

STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES
February 27, 2018

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) of Tuesday, February 27, 2018, was called to order with the determination of a quorum at 7:01 p.m. by Chairman Robert Grimes in the Board of Supervisors Chambers of the George L. Gordon, Jr., Government Center.

MEMBERS PRESENT: Robert Grimes, Steven Apicella, Ernest Ackermann, Adela Bertoldi, Dana Brown, Robert Gibbons, Danny Kim, Dean Larson, Heather Stefl

MEMBERS ABSENT: None

STAFF PRESENT: Susan Blackburn, Melody Musante, Stacie Stinnette, Jeff Harvey, Evelyn Keith, Denise Knighting, Donny Cox, Joe Valotta

DETERMINATION OF QUORUM

Mr. Grimes: Good evening ladies and gentlemen and welcome to this meeting of the Stafford County Board of Zoning Appeals. The BZA is a quasi-judicial body whose members are volunteers appointed by the Circuit Court of Stafford County. The purpose of the BZA is to hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Administrator; hear and decide upon requests for Variance from the Zoning Ordinance when a literal enforcement of the Zoning Ordinance would result in unnecessary hardship to the owners of a property; hear and decide on requests for Special Exceptions where the Zoning Ordinance allows Special Exceptions. The Board consists of seven regular members and two alternate members. An alternate member may be called to participate when a regular member is unable to hear the case. Let the record reflect tonight that we have a quorum tonight with seven voting members present. The members present and voting tonight are myself, Mr. Grimes, Mr. Apicella, Ms. Brown, Dr. Larson, Mr. Kim, Ms. Stefl, and Dr. Ackermann. In addition our alternates are also seated at the dais tonight, Mr. Gibbons and Ms. Bertoldi. The County staff is represented tonight by Ms. Musante, the Zoning Manager and Ms. Stinnette, the Senior Administrative Associate. We also have at the dais tonight Mr. Andrew McRoberts, he is the BZAs attorney. He is not associated with the County. The hearings will be conducted in the following order. The Chair will ask the staff to read the case and the members of the Board may ask questions of the staff. The Chair shall ask the applicant or their representative to come forward and state their name and address, and present their case to the Board. The presentation shall not exceed 10 minutes unless additional time is granted by the Board. Members of the Board may ask questions of the applicant to clarify or better understand the case. The Chair will then ask for any member of the public who wishes to speak in support of the application to come forward and speak. There shall be a 3 minute time limit for each individual speaker, and a 5 minute time limit for a speaker who represents a group. After hearing from those in favor of the application, the Chair will ask for any member of the public who wishes to speak in opposition to the application to come forward and speak. After all public comments have been received the applicant shall have 3 minutes to respond. We ask that each speaker present their views directly to the Board and not to the applicant or other members of the public. After the applicant's final response, the Chair shall close the public hearing. After the public hearing has been closed, there shall be no further public comments. The Board shall review the evidence presented and the Chair will seek a motion. After discussion of the motion, the Chair shall call for a vote. In order for any motion to be approved, four members of the Board must vote for approval. In order to allow the Board time for appropriate review, the applicant or applicant's representative is required to submit relevant material to the Department of Zoning and Planning 10 business days prior to this hearing, to be included in the staff report. The Board may accept additional relevant material from the applicant or the applicant's representative during the

***Board of Zoning Appeals Minutes
February 27, 2018***

hearing; however, large amounts of additional material may require a deferral, at the Board's option, on behalf of the applicant to allow the Board time to consider that additional material. Members of the public and/or staff may also submit relevant material during the hearing. The applicant should be aware tonight that we have seven voting members present, and you must have four affirmative votes to approve an application. If you do not think that there are enough members present tonight that will enable you to receive a fair hearing, then you have the right to defer the hearing until another meeting. However, you may defer the hearing for this reason only once in any 12-month period. Deferral requests are granted at the sole discretion of the Board. The applicant may also withdraw his or her application at any time prior to a vote to approve or deny the application provided that the applicant has not withdrawn a substantially similar application within the previous 12 months. Any person, or persons, who do not agree with the decision of the Board shall have 30 days to petition Stafford County Circuit Court to review our decision. Also, be aware that the Board will not hear any denied application for a Variance or Special Exception that is substantially the same request for at least one year from the date of our decision. I will now ask that anyone who has a cell phone, or other electronic device to please silence it. Thank you. It is the custom of this Board to require that any person who wishes to speak before this Board be administered an oath. Therefore, I ask that anyone who wishes to speak tonight to stand and raise your right hand. Do you hereby swear or affirm that all testimony before this Board shall be nothing but the truth?

Members of the audience: Yes.

Mr. Grimes: Thank you, you may be seated. The Chair asks that when you come down to the podium to speak, please give your first name and address clearly into the microphone so our recording secretary can have an accurate record of all the speakers. Also, please sign the form on the table at the rear of the room. Thank you. Are there any changes or additions to the advertised agenda?

Mrs. Musante: There are no changes.

Mr. Grimes: Yes Ms. Brown.

Ms. Brown: I would like to make a motion to change the order of the agenda tonight. I would like to move the election of officers, the first item, down to the bottom. We have a large turnout of the community and I would like to get to the issue at hand tonight if there's...

Dr. Larson: I will second that.

Mr. Grimes: We have a motion to move the election of officers to the end of the meeting. All in favor say aye.

Mr. Apicella: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mr. Kim: Aye.

Dr. Larson:

Ms. Stefl: Aye.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Grimes: Aye. So moved. Alright. So, before we hear the first case, does any Board member wish to make any declaration or statement concerning any case to be heard before the Board tonight? Ms. Brown?

DECLARATIONS OF DISQUALIFICATION

Ms. Brown: Yes, I would just like to state that Mr. Leming, the agent for the appellants is... lives in my district and his wife is my School Board Representative. And I did visit the property last Monday, which was February 19th, I believe. I drove by around noon, I did not get out of the car or speak to anyone.

Mr. Grimes: Any other Board members have any declarations?

Dr. Ackermann: Uhhh...

Mr. Grimes: Yes sir.

Dr. Ackermann: I visited the property and also maybe like several of the others have driven down 95 to see that thing.

Mr. Grimes: Any other members have any declarations? Nope. Hearing none, I will now ask the secretary to read the first case.

PUBLIC HEARINGS

1. A01-18/18152145 - H. Clark Leming, Agent for Thomas Jones and Patricia Joshi - Per Stafford County Code, Sec. 28-349, "Appeals to board generally," the applicant is appealing contents in a voicemail dated December 5, 2017, regarding the status of a zoning complaint on Tax Map Parcel No. 45-104F. The property is zoned R-1, Suburban Residential, located at 8 Beagle Road.

Ms. Musante: Case A01-18/18152145, H. Clark Leming, Agent for Thomas Jones and Patricia Joshi. Per Stafford County Code, Sec. 28-349, "Appeals to the board generally," the applicant is appealing contents in a voicemail dated December 5, 2017, regarding the status of a zoning complaint on Tax Map Parcel No. 45-104F. The property is zoned R-1, Suburban Residential, located at 8 Beagle Road. You have the application, owner's consent form, voice mail dated December 5, 2017, copies of Stafford County Code, Section 28-349 and Section 28-25. The Property is zoned R-1, Suburban Residential and is located at 8 Beagle Road and is occupied by a detached single-family dwelling. An application was submitted to erect a flag pole on the property. The application was submitted and issued on October 3, 2013. The flag pole was approved as 80 feet in height. Inspections were conducted by the Building Inspectors on March 16, 2014, for the footing of the pole and a final inspection was conducted on May 27, 2014. A complaint was received on September 26, 2017, stating that the County had failed to enforce its zoning ordinance by allowing a sign to be considered a flag and therefore permitting noncompliance with the size and height regulations for a sign in the R-1, Suburban Residential Zoning District, Attachment number 1. An inspection was conducted. The zoning ordinance was reviewed. A zoning technician conducted a routine inspection. The inspection included a visual observation and taking pictures of the alleged violation. This inspection occurred on October 6, 2017. The photos were reviewed and verified and a verification was made that a flag pole with a flag was present. Verification was made that a building permit was applied for, approved and issued on October 3, 2013. Upon observing the conditions on the property and after review of the zoning ordinance, staff concluded that a violation was not observed. The applicants, Thomas Jones and Patricia Joshi, through their agent, H.

***Board of Zoning Appeals Minutes
February 27, 2018***

Clark Leming, are appealing a determination and decision that certain property zoned R-1, Suburban Residential and shown on the records of the Commissioner of Revenue as Tax Map Parcel No. 45-10F is not in violation of the county R-1, Suburban Residential Zoning District Regulations. They cite Stafford County Code Section 28-349 "Appeals to the board generally," as the code section that allows for this action. The applicants state that the flag and the flag pole should be regulated as a sign per the sign definitions of both the 2013 and the 2017 zoning ordinance. Since the complaint was submitted in 2017, the current zoning ordinance shall be the ordinance in force. The definition of a sign in the current zoning ordinance states the following: Sign. Any object, device, display, or structure, or part thereof, visible from a public place, a public right-of-way, any parking area or right-of-way open to use by the general public, or any navigable body of water which is designed and used to attract attention to an institution, organization, business, product, service, event, or location by any means involving words, letters, figures, designs, symbols, fixtures, logos, colors, illumination, or projected images. The term does not include public art, architectural elements incorporated into the style or function of a building, or flags of any nation, state, or other geopolitical entity not related to a commercial business, product, or service. The term "sign" also does not include the display of merchandise for sale on the site of the display. The applicants believe the flag should be considered a sign since it is visible from a public right-of-way and is designed to attract attention by design, symbols, and logos to an organization known as the Virginia Flaggers, LLC. Furthermore, the applicants believe that this sign does not fall under the specific exclusion within the definition of flags of any nation, state, or other geopolitical entity. They state that the Confederacy was never recognized as a nation or state that ceased existence as a political entity years ago. Since the flag was to be considered a sign, the pole it was attached to was too tall and the flag itself exceeded the size of a sign permitted in the R-1, Suburban Residential Zoning District. Staff concluded that the definition of "sign" in Section 28-25, "Definition of specific terms" does not include "flags of any nation, state, or other geopolitical entity not related to a commercial business, product, or service". The definition does not limit the existence of the geopolitical entity. There is no mention of whether it is a current entity or one from times past. The definition further specifies that "... flags... not related to a business, product or service" are not included in the term sign. The Virginia Flaggers are a group of citizens in the Commonwealth who stand for certain ideals. The flag that was observed on the property during the inspection was a flag of a geopolitical entity, not related to a business, product, or service, is regulated as a flag, and does not fall within the definition of a sign and the regulations thereof which include size and height of a sign. And Mr. Chairman, you have Jeff Harvey here tonight, which is the Director of Planning and Zoning to answer any questions.

Mr. Grimes: Great. Thank you very much. Do we have questions for staff? I know that I have several.

Mr. Apicella: Mr. Chairman.

Mr. Grimes: Yes.

Mr. Apicella: I have several questions for our BZA Attorney.

Mr. Grimes: That would be appropriate now.

Mr. Apicella: Mr. McRoberts, what may be appealed to a BZA and under what Virginia Code Sections?

Mr. McRoberts: Virginia Code Section 15.2-2311.A, provides for an appeal to the Board of Zoning Appeals of any order, requirement, decision or determination of a Zoning Administrator or Administrator in the enforcement or Administration of Zoning.

Mr. Apicella: And those items are decisions, determinations, orders, requirement...

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. McRoberts: Yes, order requirement decision determination. It's actually a legal term of our... it doesn't really mean every decision of the Zoning Administrator. To take that to an extreme, it could mean just about anything a Zoning Administrator signs or decided, could be potentially appealed to the BZA and that is certainly not the scope of what the Virginia Supreme Court has held can be appealed. It has to be something of a certain order, it has to... it doesn't have to be in writing, but it has to be a certain kind of decision that affects a person's property or contractual rights or has some substantial meaning. It is not just interpretation of the Ordinance, it's not just an advisory opinion, it's not just simply you know, here's what the code means. The Supreme Court has also held that it to be in order requirement decision determination it has to give an explanation for why the decision was made. There are a number of different things the Supreme Court has held an order requirement decision determination must be in order to rise to the level of something that can be appealed to the BZA.

Mr. Apicella: And that same code section that you referenced, it identifies the requirements that must be triggered for an appeal to come to a BZA?

Mr. McRoberts: Right. In addition to there being an order requirement decision determination the appellant, the person that tries to appeal it, has to be aggrieved. And that is the term they use. Aggrieved doesn't just mean they don't like it, it has to be a certain legal interest in the order requirement decision determination. It has to impact their personal or property rights. They have to have substantial stake in the outcome of the proceeding. They have to do a number of things, if it doesn't involve their property or they are not the government involved in the Zoning Ordinance and they don't own property right next door, the Supreme Court has said that they have to prove really two things. One is that they own property in the proximity or vicinity of the property at issue, that's the first step. You might ask what is the vicinity. That is obviously a variable term. I will say that I have seen cases where that can go from 500 feet to 2,000 feet to even a mile or two. It really depends upon the types of physical harms and impacts that are alleged to be found in the next step really. So I would say it really depends but I would say close enough to have some particularized impact on that person and that person's rights, that is different from the public in general. And then the second step is assuming that they do own property in the vicinity or in the close proximity to the property, then they have to show some particularized harm. They have to show some substantial impact on their rights that is different from the public in general. So, whatever the harms that are alleged to be occurred, that caused them to be aggrieved, they have to show that those particularized harms are different from the types of harms that would accrue to the general public or to a wider swath of the public. But instead it really accrues to them because of their rights, their property. I hope that answers your question.

Mr. Apicella: So from what I think I heard you say, there's a general legal principle that person's appealing a matter before a judicial body or quasi-judicial body like the BZA, they must have standing for their case to be adjudicated by that body.

Mr. McRoberts: They have to be aggrieved and that gives them standing. Standing is what gives them the ability to file an application over which this BZA has jurisdiction. If it's an order requirement decision determination and they appeal it being aggrieved, then those two things together will give the BZA jurisdiction over the matter.

Mr. Apicella: And are there any other State Code Sections that waive this threshold requirement for an applicant to have standing (inaudible).

Mr. McRoberts: No, it's not only been in the Code a really, really long time, it's also been affirmed time and time again by the Virginia Supreme Court. And the standards are fairly well settled by the Virginia Supreme Court.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: So are there any foundational cases that further clarify what is required for an applicant to be considered aggrieved?

Mr. McRoberts: On of the older ones that seems to be cited a whole lot is Virginia Beach Beautification Commission versus Virginia Beach BZA. That case really stands for the proposition that you have to own property or have some right that is different from the public in general, that has been cited a lot. One of the more recent cases is Friends of the Rappahannock versus Caroline County. In that case they really were clear that what Virginia Beach Beautification had handed down in the BZA context also applies in the declaratory judgment context, and they are really the same standard. They also were very clear that it was a two-step analysis. I they... the folks that said they were aggrieved owned property in the vicinity and the proximity, that that was the first step. And if they satisfied that step then there would be analysis as to whether that property or those interests in the vicinity were then impacted to a sufficient level for them to be aggrieved. And that was in the Friends of the Rappahannock case that was just a couple of years ago.

Mr. Apicella: So, again what I think I hear you saying is in all cases regarding appeals to the BZA there's certain principles and a multi-part test that a person must meet to qualify for standing.

Mr. McRoberts: Correct.

Mr. Apicella: And so that overarching principle is that a person seeking the appeal must be aggrieved.

Mr. McRoberts: Yes.

Mr. Apicella: And to qualify as an aggrieved person, that applicant must essentially be the owner of the property directly impacted by the ORDD or they must be someone who has a direct economic interest in the subject parcel, or they must be a representative of the jurisdiction involved in the case. That is the first prong of the test.

Mr. McRoberts: Well those folks would actually be, I guess, the folks that would sort of have standing sort of automatically, because they own the property at issue.

Mr. Apicella: Right.

Mr. McRoberts: They are the government involved, like I said in the beginning. Without that kind of a showing, then that is where you kick into the "do they own property in the vicinity"?

Mr. Apicella: So that next... so if they don't fall into that first class, then they must either be the owner of the property, an occupant of the property, an occupant of nearby parcels or have an economic interest or property interest in adjacent or neighboring parcels.

Mr. McRoberts: Or they can be in the vicinity of the property as long as they can allege the type of impacts on them that cause them to be aggrieved differently than the general public.

Mr. Apicella: Okay so if a person doesn't fall into that... again that second tier, then that kind of ends that multi-part test. They don't have standing.

Mr. McRoberts: Well the Supreme Court describes it as a two-part test and so I... if you fail either part of the test then you are not aggrieved and you do not have standing and the BZA has no jurisdiction over your appeal.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: And just to further clarify, if again they don't have a property or an economic interest then that... then they would have to allege specific facts demonstrating particularized harm to some personal or property right different from that experienced by the public generally.

Mr. McRoberts: I think that is an accurate statement.

Mr. Apicella: Okay. And this identified harm, that can't be speculative? it can't be a potential harm?

Mr. McRoberts: Well it doesn't have to have accrued yet, but it can't be speculative. It can't be the kind of thing; well I think that maybe someday something might happen. They have to allege specific harms that are reasonably likely or are already occurring. In this case the use in question is already there.

Mr. Apicella: And the general objections to a sit... they can't be general objections to a situation or set of circumstances? That is not sufficient?

Mr. McRoberts: No, like I said at the beginning aggrieved, you know, in a generalized sense might be seemed to be just I really don't like it. But that is not what the legal term aggrieved according to the Supreme Court.

Mr. Apicella: So for cases coming before the BZA, does the applicant have the obligation to demonstrate in their initial filing that they meet the standards to be considered an aggrieved party?

Mr. McRoberts: You know, I would think so. I would think that in the initial filing they should state exactly why they are aggrieved and how they are aggrieved. Certainly they can come forward at a meeting like this and demonstrate it all, so I would imagine.

Mr. Apicella: Okay, and from your research is Stafford's Ordinances on appeals to the BZA in conformance with the State Code?

Mr. McRoberts: I believe they are.

Mr. Apicella: So, just kind of following that same logic trail. If a BZA doesn't have jurisdiction to hear an appeal based on the relevant statutes and the County Ordinances, would it be legally permissible for a Board to adjudicate the specific claims and issues raised by the appellant anyhow?

Mr. McRoberts: I don't think so. I think that standing is a requirement to get to the jurisdiction of the BZA and as the Chairman stated at the beginning this is a quasi-judicial body that is hearing an appeal and is trying to interpret the law and if there is no standing or the matter is not an order requirement decision determination then this body has no jurisdiction over it. And I think just like a court you would be expected to dismiss the matter without considering it further. Just like a trial court is not required to go to trial on something they don't have jurisdiction over.

Mr. Apicella: And to take it to its next logical step, if the BZA took up a case where it lacked jurisdiction, would that be good cause for the property owner who is adversely affected or impacted by that BZA decision to get it overturned by a court?

Mr. McRoberts: Well anyone who is aggrieved by a decision of this BZA, same standard aggrieved, within 30 days can appeal the decision to the Circuit Court. So you know, if you were to make a

***Board of Zoning Appeals Minutes
February 27, 2018***

decision either on the merits or on the jurisdictional issues or both and there is someone who could meet the test of being aggrieved, they could potentially appeal it to Circuit Court.

Mr. Apicella: Okay, so just to kind of summarize what I think I heard you say, and there was a lot. Unless and until an applicant proves that they qualify as an aggrieved party, which is a standard to achieve standing in a BZA appeals case, the Board doesn't have jurisdiction to hear that case and it may not further consider the merits of that case?

Mr. McRoberts: I believe so, yes.

Mr. Apicella: Alright. Thank you.

Dr. Ackermann: May I ask the attorney a question?

Mr. Grimes: Yes, Dr. Ackermann.

Dr. Ackermann: So in the test you say that there must be some personal or property right. So what would be an example of a personal right?

Mr. McRoberts: Owning property in the vicinity, for example. That's it.

Dr. Ackermann: And how does that differ from a property right?

Mr. McRoberts: Well that is a property right. Or a personal right might be like a contract to purchase or something else, something that gives them a stake in the property in the area or an ownership interest or some contractual right that is being impacted by the Zoning Administrators action.

Dr. Ackermann: Thank you.

Dr. Larson: Mr. Chairman?

Mr. Grimes: Yes sir.

Dr. Larson: Yes, I would like to clarify something Mr. McRoberts has been doing a lot of the talking here and has been referred to as the BZAs Attorney. I just wanted to clarify for the audience he is not an Attorney of the BZA in the classic sense that you think that an attorney is. He is a research attorney. So we... when we have questions that pertain to the law or case precedent, we can ask Mr. McRoberts questions and he can give us the answers. So he is testifying based on some research he has done. Thank you.

Mr. Grimes: Any further questions for staff?

Ms. Stefl: I do have one question.

Mr. Grimes: Yes.

Ms. Stefl: One of the things, I guess I went and looked, but did the... does the staff, I didn't see in my report and maybe I'm... I overlooked it. But what is the distance between the applicant and the foresaid property? Was that in here? Because I measured it. So, I didn't know if the staff had that.

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Musante: I do not have that information.

Ms. Stefl: Okay, well I used the Commissioner of the Revenues or you know, the map that is available to the public and going from the actual flag pole to the first applicant of Ms. Joshi's, that is 11,593.7 yards or 6.59 miles. And then of Mr. Jones' business, which he listed here, it's 16,186.1 yards from the flag or 9.19 miles. Thank you.

Mr. Grimes: I have a couple questions for staff. When you received the complaint, what form did it come to the County in?

Ms. Musante: Mr. Harvey is going to be answering those questions.

Mr. Grimes: That is fine. Mr. Harvey.

Mr. Harvey: Good evening Mr. Chairman. The form that...

Mr. Grimes: Could you state your name and address for the record?

Mr. Harvey: Yes. My name is Jeffrey A. Harvey, I am the Director of Planning and Zoning here for Stafford County Government. Our address here is 1300 Courthouse Road Stafford, Virginia.

Mr. Grimes: Great, thank you. So the question that I have is what form did the complaint come to the County.

Mr. Harvey: The initial form came in as an email with attachments of the letter and also a petition that was later followed up with hard copy.

Mr. Grimes: And you responded to this complaint via what method?

Mr. Harvey: The response was via a telephone conversation, one with Patricia Healey and two a voice mail message left on Patricia Joshi's telephone answering service.

Mr. Grimes: In the staff report you note that the flag represents a geopolitical entity. How did the County arrive at that conclusion?

Mr. Harvey: Well Mr. Chairman, after discussion with staff and the County Attorney's Office, we concluded that this flag, which represents the Confederate Battle Flag, was a representation of the United States of the Confederacy and which was at one time a geopolitical entity in the United States.

Mr. Grimes: Thank you. That's the questions that I... all I have for you. Does anybody else have any questions for staff?

Dr. Larson: Just one Mr. Chairman.

Mr. Grimes: Yes sir.

Dr. Larson: So between when you got the complaint and when you made the phone call responding, what did the County do? What actions took place?

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Harvey: Mr. Larson, it's described in the staff report. As the staff report indicates an inspector and visually observed the site, took pictures, documented what was seen on the property. At that point in time it was brought back to the office. There was additional research into the definitions in the Ordinance so see whether in deed we felt it was a violation or not. There was consultation with the Zoning Administrator as well as the County Attorney's Office. And then staff made its conclusion.

Dr. Larson: Thank you.

Mr. Grimes: Thank you sir.

Mr. Apicella: Mr. Chairman, I just have one more question. I am sorry. In the appellant's package that they submitted there is a transcript of what was left on the voicemail receiver. I just wanted to ask you is that an accurate and complete representation of what you said?

Mr. Harvey: Mr. Apicella, I don't have an actual copy of what I said, but what I read in the transcript it looks correct. The only thing I question is that the telephone number listed is not my telephone number and at the time I didn't... when I saw the transcript I didn't know whose phone number that was. I have since researched it, it is a County phone number and maybe I made an error when I spoke but that would be unusual.

Mr. Apicella: Thank you.

Mr. Grimes: Thank you sir. Mr. McRoberts, I have just a couple questions for you if you don't mind. Under appeals, we talk about Section 15.2-2309, is the determination of the Administrator or Officer presumed to be correct?

Mr. McRoberts: I don't think there is a presumption of correctness for the Zoning Administrators determination. I think that the BZA gets to determine on their own reading of the Zoning Ordinance and the facts before them, as to what they think the right answer is. And if they believe the Zoning Administrator is incorrect they can reverse the Zoning Administrator, they can modify the Zoning determination. But if they agree that the Zoning Administrator is correct, then they can affirm the Zoning Administrator.

Mr. Grimes: And under that same section, when there is an appellant filing an appeal, the burden of proof is on the appellant to prove by preponderance of evidence, correct?

Mr. McRoberts: Yes, the burden is on the appellant to carry their burdens and to prove their standing and to prove that they should get the relief they have requested.

Mr. Grimes: Okay, thank you. Any other questions for staff? Alright, hearing none, will the applicant or his or her representative please come forward and present their case?

Mr. Leming: Good evening Mr. Chairman and members of the Board of Zoning Appeals. My name is Clark Leming. I am here on behalf of the appellants here, Patty Joshi and Mr. Thomas Jones. Before I begin my presentation Mr. Chairman, I do have a few more exhibits that I'll be discussing that I would appreciate the BZA receiving and some of these are (inaudible, not talking into microphone) Melody with this. That goes out, that's Melody's and hold off on that for just a minute (inaudible, not talking into microphone). Now Mr. Chairman I want to be as responsive as can to some of the questions and comments. So please tell me what is helpful and how you wish to proceed. I am prepared this evening to address the issue of whether or not this constitutes a determination and some of what I just handed out

***Board of Zoning Appeals Minutes
February 27, 2018***

goes to that point. I am prepared to address the issue of standing and I am prepared to address the issue on its merits. So you'll have to... I would appreciate some guidance. Some of you had questions. Mr. Chairman you had a questions that really went to the substantive issue. Mr. Apicella's questions all went to the first two issues. So I am able to proceed anyway that you want me to proceed and uhmm... but give me some guidance on that because what I don't want to do is to get into matters that you may not need to hear or that you want to hear... or in the case where you want hear certain things before I get into the substance of this.

Mr. Grimes: Well Mr. Leming, I believe that since you are representing the appellant, it is up to you to decide how you would like to respond to the questions...

Mr. Leming: Alright.

Mr. Grimes: ... and comments that you have heard and present your case appropriately.

Mr. Leming: Then let's start with the issue of whether or not the complaint constitutes a determination under Virginia law. The first thing I would like to bring to your attention is Stafford County Ordinance Section 28-316. And I will tell you that this was an ordinance section that I was unfamiliar with until recently. But what this section says, and I have copies of this for you. Whenever a violation of this chapter occurs or is alleged to have occurred, any person may file a written complaint with the Zoning Administrator or his designee. Such complaint shall state fully the causes and basis thereof and shall be filed with the Zoning Administrator or his designee. The Zoning Administrator or his designee shall properly record the complaint and investigate and take action thereof. Now, what... in addition what I have handed out to you, you are aware that there is a transcript of Mr. Harvey's statement that was made both to Ms. Healy and to Ms. Joshi. Now Ms. Joshi, one of the complaints here has the recorded statement that was left with her with Mr. Harvey's voice. So we are happy to play that for you it that would be helpful or if there is any doubt as to whether or not this is what Mr. Harvey said. Now what I would do is to call your attention to the language that Mr. Harvey utilizes. He specifically says that the County... the staff have determined that there is no zoning violation. Now, I heard the discussion about well can anything be appealed, any decision. Well the statute, state law, is quite broad. It basically says any order, requirement, decision, or determination. Mr. Harvey utilizes the word determination. So we have an ordinance that gives the general public the right to play private attorney generals and file these complaints. Now in addition to that, I have handed to you a transcript. A transcript from Melody Musante, a witness in a recent case which was the Newton case, which this body heard. And what is significant about that is that Ms. Musante explains that Stafford is a complaint oriented zoning jurisdiction. The way that the Zoning Ordinance is enforced, that is violations of the Zoning Ordinance in Stafford County is through the complaint process. And of course we have an ordinance that indicates exactly that. Now Ms. Musante says (inaudible) the question, how does the County enforce the Zoning Ordinance. This is her sworn testimony. We are complaint based only, so we will receive a complaint on a property, we do some computer research, go out and look at the property, inspection, take photos, come back, look at the Zoning Ordinance. Basically what Mr. Harvey told you. But follow up investigator question, the investigator comes back to the office examines the facts he has collected and determines whether or not there is a zoning violation. Yes, and to do that he uses the Zoning Ordinance. Yes. And he applies the facts that he's gathered to that ordinance, yes. And then the investigator makes a decision as to whether or not there's a violation. Now some of you may recall the Newton case, when what was the determination in that case were Hansen notes. And there were those... in fact the County argued that those were not determinations. Well the Circuit Court of Stafford County said yes they were. Because of this process and this is the process used in Stafford County. There is no... none of the surrounding jurisdictions indecently have an ordinance like this. You know this is an ordinance that is unique as far as we can determine to Stafford County, the complaint based ordinance. So for those

*Board of Zoning Appeals Minutes
February 27, 2018*

reasons, I don't believe there is much question that this was a Zoning determination. It was a complaint authorized by the county ordinance, requesting a determination and application of facts to the Zoning Ordinance and although Mr. Harvey only came back with a telephone response to the complaint, the fact that it is oral, I think as Mr. McRoberts has already indicated, is immaterial. In fact there is a Virginia Supreme Court case where the determination by the Zoning Administrator was made a hearing, and still counted as a determination. So, for those reasons and because of the peculiar nature of Stafford County apparently, because this is a complaint jurisdiction and because the process that this county goes through and has consistently gone through for a long period of time to enforce its Zoning Ordinance, this was a determination. It was the application of an ordinance by an Administrative Official, I assume Ms. Blackburn, the Zoning Administrator was involved too. To a particular set of facts it's a determination. Now with regard to standing, standing is I concede, somewhat more complicated. The precedent that you have heard about however goes to the appeal from a BZA decision to a Circuit Court and often, often in fact in every case that I am aware of it's an appeal of a discretionary decision that has been made. That was the case with Friends of the Rappahannock. This was a discretionary decision that was made and the Circuit Court decided that there wasn't the right to appeal to the Circuit Court. Now Virginia Beautification puts it in a BZA context, but I believe Mr. McRoberts will correct me if I am wrong, but I believe the issue there was a variance. Now Mr. Chairman, I already see the yellow light coming on so I'm... at some point I am going to ask you for more time. But let me address the issues of standing. The documents, the other documents that I handed out to you are the... first of all there is a statement from both Ms. Joshi and from Mr. Jones explaining what their particular situation is. And why it is that this flag, they believe is... treats them... they perceive this in a unique way that's different from other persons in the general population. Now with regard to the proximity and what Ms. Stefl indicated is correct, they don't live near the property. But both of them have to drive up and down the interstate everyday back and forth by this flag. The point, I think, is that your Zoning Ordinance on signage specifically... the definition of the Zoning Ordinance talks about the signage that is visible from a right-of-way, visible to the general public from the right-of-way. Now, in my view, this not... this is not a typical zoning case but I believe that the Stafford County Ordinance establishes the proximity... handles the proximity to the issue to the extent that it is even applicable here. The definition of sign is exactly what does that. Because the County has the ability to regulate what people can see from the right-of-way, and of course it's there for that particular purpose. That's why it's in this location so people have to look at it. Now, in addition to that you have language in your ordinance specifically, this is the 2017 Ordinance, which I think we all agree is applicable here, indicating that the purpose of the ordinance is this, to regulate size, color and so forth and so on everything, thus ensuring the protection of the property values, the character of the various neighborhoods, the creation of a convenient attractive and harmonious community, protection against the destruction or encroachment and so forth, and specifically the regulations are intended to promote signs that are compatible with the use of the property to which they are appurtenant and not... and are not distracting to motorist. So what you have here is a flag, a symbol that has become incredibly controversial in our society and highly questionable as to the intent that is placed there for all motorists to see. And the specific intent of the ordinance is to protect citizens, motorists, from this kind of signage. Now of course that gets to the whole geopolitical issue at the substance of this. But, in summary on standing, first of all the fact that you have an ordinance that gives the individuals the right to file a complaints, I think also confers the standing on them to take it to the next level. They have a right to file a complaint to allege there is a zoning violation but not to ask the Board of Zoning Appeals to look at it. Then we have the sign ordinance and the specific reference to the proximity to the right-of-way and the protection of the motorists. Now, both Mr. Jones and Ms. Joshi have given you statements indicating what it is that they do, why this is a matter of great sensitivity for them, how many times a day they have to travel past this and what this symbol means to them personally, that the County has permitted at this location on the property. Now to the extent that the standard in Friends of the Rappahannock applies the two part test, I have addressed the proximity issue. The information that you have before you from the complainants, I think

*Board of Zoning Appeals Minutes
February 27, 2018*

specifically indicates why it is that they are not like the general population. I invite you to read that, they may speak to that during the public hearing. Mr. Jones specifically, it think it is more obvious is his case, but Ms. Joshi is from an mixed marriage, inter-racial marriage and has particular sensitivities with regard to this as well. Now the other thing that would like to do and then I will be quiet on this subject, these are articles that talk about the specific manner...

Mr. Grimes: Mr. Leming, I am going to give you another six minutes.

Mr. Leming: Okay, thank you. And I will adhere to that (inaudible, not talking into microphone).

Ms. Brown: (inaudible, not talking into microphone).

Mr. Grimes: I think that the Chairman has discretion to grant the speaker additional time and I will set that at six minutes at this point.

Mr. Leming: Now, what I have asked Mr. Musante to hand out here are various discussions from all sides of the political spectrum about the Confederate Flag and what it stands for. This I think also goes to standing because this is, this is how the Confederate Flag is perceived today. Now I hasten to point out that the flag that we are looking at, is the Confederate Battle Flag, it is not the official flag of the Confederacy, it was the flag of the Army of the Potomac. Now to the extent that the Army of the Potomac was a geopolitical entity, I guess that counts for something. But these articles go to the standing issue and the disintegration, the way the flag has evolved historically. Now there is one more handout, and I appreciate your tolerance Mr. Chairman. I would like to be sure that the record is intact here. This is an article that actually discusses the specific Confederate Flags, when they were adopted, what each of them looks like and why this particular battle flag is not the authentic flag of the Confederacy. It was not in any point in time and was actually adopted much later. And I think that enhances the standing argument because this is not a historical flag that we are looking at. This is a flag that has come to mean many different things and poses a threat and fact, poses a threat to actual safety, as we have seen in this state. Finally, Mr. Chairman I would like to share with you the information that I have found on what a geopolitical entity is. And I would like this for the record, this doesn't directly address the issue of standing, but that is the definition we found. I would point out that a geopolitical entity under the County's interpretation here would include past, not current Nazi Germany, the Palestinian Liberation Army and the Khmr Rouge. Current other geopolitical entities would include Isis, the Taliban and Al-Qaeda. I don't think that's what's intended and I think these definitions are much more consistent with the way that provision in the ordnance needs to be interpreted. But regardless, it doesn't matter. It's not the flag it's not the flag of a geopolitical entity. So it cannot be utilized, I think, for that purpose. Alright Mr. Chairman, I think that covers what... oh, the other final point, and you have other exhibits that I handed out earlier, you have an index to them. I invite you particularly to look at the way the Flaggers, their reputation, who it is that they march with. We have a specific photograph to that affect. We also have a quote from the property owner, a Facebook quote from the property owner. I think that that's the way this flag is being utilized. It is used to intimidate and the complainants are super sensitive to that intimidation and that's why I believe they have a standing Mr. Chairman. I will be happy to answer any questions that you may have. I believe that the complainants may have other points to make with regard to their standing when you have a public hearing.

Mr. Grimes: Alright, thank you very much.

Dr. Ackermann: Could I ask one question>

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Grimes: Absolutely.

Dr. Ackermann: So Mr. Leming we've heard and I have read before about the issue of standing, about proximity. Can you make your argument again in about 30 seconds...

Mr. Leming: Sure.

Dr. Ackermann: ... about why that is?

Mr. Leming: Yes, I think that the County has defined proximity here for you through its Zoning Ordinance because the definition of sign specifically covers what is visible from the right-of-way. From the Interstate in this case, in addition to that, in the preamble to your sign ordinance what is specifically mentioned is the protection of doing... having an ordinance that avoids distracting drivers, motorists. This is a distracting flag, these people have to drive by it every single day. It brings the emotions that are associated with these flags back to them every time that they drive by it. So it doesn't... and it's not a legitimate flag. But the standing issue Dr. Ackermann, really comes down to the County's own ordinance. I don't believe there is an issue as to these people being different from the general population but the proximity issue, I think is defined by the County's ordinance. And it's a sign, so it's mobile. It's something that is open to anyone to see and what I add to that is simply that we have an ordinance in Stafford County that that lets anybody complain about the Zoning Ordinance and in fact that's how the County fights zoning violations.

Mr. Kim: Can I have a question Mr. Chairman?

Mr. Grimes: Yes, Mr. Kim.

Mr. Kim: Mr. Leming you gave us a definition of sign, what would your definition of a flag be?

Mr. Leming: Well your definition of sign defines that. You know your definition of sign in the current ordinance and I assume that you... it's cited in your...

Mr. Kim: It is.

Mr. Leming: ... package there. So I don't disagree with any of that. You know the only point I... I give the County staff a lot of credit because they looked at the Zoning Ordinance. They interpreted this as an issue of Zoning Ordinance, not freedom of speech or anything like that. And the only respect in which we differ is the concept of geopolitical entity. What is a geopolitical entity? Now, I have given you definitions what I believe what a geopolitical entity is number one. Number two, the... wherever you want to draw the line you are creating a precedent here. So, what are the other, as the staff would say, past geopolitical entities that you want to recognize? A Nazi flag? Nazi Germany was a political entity in the same way that the Confederacy was, if that were a Nazi flag would it be any different? It's a geopolitical entity? If it were a present geopolitical entity, if you had a sign there for the Taliban or Al-Qaeda? I don't think there any question; in fact we found some literature suggesting that. They are a geopolitical entity, so where do you want to go with the definition? The definitions that I have given to you really have much more to do with academia than pointing to a specific past entity and saying whether or not its geopolitical or not. The Confederacy was not recognized by any major county anywhere. And of course the United States never recognized the Confederacy. So what was the Confederacy? It was an effort to succeed from the Union, it failed. It was 130 years ago, more than that now. So what was the Confederacy and why would you legitimize whatever it was at this point by recognizing it as a geopolitical entity particularly when the flag that is being utilized is not even the

Board of Zoning Appeals Minutes
February 27, 2018

official Confederate Flag. But one that is associated with many other things, like the Klu Klux Klan, like the march in Charlottesville. So, is that what you want in the County? I would also point out to you, we got in touch with Dr. Steven Fuller, who some of you all are familiar with. And his question about this was why would you want this at your southern gateway. You know people coming into the County it's the first thing that they see, what does that do to your economic opportunities?

Mr. Kim: I actually agree with a lot of what you are saying, but the issue that I have is I don't think this is in the scope of the BZA and I know we've had a lot questions before we started the hearing. And you keep bringing up the definition of signs, so I wanted to know the definition of flag, and it's a piece of cloth or similar material, typically oblong or square attached by one edge to a pole or a rope and used as symbol... I guess it's kind of difficult. So you know I am just going to skip the question. I will be fine.

Mr. Grimes: Ms. Brown you had a question?

Mr. Leming: Mr. Kim, hang on just a minute. The flag definition is not what is significant, I think. It's the definition... it's the exemption for flags in the sign portion of the ordinance. Yes, it's physically a flag but only certain flags are not signs, those that are exempted under your ordinance.

Mr. Kim: (Inaudible, not talking into microphone), say that again.

Mr. Leming: Only certain flags are not signs under your ordinance. There is a specific exemption under your definition of sign. What is exempted is the American Flag, the Flag of any State, the Flag of any Nation, which I have to read a current nation and/or other geopolitical entity. Now that's what the staff based their determination on. They called the Confederacy a past geopolitical entity, and so they say it's accepted so therefore it's not a sign and the County can't regulate it as a sign. We say it's not a geopolitical entity, it can't be considered that and even if it is, even if there's for that what you... the problem you have is it's not the flag of that geopolitical entity. It's something else altogether and then you have the problem of how the flag, this particular flag has come to be used. So we don't think it fits that definition. So if you get to that point that's our argument on substance. But I fully recognize the BZA has to get to a point where you decide this is a determination. I don't think there is any question about that. And you have to decide that these people have standing in this unusual context. That the proximity issue is determined by the county's sign ordinance, because it defines proximity for you, and who has a right to say something about that, and the ordinance says anybody can file a complaint that thinks there is a Zoning violation. So that's the way you enforce things here. I don't think it takes much imagination and I think you've got sufficient evidence and statements on your part to understand that these two complainants see things differently from the rest of the general population.

Mr. Grimes: Alright Mr. Leming, Ms. Brown has at least one question for you.

Ms. Brown: I think I might have two. Mr. Leming, I was hoping... I mean I was very diligent that I read all the materials that you sent us, which was quite a lot.

Mr. Leming: I am impressed.

Ms. Brown: I am disappointed that I am getting 40, and that is what I counted 40 pages tonight to read right now while you are talking while I want to listen to what you are saying. There is a statement up here we have, it's called... it says BZA statement and has no one's name on it and it doesn't say who they are. And we didn't have enough for all of us, all the handouts that you had.

Mr. Leming: (Inaudible, not talking into microphone).

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown: This one right here, it just says BZA statement. It's one of the complainants, I am assuming this is Mr. Thomas Jones.

Mr. Leming: Yes, (inaudible, not talking into microphone).

Ms. Brown: Okay.

Mr. Leming: (Inaudible, not talking into microphone) should have a statement from Mr. Jones and a statement from Ms. Joshi.

Mr. Grimes: Yes, the challenge is there is no name on it.

Dr. Larson: But those... we just got those, just now...

Mr. Grimes: That's correct.

Dr. Larson: ... while we were trying to listen to your testimony.

Ms. Brown: Well, my other question is...

Mr. Leming: They can testify (inaudible).

Ms. Brown: Well are you speaking for them right now? So I should ask you the question?

Mr. Leming: You... I... well do you have a question for the complainant?

Ms. Brown: I had a question for Mr. Jones, which I am not sure... is he here tonight?

Mr. Leming: (Inaudible, not talking into microphone) okay, Mr. Jones would like you to ask me.

Ms. Brown: Okay, great. I would like to know what Mr. Jones' home address is.

Mr. Leming: Yes Mr. Jones lives in Spotsylvania County.

Ms. Brown: Spotsylvania?

Mr. Leming: And he drives back and forth every day to his office which is on Garrisonville Road.

Ms. Brown: Okay.

Mr. Leming: And he's... and goes back several times to the city and to tend to his clients during the course of the day.

Ms. Brown: And this is his statement?

Mr. Leming: It is.

Ms. Brown: Okay, that's what I had. Thank you.

Mr. Leming: Yes.

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Stefl: I have a question of the applicant.

Mr. Grimes: Yes. Ms. Stefl.

Ms. Stefl: You stated in your statements (inaudible, not talking into microphone) driving up and down 95 distinguish them from the general public?

Mr. Leming: That is not what distinguishes them from the general public. What distinguishes them from the general public is their perception of the sign, of the flag sign, and their acute sensitivity to that particular symbol. It's not just the driving. Many drivers would drive up and down and not think twice about it. But these two complainants have a different perspective about the sign and this is covered, I think, in both of their statements, a different perspective about it because of their unique background and circumstances. And that I think is detailed in the statements that they have given to you. I am happy for them to talk to you more about it, but they may not feel comfortable about doing that. Ms. Joshi probably would be happy to talk with you.

Ms. Stefl: Alright, and my second question, you had 60 days because we originally were going to have this meeting in January and we voted to extend it another 30 days to allow us to talk to our attorney. Is there a reason... I don't still feel why you did not give us all this information prior to and even in the package you gave us 10 days ago, that this was not included.

Mr. Leming: Well it takes us time to put the materials together, number one...

Ms. Stefl: So you were not prepared?

Mr. Leming: But number two... no I will tell you. What we did was to submit a Freedom of Information Request from the County and we got some responses back that included email between some of the BZA members about what issues they were going to be looking at. So once we received those, which was just last week. Once we received those we had different exhibits and a different focus. This appeal... this appeal was simply... and that's where we first learned that there was going to be an issue raised here of whether or not this was actually an appealable determination and whether or not... whether there was an issue of standing. Now, so we've been working to address those issues, once we determined they were going to be issues. This is not an appeal of a standing case. The only thing that's been appealed is the substantive determination. Now, maybe Mr. McRoberts is correct in that well if you come to the BZA you better be able to show that you are appealing something that can be appealed and that you have standing. Maybe that... maybe that's absolutely correct. But there's a breakdown in the process. There was a request for the staff to give the BZA a determination as to whether these parties were aggrieved and standing. Staff wouldn't do it, they said go through the same process that anybody else goes through. So that's where we are, so that was an issue that you were dealing with. It wasn't an issue that we became aware of until we saw the FOIA request and then we prepared ourselves to address that.

Ms. Stefl: Okay.

Mr. Apicella: Mr. Chairman.

Ms. Stefl: I am good.

Mr. Grimes: Yes.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: Mr. Leming, I think you can tell from my series of questions that the issue that I am primarily focused on is jurisdiction and standing. Not because I am disinterested in the merits of this case because I think there is a threshold requirement that an adjudicatory body has to get through before it decided to hear a case. So I think I heard you say, and I thought you stood up and took the oath along with everybody else. I think I heard you say that the State Code as interpreted by the Virginia Supreme Court is superseded by a County Ordinance. Is that what I heard you say?

Mr. Leming: I don't recall saying anything...

Mr. Apicella: You said that we are a complaint driven...

Mr. Leming: Yes.

Mr. Apicella: ... County and therefore if somebody files a complaint ...

Mr. Leming: You are putting considerable words in my mouth and you are interpreting what I said. If you want an explanation I will tell you I understand what you are asking.

Mr. Apicella: I think you, you tried to argue a different set of standards for standing than the Virginia Supreme Court has going back to the Virginia Code. So that's what I'm going to. I am trying to understand...

Mr. Leming: (Inaudible).

Mr. Apicella: ... because you said...

Mr. Leming: I understand.

Mr. Apicella: ... what was decided previously on standing by the Virginia Supreme Court doesn't apply in this case...

Mr. Leming: I understand your questions.

Mr. Apicella: ... and we should use some different methodology instead of metrics...

Mr. Leming: You want an answer?

Mr. Apicella: ... Let's not filibuster, I am trying to ask the question.

Mr. Leming: I don't hear a question yet.

Mr. Apicella: You said... I am just trying to get to what you said.

Mr. Leming: Um hum.

Mr. Apicella: You said that we should look at a completely different dynamic instead of metrics then...

Mr. Leming: Um hum.

Mr. Apicella: ... Mr. McRoberts indicated...

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Leming: No, I don't think I said that either.

Mr. Apicella: Yeah you did.

Mr. Leming: No.

Mr. Apicella: I wish we had the ability to read back a transcript live. But that is essentially what you did say.

Mr. Leming: Okay.

Mr. Apicella: That there is some different methodology...

Mr. Leming: Well.

Mr. Apicella: ... that we should use, this BZA...

Mr. Leming: Do you want to go on or do you want my answer.

Mr. Apicella: You also said that...

Mr. Leming: Um hum.

Mr. Apicella: ... that those cases...

Mr. Leming: Well I will tell you...

Mr. Apicella: ... don't apply...

Mr. Leming: I will sit down Mr. Apicella until you finish your piece, alright?

Mr. Apicella: Please stand up.

Mr. Leming: *Laughing.*

Mr. Apicella: I am being respectful to you, I think you should be respectful to me.

Mr. Leming: Then ask a question.

Mr. Apicella: You said...

Mr. Leming: Than ask a question.

Mr. Grimes: Gentlemen, gentlemen. Mr. Leming, Mr. Apicella.

Mr. Apicella: I am just trying to finish my thought.

Mr. Grimes: Let's just have Mr. Apicella ask the question and...

Mr. Leming: I don't (inaudible, several people talking at once).

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: You keep interrupting...

Mr. Grimes: Let him finish.

Mr. Apicella: ... me before I get finished to answer my question.

Mr. Grimes: And then answer the question.

Voices from the audience inaudible.

Mr. Apicella: You said that those cases that that were...

Voices from the audience inaudible.

Mr. Apicella: Excuse me, please. I am asking a question. You said...

Laughter from the audience.

Mr. Apicella: ... that those cases don't apply to BZA appeals, they only apply to appeals to from the BZA to the court. That is what you said.

Mr. Leming: Yes, yes, I think... yes. Those cases all arise in the context...

Mr. Apicella: So under oath you are saying those cases...

Mr. Leming: ...of the next appeal.

Mr. Apicella: ... do not apply to this BZA. There is no methodology that we can use to determine whether or not an applicant has standing before this BZA.

Mr. Leming: The code says that the applicant has to be aggrieved. The case law that you have before you is at the next level. That is the (inaudible).

Mr. Apicella: And that does not apply to the BZA. And the Court said themselves not use extrapolated case for a variance to a case for an appeal. They have never that before?

Mr. Leming: I am sorry.

Mr. Apicella: The Supreme Court has never taken a variance case and applied standards that came out of that case to an appeals case or some other case. Is that kind of what you are saying?

Mr. Leming: Ahh.. well I am not sure I follow what you are saying. We have Virginia Beautification and you have Friends of the Rappahannock.

Mr. Apicella: Right. Some are cases beyond that.

Mr. Leming: Virginia Beautification is a BZA case. Okay? And there were certain standards applied when that case went to court. The same thing happened with Friends of the Rappahannock, that was an appeal of a discretionary decision to the Circuit Court and the Circuit Court ruled that the plaintiff, the

***Board of Zoning Appeals Minutes
February 27, 2018***

complainant in that case had not established standing. Okay? So that's the context of those cases. There is not a case that I am aware of that says the BZA shouldn't have heard the case.

Mr. Apicella: So you are saying that we shouldn't use those... we shouldn't apply those standards in Virginia Beautification and the Rappahannock case to this case.

Mr. Leming: I think you have more discretion, but in this particular case you do have some things that are unique to Stafford. Localities can go in a different direction. Localities, of course this is a Dillon State, so you've got to comply at a minimum with what the State Law is. However, you've gone beyond that with Stafford. You can establish broader standing if you want to at this level and what the County has done is to set up this complaint process and the uncontroverted evidence that you have before you is that that's the only way the Zoning Ordinance is enforced. That's how you do it, through the complaint process. Those are the determinations that are made. Now in addition, you have a unique ordinance here that you have just recently amended. You used the model government ordinance here, I believe. And what it does is to state certain principles about signs. And what the government, the locality in this case, is trying to do with that signage. One is to not district motorists. The other is to create a harmonious neighborhood where you do not have divisive structures in the middle of residential neighborhoods, albeit visible from the state. So what I am suggesting to you is that rather than looking at it through the narrow prism of Friend of the Rappahannock, that the BZA say to itself wait a minute, this is a sign case. These people are driving by this every day, everybody sees this sign. And some people are going to be affected by it in different ways than others. But it's your ordinance that specifically uses the term proximity in more than one place. So, that is what I am suggesting is the basis for the proximity portion... even if we do apply the Friends of the Rappahannock test, that's the basis for determining the proximity issue. I don't think that you have an issue on the second part of that test, which is that these people perceive that flag differently from the usual population. They are threatened by it, they are intimidated by it. I imagine virtually everybody in this room would take that position.

Mr. Apicella: Exactly. So how are they different than everybody else? I see a lot of signs here...

Mr. Leming: Um hum.

Mr. Apicella: ... from some great people who clearly are opposed to the flag.

Mr. Leming: You think...

Mr. Apicella: How... just let me... again I would like to finish my question without you jumping in.

Mr. Leming: Sure.

Mr. Apicella: How are the applicants different from anybody else in this room who has different experience, different backgrounds, different views. How are they different from the general public in relationship...

Mr. Leming: This room doesn't ...

Mr. Apicella: ... to opposing this flag?

Mr. Leming: This room doesn't comprise the general population. African Americans make up 18.5% of the population in Stafford County. They don't represent the general population here. This group tonight represents those that are offended by this particular sign.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: Sir, there are millions of people who drive up and down I-95...

Mr. Leming: Yes, mm hmm.

Mr. Apicella: I suspect that a good number of those people are in fact offended by that flag...

Mr. Leming: Mm hmm.

Mr. Apicella: ... and there may be some people that are supportive of that flag. So what I hear you saying is somehow the two applicants are different...

Mr. Leming: Mm hmm.

Mr. Apicella: ... and there is no definition of general public. I don't think it means 333 million people in this country...

Mr. Leming: Mm hmm.

Mr. Apicella: I don't even think it mean 10 million people in this county. I think it's just a general term of bard okay, so I am still trying to understand your theory here how the two applicants, Ms. Joshi and Mr. Jones are different than the general public who might oppose this flag...

Mr. Leming: Well if you read...

Mr. Apicella: ... who also have some issues similar to or different from those two applicants.

Mr. Leming: You have two statements before you that explain that number one. Number two, general population, what is the most reasonable interpretation of that? The majority of the population. Okay?

Mr. Apicella: That would be your interpretation.

Mr. Leming: That would be the interpretation of general population. Others don't see it that way and they are not the general population. And this group that you have before you tonight, it not the general population.

Mr. Apicella: So would you say 50% of the population might oppose this flag? 40%? 80%? What number do you think might oppose this flag?

Mr. Leming: You might have any number of people that oppose the flag. We are talking about the group that is specifically threatened or intimidated by the flag.

Mr. Apicella: And so there wouldn't be millions of people in this county who are offended by that flag? Is that what you are telling me?

Mr. Leming: I didn't say offended, I said threatened or intimidated.

Mr. Apicella: Or threatened or intimidated is that what you are saying?

Mr. Leming: That there is a minority...

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: Are there people in this room who are offended by this flag? Intimidated by this flag?

Many audience members: Yes.

Mr. Apicella: There you go sir.

Mr. Leming: Okay, okay. That's not... they are not the general population.

Mr. Apicella: They are not the general public. Okay. Is it your contention then that anybody from anywhere can appeal a zoning matter? Not file a complaint, but appeal a zoning matter before the BZA?

Mr. Leming: If you have a right to file a complaint, raising a zoning issue than yes, I think you have the absolute right to file an appeal of that right.

Mr. Apicella: So somebody who lives in a different country, who's here for the first time driving up 95, sees that flag or something else that they don't like, can file a complaint, may or may not get a true decision and appeal that matter to the BZA.

Mr. Leming: If they're aware of your ordinance, your ordinance says any person, any person... can file a complaint. Your ordinance.

Mr. Apicella: So going back to the, what I think are the standards, provided by the Court on these kinds of cases, can you show me where in their initial filing and in their subsequent submission that they demonstrated that they have standing? Absent the stuff that you provided today, in the initial filing that they submitted, can you demonstrate where they indicated they have standing?

Mr. Leming: In the initial filing we did not address the issues... (inaudible)

Mr. Apicella: How about in the second filing?

Mr. Leming: The second filing?

Mr. Apicella: Yes.

Mr. Leming: We didn't know that those were to be issues. Those were addressed tonight.

Mr. Apicella: So you don't think in an initial application or in subsequent materials you have the burden of proof to demonstrate that you have standing.

Mr. Leming: Not unless it's an issue.

Mr. Apicella: It's always an issue. Why wouldn't it always be an issue in a BZA case?

Mr. Leming: You know, I'll tell ya, this is the first time that the BZA, in a case that I've been before the BZA on, has raised the issue of standing. So yes, it's unique to me.

Mr. Apicella: Well, typically it's the property owner who appeals the case before the BZA, not somebody who lives ten miles away or in a different county. So you're saying that in all cases before a BZA, again a quasi-judicial entity, there's no reasonable, rational threshold here. There's no property, economic, or geographic boundary that a BZA must consider.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Leming: I think that the BZA has discretion to decide who is agreed. I don't believe that there is any definitive case law on what you are bound by. And, I think that what we have shown you tonight is a basis for you to reach a logical conclusion that these people, these complainants, are agreed. So, that's what I think.

Mr. Apicella: Mr. Chairman, I'm done.

Mr. Grimes: There's time for one more question.

Dr. Ackermann: So, you're saying, you had no idea before the request that there would an issue about standing here?

Mr. Leming: No, because I haven't addressed it before this body before.

Dr. Ackermann: Or the, whether this was an official determination?

Mr. Leming: I'm sorry?

Dr. Ackermann: Whether this, whether the phone call from the Planning Commission was an official determination?

Mr. Leming: Oh, I assumed that yes it was, there was no question in my mind that it was official determination because Mr. Harvey used the word determination and because you have a very broad State Code provision and County Ordinance provision. And in this case it refers to any administrative officer number one, as I said I'm sure Ms. Blackburn had something to do with this and any, any order requirement determination decision, any, there are no qualifications on that.

Dr. Ackermann: Do you believe it's the BZA's responsibility to let you know those are issues?

Mr. Leming: Well, yeah I think it would be helpful if in your appeal material, yes that there is some instruction. That those are issues that you need for an applicant to address. I also, I also think that the public hearing is the, is the forum where those issues can be addressed as well. But there is no suggestion in any of the appeal material in the county that suggests that, well before you get to argue your assumptions before the BZA you've to prove that you're appealing something that can be appealed and that you have standing, that you're an agreed party. So that's, that's, it's a new, it's a new turn.

Dr. Ackermann: So, but we do give instructions on other items in our applications.

Mr. Leming: Oh sure, yeah I mean, and what was submitted is in accord with the instructions in your application.

Dr. Ackermann: Thank you.

Mr. Grimes: To build on your question and comment, the applications that come before us are typically by the property owner or the partial owner. There is no question of standing at that point.

Mr. Leming: Mm hmm.

Mr. Grimes: Would you agree?

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Leming: In, in, well, I don't know. Mr. Apicella had a lot of questions about Mr. Newton's standing. Now I don't think that was the consensus of the rest of the Board.

Mr. Apicella: That is, that is not true. The standing was not an issue in that case.

Mr. Leming: You didn't think it was an appealable decision.

Mr. Apicella: The standing was not an issue in that case.

Mr. Grimes: There was a question of whether or not there was a ORDD associated with that, not whether there was standing.

Mr. Leming: Whether it was an appealable decision.

Mr. Grimes: So again, we want to make sure we keep our little buckets straight.

Mr. Leming: Well, but if it's not an appealable decision, then there's no, you have no jurisdiction to hear anything, there's no standing.

Mr. Grimes: Correct. So um, I have a couple questions for you, I don't know if anybody else does but... Do either of your clients have a contract to purchase the subject parcel or any parcel nearby.

Mr. Leming: No.

Mr. Grimes: Do they have any financial interest in the subject parcel or any nearby parcel?

Mr. Leming: No.

Mr. Grimes: So, other than the statements that they've said, that you've provided tonight...

Mr. Leming: Mm hmm.

Mr. Grimes:... and you've acknowledged that you don't believe that they're more grieved than other people in the general population, I mean you've made that statement.

Mr. Leming: Oh my goodness, either I'm not talking well or you're not understanding me. No, I did not make that statement.

Mr. Grimes: Okay, well I had heard you say that they're not really generally more aggrieved than anybody else in the population that goes by the flag.

Mr. Leming: We went back and forth between general population, they are different from the general population, general population being the majority of the people in Stafford County or driving up and down the Interstate. What you have in this room tonight, (inaudible) are probably not the general population...

Mr. Grimes: We've discussed that, I just wanted to make sure I clarified that, cause If I'd misheard you, I wanted to make sure...

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Leming: No, no, they are not aggrieved in the same way as the general population and I think that that's clear from their statements and I hope I've made that clear now.

Mr. Grimes: Okay. Does anybody else have questions for the appellant?

Dr. Larson: I, I have one, Mr. Chairman.

Mr. Grimes: Yes sir.

Dr. Larson: I'm still struggling with the aggrieved part. The Code does say that an appeal to the Board of Zoning Appeals may be taken by any person aggrieved. So you emphasize the "any", I want to go back to the aggrieved word. And we had a briefing earlier on what aggrieved actually means and it is, some of the, the important things are based on case law. There's another example here that hasn't been talked about that I wanted to get your input on. It's WANV versus Houff, 1978. I don't expect you to be familiar with the case off the top of your head but let me just read what they have here and I'll get you to respond to that. To determine whether the land owners property is in close proximity to the challenged use, the land owner must prove that the challenged use, I'm sorry, the land owner must prove that the challenged use, oh it said twice, could be seen, smelled, or heard on his property or that it will discharge emissions onto his property, if the landowner cannot improve any of these physical factors, then his property is not in close proximity and there would be no legal predicate from which to infer that this property was damaged. If the property satisfies the proximity test, than the second step is to determine whether he suffers a denial of some personal property right, legal or equitable. So I guess I'm hearing a lot of emphasis on the land owner's property, the complainant's property, and how the property in question affects their property. Can you, can you comment on that?

Mr. Leming: The, I'm not sure what the basis was for that determination, or whether it was even a land use case, but in this situation, first, there is no allegation here that their property is damaged. The tests that you were read a moment ago talked about personal or property rights. The personal right that I think is affronted here is their ability to drive up and down the Interstate in Stafford County, going about their daily business, without being affronted by a symbol of hate every time they get down to the southern part of the County. Now, I think they both would tell you that when they drive by that sign they feel it. It's a visceral reaction that they have to that sign because of their heightened sensitivity. I imagine almost everybody in this room would tell you the same thing. So that's, that's really the point. It's not that their property is damaged. It's a personal right to be free from threat or intimidation that is made possible because of the position the County has taken on something as they drive through the County going about their business.

Dr. Larson: But I'd like to remind you that we deal purely in property manners. We deal with parcels of property and how they're shaped and variances to the law to enable people to do things on their property, it's all related to property. That's what we do here.

Mr. Leming: Well then I pose the question Dr. Larson, I'd say, you know if that were a Nazi flag there, you think that would survive? Is that something that's objectionable? You know, I mean, it's, I'm saying that there are instances where a property owner does something and advertises it in such a way that it's so offensive to certain members of your community, that they have a right to complain and your Sign Ordinance is specifically designed to protect them. It talks about no distractions from the highways. It talks about, you know, if this were a sign that couldn't be seen from a highway, it wouldn't be covered by your Ordinance. It's specifically because it can be viewed from the right of way that it's covered by your Sign Ordinance, and these complainants, in my view, have the right to go about their business in Stafford County without being affronted with something that has, unfortunately, become a symbol of

***Board of Zoning Appeals Minutes
February 27, 2018***

something completely different than perhaps what it was originally intended for, a battle flag in the Civil War. So, that's, that's the crux of the issue I think, and I don't think that you're, it is a property issue because it's what somebody has done in Stafford County with their property that is causing this effect on others in the County. So, that, that I think is the point. But, the language that you all been provided in your guidances, personal right or property right, they have a right to be free from this kind of distraction and this kind of intimidation on Stafford County roads.

Mr. Grimes: Ms. Brown, you had a question?

Ms. Brown: Just one. Earlier on we were talking about the timeliness of getting all our new materials to us tonight, you said you just got the FOIA request, when did you get your FOIA...

Mr. Leming: Got the FOIA request last week, uh huh.

Ms. Brown: You got it last week so that would be February 22?

Mr. Leming: I don't remember the exact date. I remember we went through it, we had to come down and get it and then went through it and came to the, came to us it may have been some part on a disk. We got a lot of materials to go through, I don't believe I saw them until last week.

Mrs. Brown: But you didn't get, you saw them or you didn't receive them?

Mr. Leming: I don't remember the, do we have a date that, on the FOIA? I don't remember, I was not aware of them until that day.

Ms. Brown: I received your FOIA on January 30. And I know that the law is we have five business days to respond to you.

Mr. Leming: They took additional time here, you know they had another ten days.

Ms. Brown: Okay, so we did that.

Mr. Leming: We can, we can get the date for you, we have it...

Ms. Brown: Okay, thank you.

Mr. Leming: So I, but I think they did take the extra time.

Mr. Grimes: Any other questions for the applicant?

Dr. Ackermann: Dr. Larson raised a point about perhaps what the purpose of the BZA is, an even greater point, what's the purpose of zoning? I know zoning we talk about dealing with property issues and looking at the purpose of zoning in some other jurisdictions, like in the city of Richmond for example, they talk about promoting the welfare of the community and do we have any statements, maybe someone from the zoning, maybe zoning department, do we have any statements about the purpose of zoning in our county, maybe not for you Mr. Leming but for someone else. May I ask that question?

Mr. Leming: I can give you one just from your Sign Ordinance which is the, the issue here. Some of you may be aware that the County established a new Sign Ordinance, this is Article 8 of your Ordinance Signs. Signs are regulated by your Zoning Ordinance and I'll read part of this to you, the purpose of this

***Board of Zoning Appeals Minutes
February 27, 2018***

article is to regulate the size, color, illumination, movement, materials, location, height, and condition of all signs placed on private property for exterior observation thus ensuring the protection of property values. The character of the various neighborhoods, the creation of a convenient, attractive, harmonious community, the protection against the destruction or encroachment of our historic areas, and the safety and welfare of pedestrians and wheeled traffic, cars, while providing convenience to citizens and encouraging economic development. This article allows adequate communication through signage while encouraging aesthetic quality in design. And the Ordinance goes on, the regulations are intended to promote signs that are compatible with the use of the property to which they are pertinent. Landscape and architecture of surrounding buildings, this is an R-1 neighborhood incidentally, are legible and appropriate to the activity to which they pertain, are not distracting to motorists, and are construed and maintained in a structurally sound and attractive condition. Now, one of the things that I gave out to you, is a detailed letter from the adjacent property owner who has only recently decided to participate in this matter. And she talks in that letter about the fact that this flag in 2016 wasn't up when she purchased the property, somehow it had come down. And now she's having trouble selling the property because of the presence of the flag. Now, she, and she works, otherwise she would be here tonight, but she works in Fairfax County, but she's given you a detailed description of the, of what it's been like, the time when there was, the sign was vandalized, there was vandalism, but on her property too. They came after items on her property because of the flag that was next door. At one point a storm brought the flag down and one of the impertinences to the fact, to the flag. Big cranes had to come into the yard to, you know onto her property to get it re-elevated. She also talks about her conversations with the owner of the property and his motivation and what he thinks of African Americans and that is in her letter. It's also your Exhibit 9 with the exhibits that came to you last week, his statement. So, that's, that's what we're dealing with here and you have a number of things to the extent that you want to talk about the substance to this case, you have a number of things before you there, that show what's happened in other jurisdictions with the flaggers in Rockbridge County, in Danville, in Lexington, shows the president of the flaggers marching with one of the organizers of the Charlottesville rally last summer. So, that's what we know about this group and their motivation and you have an ordinance that, the only thing they, this Ordinance, this complaint initially was filed by hundreds of people, because they think this is the wrong symbol for Stafford County and this invites people that you would like to have and may invite people that would come here for another purpose, so, this is not a, this is not an insignificant issue and that's why I do say and continue to say that I believe that the BZA has discretion on this issue of who's aggrieved. This is a property issue and this is an issue that arises solely out of your Zoning Ordinance and with regard, Dr. Ackermann, to your, to the enabling legislation here, you know, anything can be, any decision, any determination, can be appealed to the BZA. It has to arise from your Zoning Ordinance, and this was a decision made by your staff looking at the facts and reading the Zoning Ordinance and saying we don't think there's a violation because the Confederacy is a geo-political entity.

Mr. Grimes: Alright, thank you Mr. Leming, I'm going to bring this back up because I think the Board might have some follow-up questions for the BZA attorney.

Mr. Leming: Alright, thank you all for... granting me the additional time.

Mr. Grimes: Thank you.

Mr. Apicella: Mr. Chairman, can we just start by asking Mr. McRoberts if he can just respond to some of the things he's heard thus far?

Audience Member: Mr. Chairman, could we hear what the owner thinks of African Americans? We'd like to (inaudible - not at microphone).

Mr. McRoberts: I think that, if we could just go back to the words of the Supreme Court of Virginia, I'm certainly much more comfortable quoting them than telling you anything that I think. Going back to the Friends of the Rappahannock case and to respond to Mr. Leming's point that well that arose out of an appeal to the Circuit Court, well the case actually was at the Virginia Supreme Court, you know, but before that it was in the Circuit Court and the argument in the case was whether there was a difference between the standard of justiciable controversy, which had been the standard in declaratory judgment actions challenging zoning decisions of governing bodies, which was the issue in Friends of the Rappahannock or, is there a difference between that and the term aggrieved, which had typically been the standard and is the standard for BZAs and BZA appeals to Circuit Court. And the Circuit Court in that case had applied the term aggrieved, and some of that case law, in finding the plaintiffs lacking in the Friends of Rappahannock case. And so the argument on appeal was, you applied the wrong standard. You should not have applied the aggrieved standard, which found the plaintiffs lacking, you should have applied justiciable controversy, which is something different. The Supreme Court analyzed that issue and found that they were one and the same. And to quote the Supreme Court, "If there is a distinction, it's a distinction without a difference", and so and then it went on to analyze the aggrieved standard that had been used by the Circuit Court, and it's the very same aggrieved standard that applies in BZA appeals, both at the BZA and also at Circuit Court. And, here's what it said, "First the complainant", this is a quote to the Supreme Court from Friends of the Rappahannock on 286 Virginia-38 pages 48-49, and it enunciates the two part test that I gave you earlier, "First the complainant must own or occupy real property, within or in close proximity to the property that is subject of the land use determination, thus establishing that it has a direct, immediate, pecuniary, and substantial interest in the decision." That's the first test. The second test is, "the complainant must" that has already established its proximity, then they must "allege facts demonstrating a particularized harm to some personal or property right, legal or equitable, or the imposition of some burden or obligation upon the petitioner, different from that suffered by the public generally" and, also in Virginia Beach Beautification, you know, they applied that same standard and certainly Friends of the Rappahannock cited in. Friends of the Rapp, Virginia Beach Beautification was in fact an appeal to the Virginia Supreme Court from Circuit Court but before that it had appealed from the BZA to Circuit Court and the standard was the BZA had granted a variance to allow this billboard down in Virginia Beach and there was a group called Virginia Beach Beautification Commission. It was a nonprofit corporation made up of a bunch of folks that really, really didn't like billboards in Virginia Beach, and had very strong feelings about it, and so they fought the granting of the variance. You know what the standard is to overturn a variance granting? You've got to find standing. You've got to be aggrieved of the granting of the variance. The very same word that we're talking about here tonight, the very same standing. So, there is no difference between how aggrieved is applied in Friends of the Rappahannock, Virginia Beach Beautification, or here, it's the same standard. There's another case that has a fairly clear description of what aggrieved means and it doesn't mean any person certainly it, I think, Mr. Larson put his finger on it, I mean, you know he does say any person but it says any person aggrieved and aggrieved is the legal standard that I've told you about. Board of Supervisors Fairfax versus Board of Zoning Appeals of Fairfax 268 Virginia 441 at pages 449-450, Supreme Court said as follows, "The term aggrieved has a settled meaning in Virginia when it becomes necessary to determine who a proper party to seek" it says here, "court relief" but it's the same standard to seek BZA relief from an adverse decision. In order for a petitioner to be aggrieved it must affirmatively appear that such a person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner must show that he has an immediate, pecuniary, and substantial interest in the litigation and not a remote or indirect interest. Though it is not sufficient for the sole, that the sole interest of the petitioner is to advance some perceived public right or to readdress some anticipated public injury when the only wrong he has suffered is uncommon with other persons similarly situated. The word aggrieved in the Statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or in position of a burden or obligation upon the petitioner different from that suffered by the public generally. That's what it means to be aggrieved and I believe that's the standard

***Board of Zoning Appeals Minutes
February 27, 2018***

that you should apply on the basis of the evidence before you to determine whether you have jurisdiction and to go to the order requirement decision determination issue, the Zoning Ordinance itself, you know, cannot determine the issue of standing or order requirement decision determination, that is something that comes out of the state law, those are state standards, and they apply in, in these appeals. An order requirement decision determination has to be a substantial ruling, not just an interpretation of the law. It has to be something that rises to a certain level. This case law that supports also that there must be a description of the reasoning for the decision. Doesn't have to have a whole lot of reasoning but it does have to have some. Another case that a phone call was alleged to be an order requirement decision determination was Vulcan Materials is an older case but in that case, in Chesterfield County, the quarry owner, and this was actually a property owner, that asked the County of Chesterfield what is it gonna take to start my quarry back up? It was apparently had not been operated for some time, and so they made inquiry of what they would have to do and they were told you're gonna have to get a brand new site plan and a new permit approval and at that time they just sort of took that and didn't appeal it, didn't question it etcetera. Later on they began going to the process of trying to open it, apparently they got different legal advice or new legal advice and they began to complain that no I don't have to get a new permit site plan or approval, I should be able to do it right away under the existing law and the existing approval. Chesterfield County, one of their defenses was, well, you should've appealed it when the Zoning Administrator told you over the phone that you had to go get a site plan and new approval. You can't now challenge it in a subsequent lawsuit when you didn't appeal it at the time. That's called the Thing Decided Doctrine, you must appeal an order requirement decision determination within 30 days, if you don't, than you cannot then later challenge it. Chesterfield made that argument but they lost, the Supreme Court said in that case, that phone call didn't actually impact any right of Vulcan Materials at that time, it was merely an interpretation of a zoning ordinance. There was no application pending, there was no permit pending, there was no building permit pending, there was nothing that actually impacted their rights, and so the Supreme Court and Vulcan Materials held that that phone call didn't rise to the kind of level needed. Another case that I believe Mr. Leming pointed to is Lily versus Caroline County. That was decided subsequent Vulcan Materials, and in that case that same doctrine and that same thing decided doctrine turned on in part whether there was an order requirement decision determination. In that case, the Caroline County Zoning Administrator was asked at a Planning Commission meeting, during the pendency of an application for a tower, whether or not, essentially why are we hearing this permit application, isn't this allowed by right. And he said, I'm going to have to look into it. They deferred it for that question for a month. At the very next meeting he came back into the meeting, stood up in the middle of the proceeding with the Planning Commission there and with all the folks that were opposed to the tower out there and the Zoning Administrator said I think it's allowed by right. No one appealed it, even though he said I'm telling you it's allowed by right and he explained some basic reason why no more than a sentence but it was something. And then he said, and really, anyone who's aggrieved by this can appeal it. And that was a verbal determination. About 60, 90 days later, the Lily's, who were the neighbors of the tower, came in and complained. They were clearly aggrieved because they were next door neighbors; the tower was right there. The issue was, was it an order requirement decision determination, because if it was, they should have appealed the order requirement decision determination within 30 days. And they didn't. They filed a declaratory judgement action a couple of months later. And so, it really turned on this is it an order requirement decision determination? The Supreme Court in that case said it was an order requirement decision determination. Because even though it was verbal, it was in a formal proceeding, it was in a manner where everyone was on notice because of the language of the decision, there was reasons for the decision given, there was notice of the right to appeal by aggrieved persons, and they said the Lily's should have appealed that. That was an order requirement decision determination. So, I think that, you know, those are some of the cases I know of that I think are helpful to the BZA to define what is an order requirement decision determination and what is aggrieved. You know, I guess the last think I would say in response to Mr. Leming, I don't think anyone has the right not to be offended by someone else's freedom of speech.

***Board of Zoning Appeals Minutes
February 27, 2018***

And I believe the United States Supreme Court said very clearly that they were offended by the burning of the American flag, but they also upheld the right to do so as freedom of speech. I'm offended by a lot of things that I see, but I don't have the right to stop people from having the freedom of speech to do things that offend me. And that is where the right is here, in my opinion. I don't think that there is a right not to be offended by others' freedom of speech. And I'd be glad to answer any other questions.

Dr. Ackermann: I have one question. So, the fact that the communication from Mr. Harvey was in a phone call has nothing to do with whether it's in a determination?

Mr. McRoberts: The fact that it was verbal does not.

Dr. Ackermann: Okay.

Mr. McRoberts: I think what does have something to do with it is that it was a very informal nature, sort of like, hey, wanted to give you an update kind of thing. He did use the word determination, you know; Mr. Leming's correct about that. He gave no reason for the determination at that point in time. What's been discussed is I think what's in the staff report as to what the staff believed and what was underlying in their thinking. But the thing that's actually being appealed is a voicemail and, in that voicemail, there was no statement of what the decision was based on at the time. The other thing that really goes to the issue of order requirement decision determination is did the actual statement on the voicemail affect these folks' rights in any way, shape, or form, property, equitable rights? You know, I think Mr. Leming is basically saying, well, they're offended by the flag. And that gives them standing. I don't think the Supreme Court has ever held peoples' feelings to give standing.

Dr. Ackermann: May someone yell fire in a crowded theater?

Mr. McRoberts: I mean, we're polling the depth of first amendment jurisprudence.

Dr. Ackermann: Okay, alright. That was the statement from the Supreme Court; Mr. Holmes was right... Justice Holmes.

Mr. McRoberts: He did say that about...

Dr. Ackermann: That you're not allowed to do that, right?

Mr. McRoberts: Yes sir.

Dr. Ackermann: Thank you.

Mr. Grimes: Any other questions?

Mr. Apicella: Mr. Chairman, just a couple. Could you reiterate what is meant by personal interest? You kind of alluded to it; I think you spoke to it but I seem to hear from the applicant's agent that it means...

Mr. McRoberts: Well, a person has to... I mean, it can't be speculative, it has to be substantial. It can't be indirect or remote. It has to be something substantive. That's all of what the Supreme Court has said about the personal right. And Mr. Leming says that his clients have the right not to be offended by a flag; I don't think that's really true.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Apicella: And the other issue that came up was what does the public generally mean? Is there some reasonable interpretation or amount?

Mr. McRoberts: Well, I mean, again, I'll go back to the language of the Supreme Court because it's not just, hey, I'm different from the public in general. It is if they have proximity to the property, one, then two, then if they do have proximity they have to show some personal... they have to allege facts demonstrating a particularized harm to some personal property right, legal or equitable, or an imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Mr. Grimes: Any other questions? Does anybody have any thoughts on this case and where we stand at this moment?

Dr. Ackermann: I don't have a motion ready, just that you asked about thoughts.

Mr. Grimes: Yes.

Dr. Ackermann: My thoughts are that this is a substantial issue for our County. My thoughts are also that I think this is not a frivolous complaint. I see some substance to it. I keep going back and forth on it. But I think that it's something that we should consider more fully rather than let it go just another means.

Mr. Grimes: Any others? Yes, Ms. Brown.

Ms. Brown: I'm troubled. As I understand from the advice that we hired for our attorney and the research I've done myself, I don't see how the applicants... I'm sorry, the appellants in this case have standing. That's where I'm going to go on this. Not that it's not an issue, I just don't believe that they have standing to bring this to us for us to hear. I don't think we have the authority to hear that.

Mr. Grimes: Any other comments?

Mr. Apicella: Mr. Chairman, that's been my issue all along, whether or not the applicants have standing. I fully appreciate that almost everybody, if not everybody in the audience, has significant views and issues that are opposed to this flag. And I sympathize with their views and their issues. I still think that, like a court, we have to decide whether or not the two appellants have standing in this case. And, as our attorney advised, if they don't have standing we can't hear the case -- just like a court. So, if somebody presents a case to a court and those persons are not aggrieved under the standards that the Virginia Supreme Court have established and then within the meaning of the Virginia State Code, we can't go any further. We would be diligent in our duties in taking this case any further and listening to the merits. Not because we don't think they're right, but because we don't have the ability to take up this case. And I think, based on what I've heard, there are some findings of fact in this case. We may or may not all agree to those specific findings of fact, but I think it's worth at least throwing some out there just like we would if we were thinking about conditions for a special exception. So, I'm going to throw some things out; folks can agree or disagree, but I think it's worth pointing those things out. The first thing is that the applicants, Mr. Jones and Ms. Joshi, submitted an application to Stafford County on December 28, 2017, via their legal representative, appealing the contents of a voicemail they received from Mr. Jeff Harvey, Stafford's Director of Planning and Zoning, on December 5, 2017, regarding the status of their zoning complaint. That's a fact. The subject parcel in which their zoning complaint and subsequent appeal is based is at 8 Beagle Road in Stafford County. That is a fact. The applicants, as confirmed by Mr. Leming, do not own or occupy the subject property on which the flag is located. The applicants do not own or occupy property immediately adjacent to the subject property on which the flag

***Board of Zoning Appeals Minutes
February 27, 2018***

is located. The applicants do not own or occupy property in the near vicinity of the subject property on which the flag is located. Again, all those things verified tonight as provided by Mr. Leming in response to questions. Clearly, the applicants lack a property, contractual, or economic interest in the subject property, nor any adjacent property nor any property in the nearby vicinity of the subject property on which the appeal was submitted. The applicants have not established that they have a direct immediate pecuniary and substantial interest in this zoning matter. Those are words that Mr. McRoberts mentioned in response to some questions about what is a threshold requirement that must be met. The applicants and their agents had several opportunities to allege a sufficient basis to demonstrate that they are persons aggrieved with standing on this matter. Their first opportunity was when they submitted their complaint. Mr. Leming said that there was no... anything in that initial application addressing an issue of standing. Then they submitted additional materials I think within the last week. Again, the issue of standing was not addressed. They did provide some supplemental materials tonight for the first time. Again, those materials in my view go to the issue of their concerns, apprehension, intimidation, whatever, in relationship to the flag but it does not speak to their property, economic, and personal interests as I think Mr. McRoberts indicated was a threshold requirement. So, three opportunities the applicants didn't demonstrate their requisite interest in the subject property on which their appeal was submitted. But even if they did, even if they did demonstrate the first part of the test, did they demonstrate that they have some personal or property interest, legal or equitable in this case? I don't think they did. They didn't identify the imposition of a burden or obligation upon the petitioners different than that suffered by the public generally. Neither in this application or in additional testimony we heard tonight have the applicants demonstrated that they're legally aggrieved as required by Virginia Code Section 15.2-2311(a) to appeal this matter to the BZA. As such, the applicants lack standing to pursue this appeal which is a preliminary and jurisdictional issue that the BZA must consider concerning any application, but clearly the applicants are not the property owners and don't have any interest in that subject property at all. So, given these facts, I believe the applicants are not aggrieved persons and therefore they do not meet the statutory threshold to achieve standing in this case.

Mr. Grimes: Any comments on Mr...

Comments from audience.

Mr. Grimes: I would like to refrain from the comments please. It's not part of this procedure at this point. It's not part of the procedure at this point.

Comments from audience.

Mr. Grimes: When we decide. So any more comments about what Mr. Apicella has noted?

Mrs. Stefl: Mr. Chairman, I move that we dismiss the application because the BZA lacks jurisdiction over the matter on appeal, finding that...

Audience member: Let them speak!

Mrs. Stefl: ... finding that the applicants have not demonstrated that they are legally aggrieved...

Audience member: Let them speak!

Mrs. Stefl: ... as required by Virginia Code to appeal to the BZA; and the applicants lack standing to pursue this appeal, which is a preliminary and jurisdictional issue for the BZA to consider this application; and the applicants lack the requisite interest in the property referenced in the telephone call

***Board of Zoning Appeals Minutes
February 27, 2018***

of the Zoning Administrator referenced in the application; and the applicants do not own the property on which the flag is located; and the applicants do not own property adjacent to the property on which the flag is located; and the applicants do not own property in the vicinity of the property on which the flag is located; and the applicants lack any property or contractual interest in the property or the flag which is the subject of the application; the applicants lack some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally; and the phone call does not constitute an order, requirement, decision or determination of the type legally appealable to this BZA.

Mr. Grimes: So, we have a motion from Mrs. Stefl to basically dismiss this case for lack of jurisdiction for the BZA, a case that the BZA cannot hear due to the lack of standing by the appellant. Do we have a second on that motion?

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

Comments from the audience.

Mr. Grimes: Do you have any other discussion in reference to the motion?

Dr. Ackermann: Yes. Do you want the first and second to go first?

Mr. Grimes: If they would like to. First, would you like to speak to the reasoning behind your motion?

Mrs. Stefl: As has been stated I think by multiple positions up here on this dais, at this time I just do not see how they are egregious and I do not see the burden of proof has been presented to us, both by the applicants' attorney, both in December when this package was due and also in the next 60 days since this was originally filed. We've received quite a bit of information and I still do not feel that they are an egregious party.

Mr. Grimes: Alright, thank you. Mr. Apicella?

Mr. Apicella: Mr. Chairman, I stand by the findings of fact that I read in this case. Ultimately a BZA cannot -- cannot -- legally consider an appeal where the applicants have not proven that they are aggrieved parties, so, in this case, the BZA lacks jurisdiction. Again, this does not mean I don't agree with the concerns that they have, it doesn't mean that they don't have merit, like a court of law we can't consider a case if we don't have standing. And that may upset a lot of people but that is ultimately what we have to decide as a BZA, on any case, whether we're allowed to hear it. If we're not allowed to hear it, it can't go forward. So, again, I think it would be inappropriate for the BZA to consider any other points lacking proper jurisdiction. And I think if we did hear the case, the property owner would have good cause to get our decision overturned because we do lack jurisdiction.

Mr. Grimes: Dr. Ackermann?

Dr. Ackermann: Mr. Chair, I oppose the motion. I think that...

Applause from the audience.

Dr. Ackermann: ... I take Mr. Leming's argument that our zoning ordinance is complaint based. That's how everything is brought to us. The... it's clear to me there's no economic interest, no direct economic interest by the applicants here. But I also feel from what our ordinance says about signs, what's often in

***Board of Zoning Appeals Minutes
February 27, 2018***

about zoning is that it's more economic interest, it is the health of the community. And thirdly, Mr. McRoberts had stated that it wasn't the fact that the determination came in a phone call which would not qualify it as an ORRD or whatever the term is... I don't know the acronym exactly. So, that's why I disagree with the motion and will not support it.

Applause from the audience.

Mr. Grimes: Thank you. Any other comments by the Board?

Dr. Larson: Mr. Chairman?

Mr. Grimes: Yes, Dr. Larson.

Dr. Larson: I listened intently to Mr. Leming's remarks and I do understand why we got the material late now; I appreciate that that you got the FOIA late. It just would have been a whole lot more useful if we could get it earlier. Getting this much material and trying to listen to testimony at the same time is very hard. It is unclear to me whether the Zoning Administrator issued a determination or not. However, I do not think this case... in this case the applicants have the standing to present their appeal to the BZA. So, I'll be supporting the motion.

Mr. Grimes: Any other comments from the Board? Alright, we have a motion as stated by Mrs. Stefl and seconded by Mr. Apicella to basically dismiss this case for lack of jurisdiction. The applicants do not have standing. All those in favor say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Mrs. Stefl: Aye.

Dr. Larson: Aye.

Ms. Brown: Aye.

Mr. Grimes: Aye. Those opposed?

Dr. Ackermann: Opposed.

Mr. Grimes: Okay, we dismiss this case for lack of jurisdiction and lack of standing by the appellant. Thank you very much for your time.

Comments from the audience as the room is clearing.

Mr. Grimes: We'll call a 15 minute recess.

Meeting recessed: 9:04 p.m. to 9:20 p.m.

Mr. Grimes: Alright ladies and gentlemen, we'll reconvene. Thank you everyone for your patience. Let me find my agenda real quick. Alright, so next item is Unfinished Business. Do we have any?

UNFINISHED BUSINESS

Ms. Musante: We don't.

Mr. Grimes: Excellent. We have Zoning Administrator's Report listed on here. Nothing?

ZONING ADMINISTRATOR'S REPORT

Ms. Blackburn: No sir.

Mr. Grimes: Makes us go quicker. Meeting minutes. Comments, corrections, clarifications. Well, excuse me, corrections.

ADOPTION OF MINUTES

August 22, 2017

Ms. Brown: I have some.

Mr. Grimes: Not clarifications.

Ms. Brown: Yeah, just corrections, just typo corrections. Um, okay, page 16, line 748 and 49, there's a duplicate sentence in there. It says, Mrs. Brown, okay, yeah that would be an issue for keeping the doors closed. That would be an issue for keeping the doors closed. So I just want to delete one of those out of there if we could. The one on 749... line. Page 18, line 882, Mrs. Brown, I just... since you met with staff, I just thought maybe you would have opportunity -- I think I probably said have had opportunity. I just wanted to... I don't want to sound illiterate. Let's see...

Mr. Grimes: I do every time I read the preamble.

Ms. Brown: A couple more, just bear with me, I'm sorry. I marked them all. Okay, page 59, line 2930, the last sentence; so, I can find any information. I think it probably means so, if I can find any information. Line 2930, the last sentence, so, I'd like to insert if. And the last one I had was page 62, line 3057, Mrs. Brown, no, not because there's anything wrong, just I have had a chance to read it. That probably should be haven't had a chance to read it. And that was it.

Mr. Grimes: Any other corrections to the meeting minutes from August 22, 2017?

Dr. Larson: Mr. Chairman, I have one. Page 56, line 2773, first complete sentence; you might hit a tree, change light to like. Probably just my bad speech. That's it.

Mr. Grimes: Thank you. Any other corrections? Do we have a motion to approve the August 22, 2017, meeting minutes?

Ms. Brown: Motion to approve.

Mr. Grimes: First from Ms. Brown; second?

Dr. Ackermann: Second.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Grimes: Second. All those to approve the minutes as corrected for August 22, 2017, say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Dr. Ackermann: Aye.

Mrs. Stefl: Aye.

Dr. Larson: Aye.

Ms. Brown: Aye.

Mr. Grimes: Aye. Other Business, 2017 Annual Report.

OTHER BUSINESS

- 2017 Annual Report

Mr. Apicella: Mr. Chairman?

Mr. Grimes: Yes.

Mr. Apicella: I think it's a great report, well written. I just want to say my own kudos to staff for the great job that they do, beyond what's written here. I think there is something that might need to be changed on the last page on the Newton case. A little below midway where it says, where the County was heard yesterday on its petition for appeal, we want to give a date certain. Obviously we don't mean yesterday, so. You see the description about that case Melody?

Ms. Musante: I do.

Mr. Apicella: So, after Supreme Court of Virginia where the County was heard yesterday on its petition for appeal.

Ms. Musante: Just put a date in there? I'm sorry, this was taken directly from the County Attorney's office so I didn't...

Mr. Apicella: No, no worries. I'm just saying it, you know, it doesn't have a date on the page so.

Ms. Musante: Okay, I will fix that.

Dr. Ackermann: Mr. Chair?

Mr. Grimes: Yes sir.

Dr. Ackermann: I also agree that it's an excellent report. On the second page, next to last paragraph, I think it should be iPads, no apostrophe, because it's not possessive, just plural. Thank you.

Mr. Apicella: Mr. Chairman, I make a motion to approve with those changes.

***Board of Zoning Appeals Minutes
February 27, 2018***

Dr. Larson: Mr. Chairman, I have one question first.

Mr. Apicella: Sorry.

Dr. Larson: That's alright. On the last page when we discuss the disposition of cases, do we have an update on the Wild Run Brewery?

Ms. Musante: The owner of Wild Run Brewery has retained Charlie Payne, Charles Payne, as his new attorney. The last correspondence I had with him was back in January.

Dr. Larson: Charlie Payne... didn't he work for the County?

Ms. Musante: No.

Dr. Larson: Oh. The other one?

Ms. Musante: Charles Shumate.

Mr. Grimes: Charlie Payne was the attorney for the wedding and venues case.

Ms. Musante: Yes.

Dr. Larson: Oh, my brain got things... Okay, that's fine. So that one's still open.

Ms. Musante: The application is still on my desk for his special exception. We have not moved that forward yet for lack of his application is not complete.

Dr. Larson: Okay, so he's applying for another special exception.

Ms. Musante: Yes he is.

Dr. Larson: Okay, thank you.

Mr. Grimes: We have a motion by Mr. Apicella to approve the Annual Report for 2017; do we have a second?

Mr. Apicella: With the changes.

Mr. Grimes: With changes.

Dr. Ackermann: Second.

Mr. Grimes: All those in favor of approving the Annual Report with changes say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Dr. Ackermann: Aye.

**Board of Zoning Appeals Minutes
February 27, 2018**

Mrs. Stefl: Aye.

Dr. Larson: Aye.

Ms. Brown: Aye.

Mr. Grimes: Aye. Those opposed? None. The Annual Report is approved. Alright, the 2018 Meeting Schedule? I know that we typically avoid December, and I'd like to do that again in the upcoming year.

- 2018 Meeting Schedule

Mr. Apicella: Also, there's a November 27 meeting that conflicts with the Board meeting that day. I know it's the week after Thanksgiving, right? So, we could either hold it in an alternative venue, like the ABC room, or change the date.

Ms. Brown: I say we hold it, and if we have no cases then we don't have it.

Ms. Musante: We cannot do the ABC Conference Room when the Board meets because they have that reserved for overflow.

Ms. Brown: Oh.

Dr. Larson: Is there a place we could meet? I think I'd prefer to meet on the appointed day if we could, if there's a place to meet because the public sort of expects that.

Ms. Musante: The only other option we have here in the building would be in the Activities Room in the basement, on this floor.

Ms. Brown: I remember being there before.

Ms. Musante: We've been there before.

Mr. Apicella: That's pretty tight quarters.

Mr. Grimes: Yes, and depending on what the case is, it could get tough.

Ms. Musante: Well, I mean, we can leave the meeting schedule as it is now and just play it by ear when October gets here and see what we need to do.

Mr. Grimes: Can we put an alternate date there?

Ms. Musante: Sure.

Mr. Grimes: Does anybody have a calendar?

Ms. Musante: We have one here.

Mr. Apicella: So, it would be November 13 or November 20, which are Thursdays.

Dr. Ackermann: The 20 is a Thursday?

***Board of Zoning Appeals Minutes
February 27, 2018***

Mr. Kim: That's the week of Thanksgiving.

Mr. Apicella: Right, I'm just throwing out the two.

Mr. Grimes: So, I want to avoid the Thanksgiving week, so November...

Mr. Apicella: November 13th.

Ms. Musante: The 13th?

Mr. Grimes: ... 13th.

Unknown: Why can't we just do it the 28th?

Mr. Apicella: That would be a Wednesday.

Mr. Kim: The 28th?

Mr. Apicella: It might be, I don't know; I'd have to look at the calendar. I actually have that on my phone so give me just a second.

Mr. Grimes: I'm not opposed to the day after.

Ms. Brown: The 28th?

Mr. Kim: Could we do it the 26th?

Mrs. Stefl: Monday?

Ms. Brown: Well, that's Thanksgiving weekend and if everybody's going to be traveling and stuff... because Thanksgiving is the 22nd.

Mr. Apicella: So, the Planning Commission I think is meeting on November 14th, that's what I have.

Ms. Brown: I'm okay with the 28th if there's not a Planning Commission meeting. I don't have their calendar. It puts it pretty well off of Thanksgiving too, so we should have everybody.

Ms. Musante: The 28th Steven?

Mr. Apicella: Yeah.

Ms. Musante: Okay.

Mr. Grimes: Works for me. Okay, onto the first agenda item that we moved to the end, the Election of Officers.

ELECTION OF OFFICERS

Mr. Apicella: Mr. Chairman, before we go there, Ms. Brown sent out an email on Friday and in it she indicated that staff have some issues or pushing the issue of BZA leadership terms of office. Staff and

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown are certainly entitled to their views and opinions. I looked at the State Code, which is ... I don't know what I've done with my copy of it here... I think it just says that BZA leadership serves for a year and then can... what's the right word...

Mr. Grimes: With the exception of its Secretary and alternates, the Board shall elect from its own membership its officers who shall serve annual terms of such and may succeed themselves.

Mr. Apicella: And so, you know, BZAs are appointed by the applicable Circuit Court, not by the local jurisdiction. I didn't see anything else in the State Code that limits the term of office for the Chair or Vice-Chair to two consecutive terms. I also, after seeing this email, reached out to several Board of Supervisor members and, two a person, they indicated one that the BZA is an independent body, it doesn't report to or through the Board of Supervisors, and they have no issue with our terms of office.

Ms. Brown: I have comments, too. First of all, I thank you for sending out that note to the attorneys; they did let me know since you didn't bother to copy me, Steven, thank you very much. I know you told me that if I sent something out, you were going to make me look stupid and excoriate me so thank you on that.

Mr. Apicella: I'm sorry, what did I not send you?

Ms. Brown: The letter that you sent on Friday to staff. Unfortunately, I wish you'd a checked with me first because the staff I was referring to was Mike Smith. So you sent it to the wrong staff. Mr. Smith is the Deputy County Administrator. He did tell me verbally, several times, and in writing, with members of the Board of Supervisors that was so thank you on that.

Mr. Apicella: I'm sorry, what did I not send you?

Ms. Brown: The letter that you sent on Friday to staff. Unfortunately, I wish you'd a checked with me first because the staff I was referring to was Mike Smith. So you sent it to the wrong staff. Mr. Smith is the Deputy County Administrator. He did tell me verbally, several times, and in writing, with members of the Board of Supervisors that was certainly their intent. Whether the Code allows them to do that or not, that was their intent. My feeling is, is we don't get past the Board of Supervisors; that's the gate to the courts to get appointed. If we don't have the approval of them, we don't even get that far. If they want us to comply with something this small so we can be in line with all of the other Boards in the County, including the School Board, I don't want to personally stand in the way of that. This is not that big of a deal that I want to defy the Board of Supervisors on this. So, I am going to... I think we should comply with it. And I thought Mr. Smith was going to talk to our staff. I don't know he did; that's what he indicated in his email to me on January 24th. He said that, Dana, the Board By-laws , excerpt copy below, state that the BACC Chair and Vice-Chair shall serve a term of no more than two consecutive years. We will re-emphasize this with staff liaisons of each BACC so they can relay to the members. And that's all he said. Again, whether or not they have the legal authority, I'm okay with it. Again, without them, we don't even get to the courts to get appointed by the courts. If we don't have the approval and the sanction of the Supervisors, we don't do it. And again, I think it's a small thing and if they want all the Boards to do it, I don't have any problem complying with that.

Dr. Larson: Melody, do you know what a BACC, what that stands for?

Ms. Musante: It's the Boards and Commissions.

Dr. Larson: Boards and Commissions... and what's the second C stand for?

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Musante: Committees.

Dr. Larson: Committees, thank you.

Ms. Bertoldi: I understand why it's there in general, but I also looked at the By-laws and the Ordinances and, you know, we are nominated by the Board of Supervisors, we're not appointed by them. Those are two very legally significant meanings. And if they wanted us to be included, maybe they meant that. But they didn't say it, and so you've got to look at, you know, it might be what they meant and they would need to change it. But we are only nominated. They can't go to the court and say, you're going to make this person, even if they do rubberstamp, let's say. They nominate, they do not appoint. We are independent from them. So, my thing is, and I totally get, you know, what you're saying, but I don't think that we are required to follow that. I think that that... the language that is there does not support that.

Ms. Brown: Well, and that's not my... my assertion is I'm not sure if we're required or not. My assertion is that that was certainly their intent and this is not something that's such a significant issue that I would go to my Supervisor and the other ones because there was quite a bit of discussion about this when it was passed, that I would go to them and say, you know what? You don't have any... you can't tell me what to do. Ha. Ha. Ha. This is...

Dr. Larson: Yeah, I don't think I'd do that either.

Ms. Bertoldi: But you can't go by intent because if you go by intent, then it would be like, well...

Ms. Brown: I go with what my Supervisor told me.

Ms. Bertoldi: Right, but I'm just saying that the, you know, there would be, for lack of better words, a slippery slope of well, that's not what I intended in this or that's not what I intended in that. I mean, then the statute needs to... that's the reason why statutes are rewritten to further flush out a situation's arise, if there's something somebody didn't think of before. They probably didn't think it. But...

Ms. Brown: Jeff, are we considered a BACC? The Board of Zoning Appeals?

Mr. Harvey: Mr. Chairman, Ms. Brown, for the purposes of the Board of Supervisors tracking appointments and recommendations, as well as invites to functions with all the Boards and Commissions, yes, the BZA is lumped together with that. As mentioned, there are other Code requirements that apply to BZAs that don't apply to other Boards.

Mr. Grimes: And, as far as I'm aware, there's other jurisdictions where the Board of Supervisors is not involved with the selection of BZA members at all. If Mr. McRoberts was here, I can remember specifically from my training, I want to say it's down near Chesterfield, somewhere down there, where it is done strictly through the Court. The County has chosen a different path to make those appointments or suggest appointments, but it's unique to Stafford -- not necessarily unique to Stafford, but a lot of the other jurisdictions don't get involved at all; a judge picks who it is.

Ms. Brown: And a lot of the other jurisdictions do not have special exceptions given to them by the Board of Supervisors. I think in the past, I think the Board of Supervisors has given it to the Board and then they've also taken it away and given it back again. So that is within their power. And it seems to me, like I said in my email, it's just reasonable that they would have some oversight of us. And, again, I don't think this is that big of a deal that I want to go up and go against what their intent was. I just... I

***Board of Zoning Appeals Minutes
February 27, 2018***

think it's insignificant that... to make a stand. If I'm going to fall on my sword for something, it's not going to be this.

Dr. Larson: Mr. Chairman? Can I just ask real quick. Dana, you talked to your Supervisor?

Ms. Brown: Yes.

Dr. Larson: And did you talk to any other Supervisors?

Ms. Brown: Um, yeah, there was a couple other ones at the meeting. It was at one of the committee meetings -- I don't remember. I don't remember, but I know that my Supervisor went up and pulled Mr. Smith over to come talk to me about this. And then he later followed it up with a written email and talked to me about it again as recently as last week.

Dr. Larson: So she thought it was a big deal.

Ms. Brown: Very big deal. But...

Dr. Larson: Steven, you talked to...?

Mr. Apicella: So, I talked to three Supervisors; Mr. Coen, Ms. Bohmke, and I'm trying to think of who the third person is.

Mrs. Stefl: Was it Gary?

Mr. Apicella: It wasn't Gary. It escapes me at the moment.

Dr. Larson: Mark?

Mr. Apicella: Mark. Mark Dudenhefer. So that's three of the seven. I don't know who else was in that meeting that you were at but they specifically told me they have no problem with the BZA's terms of office. And if we wanted to have somebody ten times as Chairman, it's not an issue for them. So I don't know where... maybe Jeff, Susan, Melody, aside from Mike, is any Board member pushing this as far as you know?

Ms. Brown: Well, Mike, Mr. Coen and Mark Dudenhefer were not here when the By-laws change happened last summer when the discussion happened.

Mr. Apicella: Right, but they're on the Board now so that's what I think is warranted. It doesn't matter who was here a year ago or three years ago when they first did this; these are the Board of Supervisors who are in place today. They're going to make that ultimate decision if we go against them and they feel like we're sticking them in the eye, which I don't think is the case.

Ms. Brown: That's kind of how I feel if we don't go along with this.

Dr. Larson: Did you ask Jeff a question?

Mr. Apicella: I did.

*Board of Zoning Appeals Minutes
February 27, 2018*

Mr. Harvey: Mr. Chairman and Mr. Apicella, staff is not aware of any questioning or direction from any individual Board members or the Board as a whole with regard to this matter. We've just not had that discussion.

Ms. Brown: I know, Melody, you told me too, back when it happened, that this was going to apply to us. And I remember saying to you well I'm not sure it does because (inaudible). No it does.

Ms. Musante: No. I spoke with Jeff and it was his suggestion that you all follow. It wasn't mandatory because you all are appointed by the court. It's different than being voted.

Ms. Brown: I know. And I'm talking about when it first happened. But yeah, still.

Ms. Musante: I did. Jeff and I have had that discussion twice.

Ms. Brown: Yeah, and that's it. Get back where it is. Whether they can enforce it or not, it was the desire for all of the Boards to operate like this. They even made it for themselves like that, and Ms. Bohmke probably I think it sounded like that she wasn't even aware because theirs is different. The BACCs are two years, the Board of Supervisors is only one. They made it a little more restrictive for themselves. Again, I just... this is a small thing; the School Board does it, all the other BACCs do it, the Board of Supervisors does it. I'm... I mean, you guys can do what you want but this is not something I'm going to take a stand on and say I'm not gonna... because I think it is a good idea. I, you know, the School Board didn't used to always do it and it was a problem over there, and now they started to do it and it's better.

Dr. Larson: I think, based on my interaction, official interactions with the Board in the past, I think they would be loath to hear somebody on this Board say that somehow they oversee us or they tell us what to do or you know. They themselves would not want to hear that. Now, I think this is an idea that we should consider on the Board on its own merits for this Board.

Ms. Brown: Okay.

Dr. Ackermann: Mr. Chair?

Dr. Larson: I don't think it's a bad idea.

Mr. Grimes: Yes sir.

Dr. Ackermann: I tend to agree with Ms. Brown on this for... first of all, from her reasoning that if this applies to other Boards and Commissions that it would be reasonable for us to go along with it. Secondly, from an organizational point of view with no disparagement to anyone who's been an officer on this Board because you've all done wonderful jobs, I think it's good to rotate the positions on the Board so that we get some... so we avoid, not that it's happening here but could, but we avoid a clique of folks who feel like they can... not feel like they can but without even like they can but just inadvertently get together and set a direction before we all hear something. That's why I think it's better to rotate. I've served on several Boards, not this one, but other types and we all have limits as to either how long we can serve or limits as to how long we can be officers. And I think it's a good idea to rotate, if you will, leadership among members of the Board. So I would certainly support that.

Mr. Kim: May I ask, are we rotating once a year? Bi-annually?

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown: Well, the other BACCs are doing it two years. Well, you have to get elected every year but you can serve no longer than two consecutive years. But you can get off and get back on again, you just have to have a break in between. I don't see anything wrong with doing it that way. I just...

Mr. Kim: Do we want to take a vote?

Mr. Grimes: Our terms are five years, correct?

Dr. Larson: Our terms are five years.

Mr. Grimes: Right. Which is longer than most other Boards and Commissions in the County.

Dr. Ackermann: Yeah, but you could be like me who's been on in my third five-year term. You know, I mean, I could be here like in how Larry Ingalls was here, what, 35 years. I probably won't live that long. But you never know. I could be here in my 90s, you know, and there you go. So having a five-year term doesn't limit us. The other thing I think that rotation of leadership does is that it keeps us... keeps some of us from just taking a backseat on everything and let's just see what comes up. So, I would like... if we want to make a motion, I make a motion that we limit our terms to two consecutive terms in any office.

Ms. Brown: I'll second it.

Dr. Larson: I think this would be... I think this would be a By-laws change, but we can certainly do it by motion.

Dr. Ackermann: You're right, yeah.

Dr. Larson: So, motion...

Dr. Ackermann: Motion to amend the By-laws.

Ms. Brown: Motion seconded.

Dr. Ackermann: To limit a term in any one office to two consecutive terms.

Ms. Brown: I'd like to use the same language everybody else uses just for simplicity sake, but that's my thought.

Dr. Larson: What's the language?

Ms. Brown: It was in the email I sent you. Hang on, I can read it. It says the Board shall make appointments of individual... okay, this is for the... to County Boards, Authorities, Commissions, and Committees, this is for the Supervisors, appointments should be made by majority vote. Appointments to the various County Boards, Authorities, Commissions, and Committees may be made by single vote or multiple votes, yeah, okay. The important part to us is no appointed member shall serve as the Chairman or Vice-Chairman for more than two consecutive years.

Dr. Larson: Okay.

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown: Again, it doesn't... how it was explained to me, you can be Chairman for two, you can get off and then go back on again. You just can't do it more than two years at a time. And you still have to get voted in every year; it's not a two-year term.

Dr. Larson: Sure.

Ms. Brown: But that's it. The School Board does it with two years; the only one that does it with one I think is the Board of Supervisors for their Chairman. And they have some other rules that they can't be Chairman in an election year or something like that.

Mr. Kim: So, the Board of Supervisors is a four-year term, right?

Ms. Brown: Four-year term but their Chair can only serve one consecutive... one term at a time. But I'm not proposing that, that the BACCs are all two, School Board's two, I'm just saying that we should be in line with the other BACCs, that was my assertion.

Dr. Larson: Is that what you had in mind, Dr. Ackermann? You need a motion.

Dr. Ackermann: I had in mind two consecutive terms, yeah; no more than that.

Dr. Larson: Chair and Vice-Chair?

Dr. Ackermann: Chair and Vice-Chair. We could extend it to all... there's only one other office, right, Secretary?

Mr. Grimes: Secretary.

Ms. Brown: I don't care if we do it to all.

Dr. Ackermann: If we do it to all, why not.

Mr. Grimes: Two things, I am opposed to it for two reasons; one, again, I think that because we are appointed by the court that the rules from the Board of Supervisors, because they have recommendations to other Boards and Commissions, simply don't apply to us. The other issue in it that I've seen in this and Dr. Larson actually pointed it out; if we made the change of Chair before this meeting started, that could have been trouble. And having somebody that's gone through it and done it on enough occasions that is just starting to get comfortable in it, and you've done it, you know where it takes a while to kind of get into the groove and get moving, having that consistency across those positions for longer than two terms I don't necessarily think is a bad thing if the Board thinks they're doing a good job. If they're not doing a good job, they won't be re-elected.

Dr. Larson: Well, my point earlier tonight was for you to stay in the Chair until the end of the meeting because we're supposed to vote for officers in this meeting.

Mr. Grimes: Right.

Dr. Larson: But there's nothing that says we have to do it the very first thing. We can do it the very last thing like we're doing now. And I would suggest that we always routinely do it the very last thing so the incoming Chair, if there is one, has a little time to get their feet on the ground and figure out how they're going to run the meeting.

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown: That's reasonable.

Mr. Grimes: There's no question about that part.

Dr. Larson: Yeah, because you got trial by fire when you got elected.

Mr. Grimes: Yes, exactly.

Mr. Kim: I remember that, yeah.

Mr. Grimes: Thank goodness, I think I was Vice for a little bit before that.

Dr. Larson: I was sitting next to you.

Ms. Brown: But if we don't rotate, we're not going to get the experience.

Mr. Apicella: Mr. Larson, how many times did you serve consecutively as Chair?

Dr. Larson: Oh, I just served two years as Chair, isn't that right?

Mr. Apicella: I thought it was three.

Dr. Larson: Was it three?

Mr. Apicella: Yeah, and I thought Mr. Gibbons served several years consecutively, four. I hear what folks are saying and I think we kind of split the issue between what the Board wants and maybe now what the Board of Zoning Appeals wants, and I think the latter part is, is a fair question. But I think the Board of Zoning Appeals decide what it wants by how it votes on the Board leadership. So, tonight the Board can decide to change leadership if it wants to or it can decide if it wants to stay with whoever is in office.

Dr. Larson: Well, but point of order...

Mr. Apicella: So it doesn't really need to be...

Dr. Ackermann: Point of order, right.

Dr. Larson: There is a motion on the floor that's been seconded.

Mr. Apicella: I understand. I'm just... I thought we were having a conversation.

Dr. Larson: But I'm just saying, I thought... it sounded like you were trying... I mean, we still have to vote on this motion.

Mr. Apicella: Right, so am I not allowed to debate the motion?

Dr. Larson: Is that what you're doing?

Mr. Apicella: Was I not? I was just spring-boarding off of what the Chair had just said, which is again, one way to decide term limits is for just like the people in and out of office is not saying hey, you can

***Board of Zoning Appeals Minutes
February 27, 2018***

only serve in Congress for six terms, it's I'm done with you as a voter, I'm not going to put you in that office anymore. So we can do that without having a By-laws change. It's by the natural vote that people take every year when this matter comes up.

Dr. Larson: I don't disagree.

Dr. Ackermann: If I could speak to that, I think folks, again and again, is just a passive way of dealing with the issue. Not that somebody has to do something wrong that we vote them out, it's just that we get other people on the Board involved in the leadership of the Board. And we're not saying that the person who's Chair this year is banished from the Board, the person who's Chair this year and the person who gets elected after that, they'll be there clearly to consult with them and to help them if they need it... if they need help. So I just think it's a... I mean, I just... From an organizational point of view I think it's a good thing to do. In fact, we see what happens in Congress when people get elected again and again and again and again. It don't work.

Mr. Kim: Well, if I can... I kind of like the system if we have a Chairman that works and makes us look better. I don't want to put limitations on that. It's just my opinion. I like that every year we have to vote in our leadership because then that stands, because if our Chair and Vice-Chair and Secretary don't do a good job, we don't, you know, regardless on term or not, we don't vote them in as Chair or Vice-Chair. So, I'd just kind of would like to at least (inaudible) and I'm kind of against the motion. Just my two cents.

Dr. Ackermann: Do we have a vote?

Mr. Grimes: I was going to say, we'll offer up any other discussion? No? I'll be honest, I did not write down who was the first to make that motion.

Dr. Ackermann: I did.

Mr. Grimes: I had them backwards. Who was second?

Ms. Brown: Myself.

Mr. Grimes: I did have it backwards, excellent. So, the motion on the floor is to revise the By-laws to limit the officers of the BZA to no more than two consecutive terms. Is that correct?

Ms. Brown: Yes. But to clarify, that doesn't mean they can't serve again. They just have to take a break.

Mr. Grimes: Nope, just two consecutive terms.

Ms. Brown: And maybe we should spell out all the officers, Chair, Vice-Chair, and Secretary.

Dr. Larson: I think that's what he moved.

Mr. Grimes: I think those are the only officers that I'm aware of.

Ms. Brown: Right, but just to...

*Board of Zoning Appeals Minutes
February 27, 2018*

Mr. Grimes: Right, I mean, I think we can... I think that the motion is to make a change to those By-laws; the language of that we'll have to hammer out.

Ms. Brown: Again, this is not a reflection on anybody; it's just that I really don't want to be the only Board in Stafford County that doesn't operate like that. And I think it is good to get, you know, some experience. I know when you were gone one time and Steven was late or his wife was getting surgery... I can't remember... but it was going to be where I was going to have to run the meeting at the last minute and didn't find out till like five to seven, had never run a meeting before, was scared to death. I'd like to have more than just one or two experienced people on how to run the meeting. And I liked your idea about making the officers at the bottom of the agenda for February, because that's true -- everybody is prepared and if you're going to be the new Chair, you might not be prepared.

Dr. Larson: Yeah, I don't think that has to be a By-laws change, it's just something we remember.

Ms. Brown: Yeah, but I think that's a good idea because...

Mrs. Stefl: The agenda is written by the Chairman, correct?

Mr. Grimes: It's actually written by staff and approved by the Chair. So, we just let Melody know that next year put it down at the bottom of the list. It'll show up at the bottom of the list. And then if I could remind everybody to turn on their microphones. Alright, so we have a motion to revise the By-laws to limit the officers of the BZA to two consecutive one-year terms, language to be worked out shortly. Motion on the floor by Dr. Ackermann, second by Ms. Brown. Those in favor say aye.

Dr. Ackermann: Aye.

Dr. Larson: Aye.

Ms. Brown: Aye.

Mr. Grimes: Put your hands up please; we've got three. Those opposed. Four; motion doesn't carry.

Ms. Brown: How come our alternates didn't vote? Doesn't the By-laws say that they vote except on all matters of the Board except for a hearing if they're not sitting on it?

Dr. Larson: I think that's right. I think I wrote it.

Ms. Brown: You think you wrote it?

Dr. Larson: I think I wrote it.

Ms. Brown: I think it's in here; I remember reading it somewhere. Hang on. I think it's 2-6 -- except as stated in 2-5, any alternate member may participate in all of the business of the Board. Alternate members may vote only if they are substituting for a regular member of the Board.

Mr. Grimes: Right.

Ms. Musante: They can participate and speak.

Mr. Grimes: But they can't vote. Substituting for a regular member.

***Board of Zoning Appeals Minutes
February 27, 2018***

Mrs. Stefl: Otherwise you'd have more people voting than what's allowed to vote.

Ms. Brown: I know, but...

Dr. Larson: No, no, no, okay. I see the way it's written; it's not what I intended when I wrote it. I intended business like this for the alternates to have a voice and to vote. You are not voting on an official decision here, this is By-laws. This is how we run ourselves.

Ms. Brown: It says something about a regular proceeding, the alternate member cannot participate in the proceedings anyway unless they're sitting on the Board.

Dr. Larson: Yeah, when it says any alternate member may participate in all business of the Board. That's what that means. But I guess it's not clear.

Ms. Brown: Maybe we should clean that up too since we're...

Mrs. Stefl: My read of that is very similar to Ms. Bertoldi's in they can participate in the discussion, but a natural official vote are only members.

Mr. Apicella: And that actually bears out in the way we've conducted business over the years.

Dr. Larson: Well, we take so few votes...

Ms. Brown: Weren't you guys weighing in on the iPad discussion? I kinda remember that.

Mr. Apicella: Right, they weighed in... there's a difference between weighing in and raising your hand and taking a vote. Just like...

Dr. Larson: It's not worth changing.

Ms. Bertoldi: Actually, the only thing I weighed in on the iPad was saying that I didn't think I had to vote because I didn't think it was appropriate as an alternate, actually was the only thing I said. Mr. Gibbons voted.

Ms. Brown: Mr. Gibbons voted? That's what I thought; I thought there was some voting going on.

Dr. Larson: Alright, so we got that; so now we have elections, right?

Mr. Grimes: Now we have elections.

A. Election of Chairman

Ms. Brown: I'd like to nominate Dr. Ackermann for Chair.

Mr. Apicella: And I'd like to nominate Mr. Grimes.

Dr. Ackermann: Do we need seconds for nominations?

Mr. Grimes: Give me a moment, because actually the way that I read the rules...

***Board of Zoning Appeals Minutes
February 27, 2018***

Ms. Brown: We don't need a second.

Mr. Grimes: ... they're made in the order. So we have Ackermann, Grimes; any other nominations for Chair?

Mr. Apicella: I close nominations.

Mr. Grimes: Alright, so we vote as the order they're received. All those in favor of Dr. Ackermann taking over the Chair say aye.

Dr. Ackermann: Aye.

Dr. Larson: Aye.

Ms. Brown: Aye.

Mr. Grimes: Raise your hands please so I can get a count. That's three. All those opposed? Four. Those in favor of Mr. Grimes taking the Chair say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Mrs. Stefl: Aye.

Mr. Grimes: Aye. Hold your hands up please. Four. Those opposed? Three. Mr. Grimes carries the Chair. We'll take nominations for the Vice-Chair.

B. Election of Vice-Chairman

Mr. Grimes: I'd like to nominate Mr. Apicella for Vice-Chair.

Ms. Brown: I'd like to nominate Dr. Larson

Mr. Grimes: Larson. Any other nominations? Hearing none, those in favor of Mr. Apicella taking Vice-Chair say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Mrs. Stefl: Aye.

Mr. Grimes: Aye. Hand count please; four. Those opposed?

Ms. Brown: No.

Mr. Grimes: Alright, Mr. Apicella, because you have a majority there already you are now the Vice-Chair. We'll now take nominations for Secretary.

***Board of Zoning Appeals Minutes
February 27, 2018***

C. Election of Secretary

Mr. Kim: I nominate Heather Stefl.

Mr. Grimes: Stefl. Do I have another nomination? Hearing none, those all in favor of Mrs. Stefl being secretary say aye.

Mr. Apicella: Aye.

Mr. Kim: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mrs. Stefl: Aye.

Dr. Larson: Aye.

Mr. Grimes: Aye. Hand count please? It looks like everybody; unanimous. Perfect. Carried. Last one, adjournment.

ADJOURNMENT

Mrs. Stefl: I move for adjournment please.

Mr. Grimes: We have a nomination to adjourn from Mrs. Stefl. Second by Mr. Kim. All those in favor?

Mr. Apicella: Aye.

Mr. Kim: Aye.

Dr. Ackermann: Aye.

Ms. Brown: Aye.

Mrs. Stefl: Aye.

Dr. Larson: Aye.

Mr. Grimes: Aye. Thank you all very much.

With no further business to discuss, the meeting adjourned at 9:58 p.m.