

6           MR. YORK: Let me ask you a question.

7           Would that building shade your tomato plants if  
8           it was a three-story building instead of a four-story  
9           building?

10          MR. RAPER: I think it would make a difference,  
11          and that's why I am fighting to overturn the  
12          decision.

13          MR. YORK: All right. Thank you.

14          MR. RAPER: There are buildings within sight  
15          that are three stories and there's nothing really on  
16          the block or in our neighborhood that is this big as  
17          the proposed building.

18          MR. YORK: The zoning administrator actually has  
19          some time left.

20          Do you want to say anything about the other  
21          examples he gave or were you even listening?

22          He pointed out another building on Cary Street  
23          where you --

24          MR. DAVIDSON: If it's not in the letter, then I  
25          might have to pull up the case.

1 MR. YORK: Okay, then.

2 All right. Is there --

3 MR. POOLE: Mr. Chairman.

4 MR. YORK: We're not finished.

5 Is there anyone else who is --

6 MR. POOLE: I'm asking for a break.

7 Can we take a break?

8 MR. BENBOW: Do you want to finish his  
9 testimony?

10 MR. YORK: Well, I was just going to ask -- this  
11 will be quick. Is there anybody other than the  
12 owners, applicant who wants to speak in support of  
13 the zoning administrator?

14 MR. BENBOW: Is this in support or opposition?

15 UNIDENTIFIED SPEAKER: This is in opposition.

16 UNIDENTIFIED SPEAKER: We've used up the ten  
17 minutes.

18 UNIDENTIFIED SPEAKER: That's fine. I just want  
19 to give this to you.

20 MR. YORK: All right. We need a break, a brief  
21 one.

22 (Short recess, 3:09 p.m. - 3:18 p.m.)

23 MR. YORK: Do we agree that since we have a  
24 court reporter here that we will waive the rules and  
25 hear this case out of order or do we hear the other

1 two cases?

2 MR. POOLE: I absolutely think we should hear  
3 this case out of order. I would make a motion that  
4 we hear this case out of order.

5 MR. YORK: All those in favor of the motion?

6 MR. POOLE: Aye.

7 MR. SAMUELS: Aye.

8 MR. YORK: Okay. Then we will hear the motion.  
9 I mean, we will hear the case.

10 Should we divide it in two: 30-day argument and  
11 60-day argument?

12 MR. POOLE: If you wish.

13 MR. YORK: I mean, don't you think that's  
14 appropriate?

15 Someone make a motion.

16 MR. POOLE: I'll make a motion to uphold the  
17 decision of the zoning administrator.

18 MR. SAMUELS: I second it.

19 MR. POOLE: With respect to his October 24th  
20 letter.

21 MR. YORK: And the 30-day time limit within  
22 which an appeal has to be filed.

23 MR. POOLE: Correct.

24 MR. YORK: Someone second that for purposes of  
25 discussion.



1 MR. SAMUELS: I will second that.

2 MR. YORK: All right. Open for discussion.

3 Let's hear your arguments.

4 MR. POOLE: The first and foremost thing that I  
5 want this Board to understand is this Board has  
6 authority to deal with the decisions of the zoning  
7 administrator and no one else. This appeal is the  
8 issues that the zoning administrator made a decision  
9 on.

10 We have no authority to make any decisions with  
11 respect to the POD process. What's done in the POD  
12 process is subject to the director and his  
13 decision-making process is clearly laid out both in  
14 his -- both in the ordinance and in his regulations  
15 that he's promulgated.

16 So none of what we do here today has anything to  
17 do with anything other than the decision of the  
18 zoning administrator. And my motion is to limit that  
19 decision to his letter of October the 24th, 2017, and  
20 that his decision be upheld.

21 Clearly, there is a decision made by the zoning  
22 administrator in that letter. Clearly, it's his  
23 authority to consider the zoning ordinance and when  
24 there are discrepancies, when there are words of  
25 common language that are in the ordinance, he has the

1 authority to interpret them. He did so. He said so  
2 in his letter.

3 And I think that his determination, specifically  
4 with respect to the transitional site, was clearly a  
5 decision by the zoning administrator with plans that  
6 were in front of him, that he considered. He made a  
7 decision and the appeal period runs after 30 days.  
8 That's how I see it.

9 MR. YORK: And under 15.2-2309, there's a  
10 presumption in favor of the zoning administrator.

11 MR. POOLE: Oh, yes. Absolutely.

12 MR. YORK: You know, especially on the issue of  
13 fairness, it is true. And if you look at all of the  
14 things that are in the state code that determine when  
15 a decision vest a developer, that a number of those  
16 things, one has to know to seek out in order to be  
17 able to find out about them.

18 And a number of people today have spoken about  
19 the fact that there really was no notice that they  
20 could possibly be aware of, and that's true. But,  
21 unfortunately, that is the way the law is written.  
22 There are some things that can be done about it, but  
23 they haven't been done and we have to go by what the  
24 law says.

25 Clearly, you know, who would have known that

1 30 days started with that October 24th letter, but  
2 that's just the way it is.

3 MS. HOGUE: I would like to add, both attorneys,  
4 Ms. Mullen and Mr. McRoberts, did a great job. I am  
5 more compelled about fundamental fairness for the  
6 neighborhood, that they did not, even though  
7 October 24th was the first letter, and I don't know  
8 what's the best process and that's where your city  
9 council person needs to come in, but it doesn't seem  
10 like the neighborhood is getting due process and  
11 fundamental fairness in not having known about this  
12 until much later than October 24th.

13 And two neighborhood people being 50 feet and a  
14 hundred feet away, I do feel I have some direct  
15 standing to speak that they did not get notice.

16 MR. YORK: Anyone else?

17 MR. SAMUELS: I'm basically agreeing with the  
18 opinion as stated as Rodney so stated it. And,  
19 again, I agree with Ms. Hogue's opinion about it as  
20 also expressed here, but we stand charge with another  
21 task directly related overwhelmingly, I think, with  
22 the zoning administrator and his opinion and his  
23 right to make such an opinion.

24 MR. YORK: All for the vote?

25 All those in favor?

1 MR. POOLE: Aye.

2 MR. SAMUELS: Aye.

3 MR. YORK: Oppose?

4 Ms. HOGUE: I'm opposed.

5 MR. YORK: Three to one.

6 MR. BENBOW: I didn't hear you, Roger. Did you  
7 vote?

8 MR. YORK: Yes. Three to one.

9 MR. BENBOW: Three to one. Okay.

10 MR. YORK: All right. With respect to the  
11 60-day notice, the provision about the determination  
12 of the zoning administrator may not be altered after  
13 60 days from which it was given.

14 MR. POOLE: I would move to support the zoning  
15 administrator's decision as written in October 24th,  
16 1917 (sic), giving the 60-day limitation of the  
17 Virginia State Code. There's clear reliance.  
18 There's been testimony as to the reliance of the  
19 owner that he did -- they applied under a section of  
20 the code or -- excuse me -- a section of the city  
21 ordinance that specifically provides for this type of  
22 decision-making process. The decision was written by  
23 the zoning administrator and more than 60 days has  
24 passed and reliance has been proven.

25 MR. YORK: And the decision was confirmed, as is

1 STATE OF VIRGINIA  
2 COUNTY OF CHESTERFIELD, TO WIT:

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I, Jacquelin O. Gregory-Longmire, a fully trained, qualified, and certified court reporter, do hereby certify that the proceedings in the herein matter were taken at the time and the place therein stated; that the proceedings were reported by me, Professional Court Reporter and disinterested person, and that the foregoing contains a true and correct verbatim transcription of all portions of the proceedings.

I certify that I am not related by either blood or marriage to any of the parties or their representatives; that I have not acted as counsel to or for any of the parties; nor am I otherwise interested in the outcome of this complaint.

WITNESS my hand this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

My commission expires September 30, 2021.

Notary Registration No. 7275579.

\_\_\_\_\_  
JACQUELIN O. GREGORY-LONGMIRE

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