IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081743

BOARD OF SUPERVISORS OF STAFFORD COUNTY, VIRGINIA

and

STAFFORD COUNTY, VIRGINIA,

Appellants,

v.

CRUCIBLE, INC.

Appellees.

BRIEF *AMICI CURIAE* OF VIRGINIA CHAMBER OF COMMERCE AND HOME BUILDERS ASSOCIATION OF VIRGINIA

Arthur E. Schmalz (VSB No. 36014)
Jill Marie Dennis (VSB No. 43466)
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
Tel: (703) 714-7400
Fax: (703) 714-7410
Counsel for Amici Curiae Virginia Chamber of Commerce and Home Builders Association of Virginia

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PRELIMINARY STATEMENT

The Virginia Chamber of Commerce (the "Chamber") and the Home Builders Association of Virginia ("HBAV") (collectively, the "*Amici*") submit the following Brief in support of the ruling of the Circuit Court of Stafford County in the case below.

IDENTIFICATION OF THE *AMICI* AND THEIR INTEREST IN THIS CASE

The Virginia Chamber of Commerce is a trade association representing over 800 businesses in Virginia. The Chamber is the Commonwealth's largest general business organization representing all business sectors, from small business enterprises to Fortune 500 companies. Many of the Chamber's members are involved in the land development industry. Even more have interests in real property and, from time to time, have to utilize the land use review and approval process of local governments in Virginia. The Chamber regularly advocates in the General Assembly for policies that further the interest of its members and the business community of Virginia at-large.

The Home Builders Association of Virginia is a 5,000-member statewide organization of home builders and firms that provide products and services to the home building industry. It and its members have a significant interest in the laws and procedures relating to local government

land use review and approval in Virginia. HBAV dedicates substantial attention, energy and resources to matters before the General Assembly that may impact land use and property rights in the Commonwealth.

Both the Chamber and HBAV, and their members, are legitimately interested in this case because it involves the question of whether landowners and developers who seek out and obtain a zoning administrator's determination that a specific proposed project is permitted by existing zoning ordinances, and thereafter expend significant time and money pursuing that project in reliance upon the determination, have a vested right that protects them from subsequent zoning ordinance changes.

The *Amici* believe that this question should be answered in the affirmative. Preserving an effective and meaningful zoning administrator review process -- a process that is authorized by the Code of Virginia and most local zoning ordinances -- is critical to landowners and developers, such as the *Amici*'s members. Indeed, it is the only expeditious and inexpensive procedure by which a landowner or developer can determine whether a contemplated project is permitted under existing zoning ordinances. Without this procedure, a landowner and developer in the position of Crucible, Inc. in this case has no alternative but to spend considerable time and money preparing development plans (such as site

plans or subdivision plans) and to hire lawyers and other professionals to navigate the sometimes lengthy and torturous local government land use review process -- all with no assurance that his proposed project will be allowed under the existing zoning. Such a result would deter many landowners and developers from putting their property to its most economically productive use, contrary to one of the most important purposes that zoning and land use planning serves:

> The General Assembly has recognized that it is in the public interest that private land not required for public use be put to its optimum use to fulfill societal needs. One purpose of zoning ordinances is 'to encourage economic development activities that provide desirable employment and enlarge the tax base' . . . . Landowners venture investments only when the prospects of profit are reasonable. Prospects are reasonable only when permissible land use is reasonably predictable. The Virginia landowner always confronts the possibility that permissible land use may be changed by a comprehensive zoning ordinance reducing profit prospects; yet, the Virginia statutes assure him that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning.

Board of Supervisors of Fairfax County v. Snell Const. Corp., 214 Va. 655, 657-658, 202 S.E.2d 889, 892 (1974) (citations omitted).

If, as the Appellants urge, a zoning administrator determination cannot give rise to vested rights, then the zoning administrator review process will have little or no value to landowners in the Commonwealth. Likewise, it will enable local governments to take multiple bites at the apple

in attempting to derail a proposed land use that a landowner had been pursing in good faith reliance on a zoning administrator determination. Indeed, that is, in essence, what happened to Crucible, Inc. Reversal of the Trial Court's ruling would allow a local government to attempt to overturn a zoning administrator's determination through a Board of Zoning Appeals ("BZA") appeal and, then, regardless of the outcome of the appeal, accomplish the same objective by simply changing the zoning ordinance.

In short, reversal of the Trial Court's decision would undermine the predictability and consistency with which zoning ordinances and procedures should be administered in the Commonwealth, would render zoning administrator determinations largely useless, and would assail the dignity and finality of the BZA appeal process.

STATEMENT OF THE NATURE OF THE CASE AND FACTS

The *Amici* adopt the Statement of the Nature of the Case And Facts contained in the Brief of the Appellee, Crucible, Inc. ("Crucible").

STANDARD OF REVIEW

The *Amici* adopt the Standard of Review contained in Crucible's Brief.

ARGUMENT

The *Amici* concur in all the arguments made by Crucible in its Brief. There are, however, two specific issues raised in this appeal which the *Amici* believe are of particular importance to the interests of their respective members: (1) whether the trial court correctly ruled that Crucible was not required to seek a vested rights determination from the Zoning Administrator before filing suit in the trial court below; and (2) whether the trial court correctly concluded that the Zoning Administrator's determination at issue (the "Determination") was a significant affirmative governmental act ("SAGA") within the meaning of the vested rights statute, Va. Code Ann. § 15.2-2307. For the following reasons, the *Amici* assert that the trial court's rulings on both issues were correct, and should be affirmed.

I. Crucible Did Not Have To Seek A Vested Rights Determination From The Zoning Administrator.

A. The Appellants Have Attempted to Extend the Purpose of The Amendments to Section 15.2-2286(A)(4) Beyond the Issue Created by *Holland v. Johnson*.

The *Amici* agree with Crucible that nothing in Va. Code Ann. § 15.2-2286(A)(4) required it to obtain from the Zoning Administrator a determination of its vested rights. The *Amici* take this opportunity, however, to clarify and amplify the points that Crucible has made in its Brief.

The Appellants contend that the only purpose of the 1993 amendment to Section 15.2-2286(A)(4) was to give zoning administrators the power to adjudicate vested rights determinations, and thereby make the zoning administrator the exclusive forum for determining vested rights in the first instance. (Appellants' Br. at 20.) This ignores, however, the issue in *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991), to which the General Assembly purportedly responded.

In *Holland*, the sole question that this Court addressed was "whether a zoning administrator has the authority to decide whether a landowner has a vested right in a land use." 241 Va. at 554, 403 S.E.2d at 357. There, the zoning administrator and the locality argued that, in the precursor to Section 15.2-2286, the General Assembly had empowered the zoning administrator to render such a decision. The Court unequivocally stated, "[n]othing in the statute authorizes the zoning administrator to adjudicate property rights." *Id*. at 556, 403 S.E.2d 358.

It is in this context that the 1993 amendments to the Code must be viewed. When the General Assembly added to the zoning administrator's powers the authority to make "conclusions of law regarding determinations of rights accruing under § 15.2-2307," Va. Code Ann. § 15.2-2286(A)(4), it was doing no more than granting zoning administrators the authority that

this Court held was plainly lacking from the statute. Had the General Assembly meant to make resort to the zoning administrator the *sole remedy* for a property owner seeking a determination of its vested rights, it surely would have said so.

B. The Legislative Response to *Holland v. Johnson* Was Ineffectual and Unconstitutional.

Significantly, when the General Assembly did respond to this Court's ruling in *Holland*, it overlooked a critical component of that decision. In short, *Holland* renders unconstitutional and void any legislative attempt to confer upon zoning administrators the authority to adjudicate an individual's property rights.

Specifically, in *Holland*, this Court did not simply reject the argument that the Virginia Code authorized the zoning administrator to make vested rights determinations. Instead, the Court expressly held that the "determination whether a property owner has acquired a vested right in land use" implicates an "adjudication [that] can be made *only by a court*." *Id*. at 555, 403 S.E.2d at 357 (emphasis added). This holding was firmly grounded in the separation of powers principles of the Constitution of Virginia:

> The judicial power of this Commonwealth is vested in the Supreme Court and in such other courts as are established by the General Assembly. Va. Const. art. VI, § 1. It is the sole

> province of the judiciary to expound the laws and to adjudicate cases. That power, which emanates from the Virginia Constitution, is not shared with any other branch of government.
>
> * * *
>
> A vested right in a land use is a property right which is created and protected by law. An adjudication regarding the creation, existence, or termination of that right *can be made only by a court of competent jurisdiction*.

Id. at 555-56, 403 S.E.2d at 357, 358 (emphasis added).

In amending Code Section 15.2-2286(A)(4), the General Assembly attempted to confer upon zoning administrators powers that only the courts constitutionally possess. Thus, the 1993 amendment to Section 15.2-2286(A)(4) is unconstitutional and void. Accordingly, neither Crucible nor any other land owner is required to seek a vested rights determination from a zoning administrator (or any other local government official) prior to seeking an adjudication of his or her property rights in the courts of the Commonwealth.

II. A Determination by a Zoning Administrator That Is No Longer Subject To Appeal, Modification Or Reversal Constitutes a "Significant Affirmative Government Act."

The trial court properly and correctly ruled that the Zoning Administrator's Determination was a SAGA, affording Crucible vested rights pursuant to Code Section 15.2-2307. As explained below, the trial court's decision is consistent with the constitutional protection of property rights

and the purposes of Code Section 15.2-2307. It is also supported by the General Assembly's statutory scheme which provides property owners with greater certainty about their rights and protects them from challenges to, and modifications of, zoning determinations. The trial court's decision is further supported by the elaborate appeal and procedural rights afforded to those aggrieved by zoning administrator determinations.

A. The Appellants' Position, if Adopted, Would Undermine The Purposes of Section 15.2-2307 and the Vested Rights Doctrine.

The Appellants have disserved the Court by steering the focus to irrelevant issues such as subdivision plat and site plan approvals, and a parade of horribles that will purportedly occur if the Court affirms the trial court's reasoned conclusion that the Zoning Administrator's Determination in this case was a SAGA for the purposes of Code Section 15.2-2307. Stripped of its hyperbole and rhetoric, the Appellants' position is that there can be no SAGA if it occurs prior to, or instead of, any of the acts specifically identified in Section 15.2-2307. (*See* Appellants' Br. at 28-29.) ("The Circuit Court's decision would allow a landowner in the subdivision or site plan process to always meet the threshold requirement of a SAGA before obtaining the actual approval of his preliminary plat or plan.") The Appellants' reading of Section 15.2-2307 conflicts with the purpose of the

statute and the vested rights doctrine, and would effectively nullify critical language of the statute, including the phrase, “without limitation” -- language the General Assembly added for the purpose of expanding the range of governmental acts that can give rise to vesting under Section 15.2-2307.

The purpose of Virginia’s vested rights doctrine is to protect “a citizen’s constitutional right to develop property free of the ‘fluctuating policy of legislative bodies.’” Ralph D. Rinaldi, *Virginia’s Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. (Student Ed.) 77, 101 (1994) (citation omitted). Vested rights are property rights, and they are protected by the Virginia Constitution. *School Bd. of the City of Norfolk v. United States Gypsum Co*., 234 Va. 32, 38, 360 S.E.2d 325, 328 (1987). Avoiding “legislative fluctuation” is particularly important in the area of land development: “Landowners venture investments [in land use] only when the prospects of profit are reasonable. Prospects are reasonable only when permissible land use is reasonably predictable.” *Snell*, 214 Va. at 658, 202 S.E.2d at 892.

This Court recognized just last year that Section 15.2-2307 is aimed at providing property owners with protection from legislative fluctuations: “The clear intent of the statute is to provide a property owner with

protection from a subsequent amendment to a zoning ordinance when the property owner has already received approval for and made substantial efforts to undertake a use of the property under the prior version of the ordinance." *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 243, 657 S.E.2d 153, 159 (2008). The Court also previously recognized that the amendments to Section 15.2-2307 constituted "substantial changes" which clarified and expanded the types of governmental acts which can give rise to vesting. *City of Suffolk v. Board of Zoning Appeals*, 266 Va. 137, 143-145, 580 S.E.2d 796, 798-99 (2003).

When it is unclear whether a proposed land use is permissible under the applicable zoning classification, a landowner faces a double danger: it can spend hundreds of thousands of dollars to develop site plans and apply for the requisite permits and approvals just to learn (1) that the land use is *not* permissible under the locality's interpretation of its zoning ordinance; or (2) that the local government has effectively "raced" the developer to change the zoning before the developer could substantially complete its project. Either result is untenable.[1]

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[1] Appellants make it appear that submitting a subdivision or site plan is akin to filling out a simple application. (*E.g.*, Appellant Br. at 8-9.) They overlook the significant cost of designing and obtaining a site plan. For example, nearly 40 years ago, the developer in *Board of Supervisors of*

Crucible faced those very dangers when trying to decide whether and where it could construct its training center as a lawful, by-right use. The question was whether the training center would be considered a "school," a by-right use under the property's existing zoning classification. Since the training center was not a traditional "school" with yellow busses, bells and playground equipment, the answer to the question was not certain. Crucible needed -- as many landowners and developers in similar circumstances need from time to time -- an *official determination* that its proposed use was, indeed, a permissible use under the County's existing zoning ordinance. Crucible received an official determination from the Zoning Administrator only after it made a presentation to County officials, at which it submitted project plans and other information about its facility. Thus, when the County Zoning Administrator issued a determination that Crucible's training facility is a "school" within the meaning of the applicable zoning ordinance, he effectively authorized Crucible's proposed use under the existing zoning. As a result, the Zoning Administrator's Determination should be deemed a SAGA for the purposes of Section 15.2-2307.

Fairfax County v. Medical Structures, Inc., 213 Va. 355, 357, 192 S.E.2d 799, 801 (1972), spent more than $59,000 for engineering and architectural plans alone, and nearly $250,000 in total costs associated with the

The Appellants complain, however, that this conclusion means that "Crucible's rights vested before it obtained approval of, indeed before it even properly filed, a site plan, approval of which would constitute a SAGA under criteria (v) or (vi) of" Section 15.2-2307.[2] (Appellants' Br. at 25.) The statute, however, recognizes that not every SAGA must occur during the development process. In fact, the plain language of Section 15.2-2307 evidences the General Assembly's intent that the statute be read broadly and beyond the doctrine of vested rights articulated by this Court in pre-1998 decisions.

As an initial matter, Section 15.2-2307 abrogates the holdings of several decisions of this Court, insofar as they might be read to prevent vesting pursuant to the terms of the statute. For example, in *Snow v. Amherst County Board of Zoning Appeals*, this Court concluded that "the grant of a variance is not a significant official government act…. The mere reliance on a particular zoning classification, whether created by ordinance

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preparation of a site plan for the development of its proposed project. Obviously, those costs today are significantly higher.

[2] Even here, the Appellants misread the statute. Subsection (v) refers to the government's approval of a "*preliminary* subdivision plat, site plan or plan of development," while subsection (vi) involves *final* plats and plans. Given the facts of this case, the Zoning Administrator's decision can easily be viewed as an approval of a preliminary plan of development. (*See* Appendix at 239-43, 375, 377.)

or variance, creates no vested right in a property owner." 248 Va. 404, 408, 448 S.E.2d 606, 608-09 (1994). Similarly, in *Board of Supervisors of Chesterfield County v. Trollingwood Partnership*, 248 Va. 112, 115-16, 445 S.E.2d 151, 153 (1994), this Court held that approval of a special use permit alone, without subsequent site plan approval, could not give rise to a vested right. Section 15.2-2307, however, lists the granting of a variance and the issuance a use permit with conditions as examples of SAGAs, thus abrogating *Snow* and *Trollingwood* to the extent that those decisions might otherwise prevent vesting under the statute. This evidences a legislative intent to afford expanded vested rights protection to landowners within the Commonwealth -- protections beyond what was available prior to 1998.

The General Assembly's intent to provide expanded vested rights protection is further bolstered by the introductory language of Section 15.2-2307, which stresses that "[n]othing in this article shall be construed to authorize the impairment of any vested right," and that the statute shall not "limit[] the time when rights might otherwise vest." *Id*. This is a clear legislative recognition that vested rights can arise at a variety of times and in a number of different ways. Indeed, while Section 15.2-2307 enumerates several examples of governmental acts deemed to be SAGAs, by including the words "without limitation," the General Assembly plainly

indicated that acts other than those specifically mentioned could be deemed SAGAs. *Id*. This is, yet again, more evidence that the General Assembly intended the statute to provide expanded vested rights protections, and not the narrow, constrained level of protection urged by the Appellants and *Amicus* Local Government Attorneys of Virginia, Inc. ("LGA").

The Appellants ignore the opening text of Section 15.2-2307, and they dismiss the "without limitation" language as virtually meaningless -- a mere "legislative safety valve, accommodating the rare, unforeseen situation where a governmental act is not on the list but is nonetheless sufficient for vesting purposes." (Appellant Br. at 25.) The Appellants contend that such "rare, unforeseen situations" must be "substantially similar and equally serious" as those explicitly identified in the as SAGAs in the statute. (*Id*. at 27.) And, although they theorize that a zoning administrator determination is *not* a SAGA, they never even attempt to suggest what governmental acts other than those specifically enumerated *would* constitute a SAGA under the "without limitation" clause. This is because the Appellants are reading the statute far more narrowly than the General Assembly intended.

B. Both the Trial Court's Factual Findings and the Statutory Scheme that Embodies Section 15.2-2307 Reflect the Proper Significance of Zoning Administrator Decisions.

The Appellants also attempt to paint the Zoning Administrator's Determination as insignificant -- as some sort of off-the-cuff pronouncement or back-of-the-envelope calculation. (*E.g.*, *id*. at 29.) This characterization ignores the trial court's specific factual finding that the Determination was a carefully decided matter. It also ignores the statutory scheme that imbues zoning administrator decisions with meaning and significance.

The trial court's conclusion that the Zoning Administrator's decision was carefully decided was reached only after presentation and consideration of detailed information about the specific project proposed by Crucible. (Appendix at 239-42.)[3] Both the Appellants and the LGA improperly disregard the trial court's factual finding on that point by characterizing the Zoning Administrator's Determination as a mere "zoning verification" (*e.g.*, Appellant's Br. at 4; LGA Br. at 16), when the trial court specifically found to the contrary. (*See* Appendix at 364-65) ("[A]lthough

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[3] The Trial Court's factual finding in this regard is "entitled to the same weight as a jury verdict," and this Court is "bound by" that finding unless it is "plainly wrong or without evidence to support" it. *Little v. Cooke*, 274 Va. 697, 703, 652 S.E.2d 129, 133 (2007). Moreover, because the Appellants did not assign error to that finding, this Court may not review it now. Va. R. S. Ct. 5:17(c).

this document is entitled zoning verification, it really -- what it really is is a zoning determination and interpretation and a decision . . . a decision by the zoning administrator that the description of this facility constitutes a school.")

Additionally, in attempting to downplay the significance of zoning administrator determinations, the arguments of Appellants and the LGA are at odds with zoning administrators' statutory powers, under which they are permitted to "have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance." Va. Code Ann. § 15.2-2286(A)(4).

Similarly, the Appellants and the LGA devalue the General Assembly's recognition of the import and impact of zoning administrator determinations. Indeed, the significance of such determinations is borne out by the same statutory scheme in which Section 15.2-2307 resides. For example, any "person aggrieved" by a zoning administrator's decision has a statutory right of appeal to the BZA for the applicable locality. Va. Code Ann. § 15.2-2311(A). The BZA appeal is subject to various notice, hearing and other statutory procedural protections. Va. Code Ann. § 15.2-2312. Moreover, "any persons jointly or severally aggrieved by any decision" of a BZA may then seek relief from the circuit court through a petition for writ of

certiorari. Va. Code Ann. § 15.2-2314. It is inconceivable that the General Assembly would create this elaborate mechanism for appealing and reviewing a zoning administrator determination if it were merely an inconsequential "run-of-the-mill governmental decision," to use the Appellants' derisive characterization (Appellants' Br. at 15), as opposed to a SAGA under Section 15.2-2307.

Furthermore, the consequences of failing to appeal a zoning administrator's determination to the BZA within the 30-day period prescribed by Section 15.2-2311(A) are highly significant. If no timely appeal is taken, then the zoning administrator's determination becomes "a thing decided," and is not subject to judicial challenge. *Lilly v. Caroline County*, 259 Va. 291, 296, 526 S.E.2d 743, 745 (2000) (internal quotation marks omitted). This is yet another reason why a zoning administrator's determination, at least under circumstances similar to those at issue in this appeal, should be deemed a SAGA for the purposes of Section 15.2-2307.

Adding to the significance of a zoning administrator's determination are the provisions of Section 15.2-2311(C) which, at the very least, implicitly confer SAGA status on an administrator's unchallenged determination:

> In no even shall a written order, requirement, decision or determination made by the zoning administrator or other

> administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer . . . .

Va. Code Ann. § 15.2-2311(C). The express acknowledgement that a landowner might "materially change[] his position in good faith reliance" on a zoning administrator's determination, and the explicit protection for such reliance, should be more than enough to render a zoning administrator's determination a SAGA for the purposes of Section 15.2-2307.[4] In fact, this Court observed in *Goyonaga* that Section 15.2-2311(C) "*does provide for the potential vesting of a right to use property* in a manner that 'otherwise would not have been allowed.'" 275 Va. at 244, 657 S.E.2d at 160 (emphasis added) (citation omitted). This recognition reflects the significance of a zoning administrator determination like the one issued to Crucible, and also why such a determination should be deemed a SAGA for the purposes of Va. Code Ann. § 15.2-2307.

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[4] Although the Zoning Administrator stated in his letter that his decision "is subject to change" (Appendix at 377), Section 15.2-2311(C) prohibited him from modifying or reversing that decision after 60 days. The Zoning Administrator certainly could not subvert the command of the statute simply by resort to his own words.

C. The Facts of this Case Emphasize Why Zoning Administrator Determinations Under Similar Circumstances Should be Deemed to be a SAGA.

Here, the Board of Supervisors and third parties filed untimely BZA appeals of the Zoning Administrator's Determination that Crucible's training facility qualified as a school that was permitted by right under the applicable zoning classification. Indeed, in an earlier case between these same parties, the circuit court reversed the BZA's finding that the appeals were timely, thus rendering the Zoning Administrator's Determination a "thing decided," and immune to judicial challenge by the County Board of Supervisors and third parties.[5]

The Crucible also gained the protections of Section 15.2-2311(C) 60 days after the Zoning Administrator issued his Determination. Accordingly, after that time, Crucible was afforded the assurance that it could go forward with its project and prepare and submit -- at great cost -- a by-right site plan, without the risk that the Board of Supervisors or third parties would later challenge its zoning or its project, or that the Zoning Administrator's Determination might somehow be modified or reversed. The Trial Court

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[5] *See Crucible, Inc. v. Board of Zoning Appeals of Stafford County*, At Law. Nos. 2005-481 and 2005-482, Opinion Letter (May 31, 2006) (attached as Exhibit A). The Zoning Administrator issued his decision on May 11, 2004, and the appeal period expired on June 10, 2004.

specifically found, as a fact, that Crucible relied in good faith on the Zoning Administrator's Determination, and incurred approximately $1.1 million in expenses as a result of that good faith reliance. (Appendix at 368-69.)

Any landowner or developer in a similar situation, relying in good faith on a zoning administrator determination as to which no appeal has been taken within 30 days, and that has not been modified within 60 days, should be deemed vested to the use approved by the determination without fear that his project will be thwarted by a subsequent zoning ordinance amendment.

In short, it is inconceivable that a zoning administrator's determination in favor of a property owner's development rights, under these circumstances, does not qualify as a SAGA -- particularly when the General Assembly has expressly recognized that the locality and its citizens can be aggrieved by such a determination, and has conferred appeal rights on those aggrieved. These explicit statutory rights, remedies and protections clearly demonstrate that a zoning administrator's determination necessarily must carry significant weight and confer significant rights and obligations. Otherwise, those rights, remedies and protections would be unnecessary and meaningless. Such a result is to be avoided. As this Court has previously observed, "'The rules of statutory interpretation argue against

reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.'" *Natrella v. Board of Zoning Appeals*, 231 Va. 451, 461, 345 S.E.2d 295, 301 (1986) (citation omitted.)

Here, for example, if the Zoning Administrator's Determination had no significance, there was no reason for the Board of Supervisors to appeal it to the BZA as it did in this case; the Board simply could have changed the zoning on the Property and done nothing more. As for third parties, moreover, a zoning administrator determination is one of the few local administrative land use decisions as to which the General Assembly has granted persons other than the applicant/landowner a right to challenge. A property owner, for example, has no avenue for challenging the approval of a subdivision plat for his neighbor's property. *Logan v. City of Roanoke*, 275 Va. 483, 499, 659 S.E.2d 296, 304-305 (2008). Yet, a subdivision plat approval -- which cannot be challenged by third parties -- is specifically identified as a SAGA under Section 15.2-2307. A zoning administrator's determination that a proposed project is allowed by-right, and which is not appealed, modified or reversed within the applicable statutory periods -- thereby imbuing it with the statutory protections discussed above -- should be accorded at least the same stature and significance as the approval of a site plan or subdivision plat for the purposes of Va. Code Ann. § 15.2-2307.

In short, developers and landowners should be able to rely upon the only avenue available to them, prior to spending thousands of dollars (or more than a million dollars, in Crucible's case), to obtain assurance that their proposed project is permitted under applicable zoning ordinances. They should be permitted to proceed with the development of their property in accordance with a zoning administrator's determination knowing that the determination is protected from challenge or reversal within 30 and 60 days, respectively, *and* that their reasonable investment backed expectations will not be thwarted by an after-the-fact zoning ordinance change.

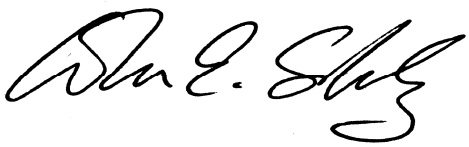
If a zoning administrator's determination in this context is not a SAGA, then it serves no purpose. Instead, the landowner would be subject to the whims of the government and the "fluctuating policy of legislative bodies," contrary to the very purposes of the vested rights doctrine, and the more expansive concept of vesting that the General Assembly intended to create through the enactment of Section 15.2-2307 in 1998.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Virginia Chamber of Commerce and the Homebuilders Association of Virginia respectfully request that the Court affirm the decision of the Circuit Court of Stafford County.

Respectfully submitted,

Virginia Chamber of Commerce
Home Builders Association of Virginia



By Counsel

Arthur E. Schmalz (VSB No. 36014)
Jill Marie Dennis (VSB No. 43466)
HUNTON & WILLIAMS LLP
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
Tel: (703) 714-7400
Fax: (703) 714-7410
aschmalz@hunton.com
jmdennis@hunton.com

Counsel for Amici Curiae Virginia Chamber of Commerce and Home Builders Association of Virginia

RECEIVED JUL 0 6 2006

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

CRUCIBLE, INC.,	)	
Petitioner,	)	
v.	)	At Law Number 2005-481
	)	At Law Number 2005-482
BOARD OF ZONING APPEALS OF STAFFORD COUNTY, VIRGINIA, *et al,*	)	
Respondents.	)	

ORDER

This matter comes before the Court on two appeals from decisions of the Board of Zoning Appeals of Stafford County.

For the reasons articulated in the accompanying Opinion entered today, it is HEREBY ORDERED that the appeal in Law Number 2005-482 is GRANTED. The BZA's finding that the Adjacent Landowners and Board of Supervisors' appeals to the Board of Zoning Appeals were timely filed is reversed and these appeals are DISMISSED for failure to comply with Virginia Code Section 15.2-2311(A).

It is FURTHER ORDERED that the appeal in Law Number 2005-481 is DISMISSED as moot.

This Order is Final.

ENTERED this 12 day of June, 2006 nunc pro tunc to May 31, 2006.

Randy I. Bellows
Circuit Court Judge

EXHIBIT
A

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

A COPY TESTE:
Barbara G. Decatur, CLERK
CIRCUIT COURT OF STAFFORD

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
703-246-2221 • Fax: 703-385-4432 • TDD: 703-352-4139

MICHAEL P. McWEENY
MARCUS D. WILLIAMS
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
LESLIE M. ALDEN
KATHLEEN H. MACKAY
JONATHAN C. THACHER
R. TERRENCE NEY
GAYLORD L. FINCH, JR.
RANDY I. BELLOWS
JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

BURCH MILLSAP
BARNARD F. JENNINGS
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
RETIRED JUDGES

June 1, 2006

H. Clark Leming, Esquire
John E. Tyler, Jr., Esquire
Leming & Healy
Post Office Box 445
Garrisonville, Virginia 22463
Counsel for Petitioner

Grayson P. Hanes, Esquire
Reed Smith, LLP
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22032
Counsel for Petitioner

Joseph L. Howard, Jr., Esquire
Stafford County
P.C. 1300 Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Stafford County Attorney

Sharon Pandak, Esquire
Sands Anderson Marks & Miller
904 Princess Anne Street, Suite 407
Fredericksburg, Virginia 22404-0907
Counsel for Board of Supervisors

John Foote, Esquire
Michael J. Coughlin, Esquire
Walsh, Colucci, Lubeley, Emrich & Terpak, PC
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22193
Counsel for Adjacent Landowners

Rachel Hudson
Stafford County
1300 Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Assistant Zoning Administrator

John Overbey
Stafford County
1300 Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Stafford County BZA Secretary

Patricia H. Berry
Stafford County
Judicial Legal Asst. to Judge J. Martin Bass
Stafford County Circuit Court
Post Office Box 895
Stafford, Virginia 22555-0895

Re: *Crucible, Inc. v. Stafford County BZA, et al.*, Stafford Circuit Court Case At Law Nos. 2005-481; and 2005-482.

Dear Counsel:

The Opinion Letter issued by this Court on May 31, 2006 contained an inadvertent typographical error.

The last sentence of the last paragraph on Page 7 currently reads as follows:

> The statutory limitations period, therefore, concluded on or about June 10, **2005**.

This paragraph should read as follows:

> The statutory limitations period, therefore, concluded on or about June 10, **2004**.

This letter serves to amend the Opinion Letter and thereby correct the record.

Sincerely,

Randy I. Bellows
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CRUCIBLE, INC.,	)	
Petitioner,	)	
v.	)	At Law Number 2005-481
	)	At Law Number 2005-482
BOARD OF ZONING APPEALS OF STAFFORD COUNTY, VIRGINIA, *et al*,	)	
Respondents.	)	

ORDER

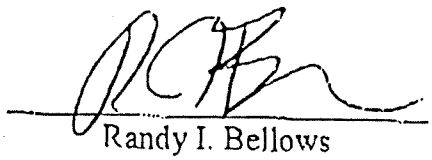
This matter comes before the Court on two appeals from decisions of the Board of Zoning Appeals of Stafford County.

For the reasons articulated in the accompanying Opinion entered today, it is HEREBY ORDERED that the appeal in Law Number 2005-482 is GRANTED. The BZA's finding that the Adjacent Landowners and Board of Supervisors' appeals to the Board of Zoning Appeals were timely filed is reversed and these appeals are DISMISSED for failure to comply with Virginia Code Section 15.2-2311(A).

It is FURTHER ORDERED that the appeal in Law Number 2005-481 is DISMISSED as moot.

This Order is Final.

ENTERED this 31 day of May, 2006.



Randy I. Bellows
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

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703-246-2221 • Fax: 703-385-4432 • TDD: 703-352-4139

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QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
RETIRED JUDGES

OPINION LETTER

May 31, 2006

H. Clark Leming, Esquire
John E. Tyler, Jr., Esquire
Leming & Healy
Post Office Box 445
Garrisonville, Virginia 22463
Counsel for Petitioner

Grayson P. Hanes, Esquire
Reed Smith, LLP
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22032
Counsel for Petitioner

Joseph L. Howard, Jr., Esquire
Stafford County
Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Stafford County Attorney

Sharon Pandak, Esquire
Sands Anderson Marks & Miller P.C. 1300
904 Princess Anne Street, Suite 407
Fredericksburg, Virginia 22404-0907
Counsel for Board of Supervisors

John Foote, Esquire
Michael J. Coughlin, Esquire
Walsh, Colucci, Lubeley, Emrich & Terpak, PC
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22193
Counsel for Adjacent Landowners

Rachel Hudson
Stafford County
1300 Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Assistant Zoning Administrator

John Overbey
Stafford County
1300 Courthouse Road
Post Office Box 339
Stafford, Virginia 22555-0339
Stafford County BZA Secretary

Re: *Crucible, Inc. v. Board of Zoning Appeals of Stafford County*, At Law No. 2005-481 and 2005-482.

Dear Counsel:

This matter is before the Court on two appeals from decisions of the Board of Zoning Appeals of Stafford County.[1] The Court has reviewed all of the pleadings submitted as well as the complete record below. Having heard oral argument in Stafford County on May 25, 2006 and upon careful consideration, the Court is now prepared to rule.

I. FACTUAL AND PROCEDURAL HISTORY.

The instant proceedings arose out of a March 3, 2004 Zoning Verification Request made by petitioner Crucible Inc. ("Crucible"). Crucible sought to determine whether a proposed training facility that it intended to locate on land located within an A-1 (Agricultural) district qualified as a "school" as that term is used in the Stafford County Zoning Ordinance.[2]

On March 5, 2004, prior to receiving the Zoning Administrator's determination, Crucible contracted to purchase Parcel 36-57, 198 acres located within an A-1 (Agricultural) district in Stafford County at a price exceeding $2 million.

On May 6, 2004, Crucible made a presentation detailing its proposed use of the property to the Zoning Administrator for Stafford County ("Zoning Administrator"). Various other county officials also attended this meeting.

In an undated letter, the Zoning Administrator determined that as of May 11, 2004 Parcel 36-57 was zoned A-1 (Agricultural) and the proposed facility would, in fact, qualify as a "school," a use permitted by right pursuant to Stafford County Zoning Ordinance § 28-35. Crucible has since spent nearly $1.2 million in connection with the proposed facility.

On May 17, 2005, Crucible filed a "Major Site Plan Application."

On or about May 23, 2005 Crucible mailed a letter to thirteen adjoining property owners notifying them that a major site plan had been submitted for approval to Stafford County. This was the first time that the Adjacent Landowners were notified of Crucible's proposed use. On June 20, 2005 the Adjacent Landowners appealed the Zoning Administrator's determination that the proposed facility qualified as a "school" to the Board of Zoning Appeals for Stafford County ("BZA").

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[1] The Court sits by designation of the Supreme Court of Virginia, dated February 3, 2006.

[2] Stafford County Zoning Ordinance § 28-35 ("A-1 Agricultural. The purpose of the A-1 district is to reserve areas for traditional agricultural activities and to provide for their continuation as well as preservation of areas of rural character. (a) Uses permitted by right: . . . School").

On June 7, 2005, the Board of Supervisors for Stafford County ("Board") asserts that it first learned of the Zoning Administrator's determination.[3] The Board filed its appeal to the BZA on June 29, 2005.

Thus, both the Board and Adjacent Landowners assert that each appeal was filed within thirty days of actual notice.

On July 6, 2005, Crucible filed its own appeal to the BZA arguing that the Adjacent Landowners and Board had not complied with the thirty day statutory limitations period in which to file an appeal from a decision of the Zoning Administrator pursuant to Virginia Code Ann. Section 15.2-2311(A). Crucible also argued that both the Adjacent Landowners and Board lacked standing to pursue their appeals.

On September 22, 2005 the BZA convened to hear the appeals of the BZA, Board, and Adjacent Landowners. The Board first addressed Crucible's appeal and voted on whether the Board and Adjacent Landowner's appeals were untimely. By a vote of three in favor to three against, with one member abstaining, the vote to approve a motion finding that the Board and Adjacent Landowner's appeals were untimely failed to pass.[4]

The Board then proceeded to the merits of the Board and Adjacent Landowner's appeals as to whether the proposed facility qualified as a "school." By a vote of five to one, the Board voted to reverse the Zoning Administrator's determination that the Crucible's proposed facility qualified as a "school."[5]

Crucible timely petitioned the Stafford County Circuit Court for two writs of certiorari, pursuant to Va. Code Ann. § 15.2-2314. These writs were granted on September 30, 2005.

---

[3] This assertion is contested by Crucible which argues that the Board had earlier notice of the Zoning Administrator's determination. For example, Crucible argues that the Zoning Administrator is an agent of the Board and, therefore, knowledge of its agent's actions may be properly attributed to the Board as principal. The Court does not need to reach this issue in light of its ruling.

[4] Board Members John Overbey, Nicholas Kopchinsky, and Stephen Beauch voted to concur with Crucible that the Board and Adjacent Landowner's appeals were untimely. Board Members Larry Ingalls, Cecelia Kirkman, and Angelo Amador voted against a finding that the appeals were untimely. Board Member Julie Rutledge abstained from voting.

[5] By letter dated September 27, 2005, the Deputy Zoning Administrator for Stafford County notified the parties that Crucible's appeal had been denied and that the Board and Adjacent Landowner's appeals had been granted and the Zoning Administrator's determination had been reversed.

Law Number 2005-482 is Petitioner Crucible Inc.'s appeal of the BZA's decision that the underlying appeals were timely filed by Adjacent Landowners and the Board.[6] For the reasons set forth below, Crucible's appeal to this Court is granted and the BZA's decision that the underlying appeals were timely filed is reversed.

Law Number 2005-481 is Crucible's appeal of the BZA's decision that Crucible's proposal did not qualify as a "school" as that term is used in the Stafford County Zoning Ordinance. The BZA's decision reversed a previous determination by the Zoning Administrator that Crucible's proposal did qualify as a "school." This appeal is dismissed as moot based on this Court's decision in Law Number 2005-482.

II. STANDARD OF REVIEW.

Virginia Code Section 15.2-2314 provides in pertinent part:

> In the case of an appeal from the board of zoning appeals to the circuit court . . . the decision of the board of zoning appeals shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court.

Va. Code Ann. § 15.2-2314.[7]

The 'preponderance of the evidence' standard, contained in Section 15.2-2314:

> pertains only to questions about the sufficiency of the record to prove a particular fact. When . . . the issue is a question of law . . . the appealing party must show that the board either applied erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance.

---

[6] Although the Board never explicitly voted that the appeals were timely filed, this Court finds that such a decision is implicit in the BZA's decision to reach the merits of the appeals.

[7] An amendment altering the standard of review set forth in Virginia Code Section 15.2-2314 was signed by the Governor on March 31, 2006. While the statute is silent as to the amendment's effective date, Section 13 of the Virginia Constitution provides that, "[a]ll laws enacted at a regular session . . . shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted . . ." Accordingly, the law in effect as of the date of this decision, and therefore the law to be applied, is Va. Code Ann. § 15.2-2314 prior to the March 31, 2006 amendments. *See* 1 M.J., APPEAL AND ERROR, § 237 ("A court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.").

Bd. of Supervisors v. Bd. of Zoning Appeals, 271 Va. 336, 348–49 (2006) (internal quotations omitted).

The question before this Court—whether the Board and Adjacent Landowner's appeals were timely filed—is a pure question of law. Therefore, the issue before the Court is whether the BZA's decision was based on the application of "erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance." *Id.*

III. WHETHER THE RESPONDENTS' APPEAL TO THE BZA WAS TIMELY FILED PURSUANT TO VA. CODE ANN. § 15.2-2311(A).

Resolution of this case hinges on the proper interpretation of Section 15.2-2311(A), which provides:

> An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article, any ordinance adopted pursuant to this article, or any modification of zoning requirements pursuant to § 15.2-2286. Notwithstanding any charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within 30 days in accordance with this section, and that the decision shall be final and unappealable if not appealed within 30 days. The appeal period shall not commence until the statement is given. The appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

Va. Code Ann. § 15.2-2311(A).

How this statute should be construed under these facts is a case of first impression in Virginia.[8] The Adjacent Landowners and Board argue alternative interpretations of Section 15.2-2311(A) to those of Crucible. Under each of the Adjacent Landowners and Board's interpretations, their respective appeals would be considered timely filed. Under Crucible's interpretation, their appeals would be untimely.

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[8] In both *Lilly v. Caroline County*, 259 Va. 291 (2000) and *Carolinas Cement Co. v. Zoning Appeals Board*, 29 Va. Cir. 463 (1999), the aggrieved party had actual notice of the Zoning Administrator's determination.

A first possible interpretation of Section 15.2-2311(A) is that, except in the cases of zoning violations and written orders of the zoning administrator, there is no statutory limitation to the right to appeal.[9]

A second possible interpretation is that as to potentially aggrieved or affected parties, there is a thirty day statutory limitation on the right to appeal but, it only commences to run when an appellant receives actual notice.

Crucible offers its own interpretation of the statute, as follows: The fourth sentence of Section 15.2-2311(A), which reads that "[t]he appeal shall be taken within thirty days after the decision appealed from," applies to the entire statute. In other words, with or without notice, a potentially aggrieved or affected party must appeal within thirty days of a Zoning Administrator's determination. Under this interpretation, the notice requirement, and the notice of appellate rights requirement, only applies to recipients of zoning violation or written orders of the Zoning Administrator. Since this case does not involve either a zoning violation or a written order of the Zoning Administrator, Crucible argues that the thirty day statutory limit began to run from the date of the Zoning Administrator's decision on or about May 11, 2004.

In determining which of these possible interpretations of Code Section 15.2-2311(A) is the correct one, this Court is mindful that it is obligated to "construe the law as it is written" and to "assume that the legislature chose, with care, the words it used when it enacted the relevant statute." *Simon v. Forer*, 265 Va. 483, 490 (2003) (internal quotations omitted). Further, in construing this statute the Court endeavors to "ascertain and give effect to the intention of the legislature" so long as a "literal construction" does not "involve a manifest absurdity." *Turner v. Wexler*, 244 Va. 124, 127 (1992) (internal quotations omitted).

In the instant case, the legislature has "used words of a plain and definite import." *Gwinn v. Collier*, 247 Va. 479, 483 (1994). As such, this Court is bound by the literal language used in the statute and cannot find that "the legislature did not mean what it has actually expressed." *Id.* Therefore, this Court finds that the construction articulated by Crucible is the correct one.

Support is found in the previous incarnations of Code Section 15.2-2311(A) and, most significantly, in the statutory amendments made in 1993.[10]

---

[9] Where a zoning violation or a written order of the zoning administrator is involved, it is clear that a thirty day statutory limit for appeal to the BZA applies. Further, it is also clear that the recipient of the zoning violation or order must receive notice and the decision, including notice of appellate rights, and that the thirty day statutory limit does not commence until such notice is given.

[10] Va. Code Ann. § 15.2-2311(A) was then indexed as 15.1-496.1.

In 1992, the disputed statute provided:

> An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. Such appeal shall be taken within thirty days after the decision appealed from . . .

Va. Code Ann. § 15.1-496.1 (1992).

In 1993, the present second and third sentences, emphasized below, were added directly between the previous first and second sentences:

> An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. **Notwithstanding any charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within thirty days in accordance with this section, and that the decision shall be final and unappealable if not appealed within thirty days. The appeal period shall not commence until such statement is given.** Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof.

Va. Code Ann. § 15.1-496.1 (1993) (in part).

The addition of the second and third sentences directly in between the general right to appeal contained within the first sentence and the limitation on that right contained in the fourth sentence strongly supports a finding that the thirty day statutory limitation on the right to appeal commences upon the date of the decision regardless of whether actual notice is given.

As applied to the facts of this case, the "decision appealed from" was made on or about May 11, 2004 when the Zoning Administrator determined that the proposed facility qualified as a "school" under the Stafford County Zoning Ordinance. The statutory limitations period, therefore, concluded on or about June 10, 2005.

The "notice of appeal" was filed on June 20, 2005 by the Adjacent Landowners and on June 29, 2005 by the Board. Accordingly, the Adjacent Landowners and Board's appeals to the BZA were "not timely filed, the administrative remedy has not been exhausted, and the zoning administrator's decision [is] a 'thing decided' not subject to court challenge." *Lilly v. Caroline County*, 259 Va. 291, 296 (2000) (citing *Dick Kelly Enter. v. City of Norfolk*, 243 Va. 373, 378 (1992)).

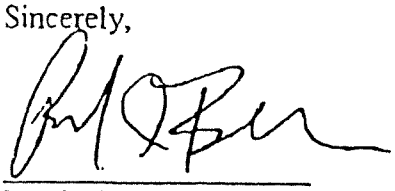
This Court is well aware of the equitable arguments advanced on behalf of the Adjacent Landowners and Board; specifically, they argue that it is unfair to impose a limitation period without a concomitant requirement of notice to trigger the limitation period. This Court, however, cannot read into the statute a notice requirement which does not, in fact, exist.

Therefore, this Court finds that the BZA applied erroneous principles of law and that its decision to treat these appeals as timely filed was plainly wrong. The Board's and Adjacent Landowner's appeals to the BZA were untimely under Virginia Code Section 15.2-2311(A) and must be dismissed.

IV. OTHER MATTERS.

In Law Number 2005-482 Crucible also argues that the Adjacent Landowners and the Board lacked standing to file their respective appeals to the BZA. In Law Number 2005-481 Crucible appeals the BZA's decision that Crucible's proposal did not qualify as a "school" as that term is used in the Stafford County Zoning Ordinance. Given the Court's decision that the Board's and Adjacent Landowner's appeals to the BZA must be dismissed as untimely, the Court does not reach either the "standing" or "school" issues. The Court, therefore, expresses no opinion on the merits of these arguments.

Sincerely,



Randy I. Bellows
Circuit Court Judge

RULE 5:26(d) CERTIFICATE

Pursuant to Rule 5:26(d) of the Supreme Court of Virginia, I certify that on March 17, 2009, twelve (12) copies of this Brief *Amici Curiae* of Virginia Chamber of Commerce and Home Builders Association of Virginia were delivered by hand and filed with the Clerk of the Supreme Court of Virginia, an electronic copy was delivered by electronic mail to scvbriefs@courts.state.va.us, and three (3) copies were mailed to:

Sharon E. Pandak, Esq.
Alan F. Smith, Esq.
Greehan, Taves, Pandak & Stoner, PLLC
4004 Genesee Place, Suite 201
Woodbridge, Virginia 22192

Counsel for Appellants Board of Supervisors of Stafford County, Virginia and Stafford County, Virginia

- and -

H. Clark Leming, VSB No. 24633
John E. Tyler, Jr., VSB No. 37394
Leming and Healy P.C.
Post Office Box 445
Garrisonville, Virginia 22463

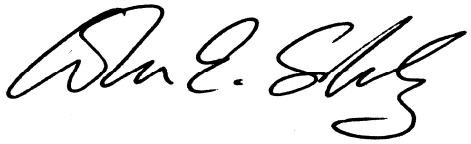
Grayson P. Hanes, VSB No. 06614
Reed Smith LLP
3110 Fairview Park Drive, Suite 1400
Falls Church, Virginia 22032

Counsel for Appellee Crucible, Inc.

- and -

Phyllis C. Katz, VSB No. 22259
L. Lee Byrd, VSB No. 28662
Annemarie DiNardo Cleary, VSB No. 28704
Ann Neil Cosby, VSB No. 42682
Sands, Anderson, Marks & Miller, P.C.
WyteStone Plaza, Suite 1800
801 East Main Street (23219)
P.O. Box 1998
Richmond, Virginia 23218-1998

Counsel for Amicus Curiae Local Government Attorneys of Virginia, Inc.



Arthur E. Schmalz
Counsel for Amici Curiae
Virginia Chamber of Commerce and
Home Builders Association of Virginia