IN THE

Supreme Court of Virginia

RECORD NO. 081743

BOARD OF SUPERVISORS OF STAFFORD COUNTY, VIRGINIA
and
STAFFORD COUNTY, VIRGINIA,

Appellants,

v.

CRUCIBLE, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

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IN THE
SUPREME COURT OF VIRGINIA

BOARD OF SUPERVISORS OF
STAFFORD COUNTY, VIRGINIA &
STAFFORD COUNTY, VIRGINIA,

Appellants,

v. **Record No. 081743**

CRUCIBLE, INC.,

Appellee.

OPENING BRIEF OF APPELLANTS

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

Appellants Board of Supervisors of Stafford County, Virginia, and Stafford County, Virginia ("Board of Supervisors" /"Board") ask this Court to reverse *ad hoc* decisions of the Circuit Court/trial court, which ignored statutes governing both process for determining vested rights and substantive requirements for establishing entitlement to vesting, and improperly conveyed vested rights on Appellee Crucible, Inc. ("Crucible") to develop an anti-terrorist training facility in a rural residential neighborhood without following new zoning enacted by the Board, and the attendant public process.

Crucible operates a security training facility in an industrial district in Stafford County, Virginia. Seeking to expand its operations, Crucible located a different site where it could build a new facility. It obtained a zoning verification from the County Zoning Administrator ("zoning administrator") that the proposed facility was a by-right use in the agricultural district. Upon learning of the zoning verification, the Board of Supervisors immediately amended the Zoning Ordinance. As a result of this amendment, Crucible needed to obtain a conditional use permit ("CUP") before proceeding with its new facility.[1] Crucible sued, claiming it had a vested right to proceed as a by-right use under the previous ordinance. In contravention of applicable statutes, the Circuit Court ruled that Crucible had a vested right to develop its new facility based on a zoning verification.

ASSIGNMENTS OF ERROR

1. The trial court erred in holding that § 15.2-2286(A)(4) VA Code Ann. allows the Crucible to obtain a vested rights determination

[1] Crucible stopped work related to the proposed development prior to the amendment requiring a CUP. *Joint Appendix ("J.A.")*, p. 213. The ordinance was later amended. Those amendments are not relevant to the instant issues.

from the Circuit Court without having to first obtain a vested rights determination from the zoning administrator.

2. The trial court erred in holding that the Crucible had a vested right, under § 15.2-2307 VA Code Ann., to develop its new training facility based on a zoning verification issued by the zoning administrator.

   a. The trial court erred in holding that the Crucible was the beneficiary of an un-enumerated, significant affirmative governmental act ("SAGA") based on a zoning verification.

   b. The trial court erred in holding that the Crucible relied in good faith on a SAGA.

   c. The trial court erred in holding that the Crucible incurred extensive obligations or substantial expenses in diligent pursuit of a specific project in reliance on a SAGA.

STATEMENT OF THE NATURE OF THE CASE & MATERIAL PROCEEDINGS

This is an appeal of the Circuit Court's decision that (1) Crucible could obtain a vested rights determination from the Circuit Court without first seeking a determination from the zoning administrator,

and (2) Crucible had vested rights to develop its proposed facility based on a zoning verification issued by the zoning administrator.

In March 2004, Crucible requested a zoning verification that its proposed facility was a by-right use on a new site. The zoning administrator issued a zoning verification in May 2004, stating that the Crucible facility "would be classified a 'school' by definition in the Stafford County Zoning Ordinance." *J.A.*, page ("p.") 449.

Subsequently, Crucible submitted a site plan to the County but did not complete its submission so that it could be reviewed. *J.A.*, pp. 250, ll. 4-9; 262, ll. 12-22; 263, ll. 1-19; 456-463; 502. When Crucible notified adjoining landowners of the submission of its site plan, the neighbors contacted the Board with their concerns about the impact of such a facility on them without any mitigating conditions, and appealed to the Stafford County Board of Zoning Appeals ("BZA") on June 20, 2005.[2] *J.A.*, p. 494.

The Board of Supervisors was not notified of the zoning verification until June 7, 2005. The Board appealed the zoning

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[2] There is no dispute that, notwithstanding the verification that it had a by-right use, Crucible was required to obtain County approval of a site plan and other permits in order to develop the use.

verification to the BZA on June 29, 2005.[3] Importantly, on August 24, 2005, following the required notice and hearing process, the Board enacted Ordinance O05-37, requiring Crucible, as well as other similar uses, to obtain a CUP for its proposed facility ("the CUP Ordinance"). *J.A.*, pp. 490-91.

Crucible sued, claiming among other things, vested rights to develop the new facility. *J.A.*, pp. 6-7 ¶¶ 23-31. In response, the Board filed a plea in bar and demurrer, asserting, among other things, that Crucible could not obtain a vested rights determination from the Circuit Court without first seeking a determination from the zoning administrator. *J.A.*, pp. 15-30. After a hearing, the trial court overruled the Board's demurrer in pertinent part and held that Crucible could seek a vested rights determination from the Circuit Court without requesting a zoning administrator's determination. *J.A.*, p. 141. Following a later evidentiary hearing, the trial court held that Crucible had vested rights to develop its proposed facility. *J.A.*, pp. 154-157. The County appeals both of the Circuit Court's decisions.

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[3] The BZA overturned the zoning verification, holding that the proposed project was not a "school" allowed by right in the Agricultural district. Crucible appealed to the Circuit Court, which overturned the BZA's decision on other procedural grounds. The Supreme Court did not grant the Board's appeal.

QUESTIONS PRESENTED

1. Can Crucible obtain a vested rights decision from the Circuit Court without having to seek a vested rights determination from the zoning administrator first? (Assignment of Error No. 1.)
2. Does Crucible have vested rights to develop its proposed facility based on the zoning verification? (Assignment of Error No. 2, 2a, 2b, and 2c.)

STATEMENT OF FACTS

Crucible operates a security training facility in Stafford County, Virginia. *J.A.*, pp. 235, ll. 14-22; 236, ll. 1-6. On its current 88 acre site, which is zoned M-1 (Industrial Light), Crucible trains primarily government agents and employees in "individual protective measures," including "firearms training," "unarmed combat defensive tactics," "surveillance detection," and "anti-terrorist evasive driving." *J.A.*, p. 235, ll. 16-21. Crucible sought to expand its operations and located a new 198 acre site which is zoned A-1 (Agricultural). *J.A.*, pp. 2, 76.

In March 2004, Crucible requested a zoning verification that its proposed facility was a "school" under the Zoning Ordinance and permitted as a by-right use, under A-1 (Agricultural) zoning, on the

new site. *J.A.*, p. 448. (The A-1 district at that time allowed schools as well as numerous other uses by-right, i.e. the use did not require any other zoning permits. County approval of site plans and other permits was required of these by-right uses.) *J.A.*, pp. 490-91.

After a presentation by Crucible to the zoning administrator and his staff, the administrator issued a zoning verification in May 2004.[4] *J.A.*, pp. 239-41. The verification stated that Crucible's proposed "facility would be classified a 'school' by definition in the Stafford County Zoning Ordinance," but the "[v]erification is valid as of May 11, 2004 and is subject to change." *J.A.*, p. 377. Essentially, Crucible asked if its proposed facility was a "school," a by-right use, and the zoning administrator looked at the Zoning Ordinance and said "yes." At the same time, however, he caveated his response because no site plan had even been submitted. *J.A.*, pp. 76.

Daniel Schardein, the former zoning administrator who issued the zoning verification, described the verification as a "snapshot" provided as a "courtesy" to landowners. *J.A.*, pp. 281, ll. 1-8; 366, ll.

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[4] Crucible's inquiry was like those frequently made by landowners or developers of zoning or other staff of a locality during exploratory stages of acquisition of property or development. *J.A.*, pp. 285, l. 22; 286, ll. 1-5.

16-18. The verification was a "statement of zoning" at that time, not a zoning determination, and did not approve any specific project. The document stated "Verification is valid as of May 11th, 2004, and subject to change." *J.A.*, p. 283, ll. 18-19. Mr. Schardein testified:

> A. What it means is that this is good at the moment, best of our knowledge. And to acknowledge things can change down the road and that you can't rely on this forever.
>
> Q. What would be an example of a change?
>
> A. Change in the code, change in the ordinances, outside of the prerogative to do that.

J.A., pp. 283, ll. 21-22; 284, ll. 1-5. The former zoning administrator further testified that the verification simply tells the owner

> what the property is zoned and any outstanding issues that may concern that. And they can [then] proceed at their own risk subsequent to that. That's why I have the statement in there, that it's subject to change. I don't want to have it coming back, you told me such and such, when things can change

J.A., p. 294, ll. 2-8. The zoning administrator did not approve any specific project with the verification. *J.A.*, pp. 282, ll. 17-22; 283, ll. 10-14. Verifications are not a required step towards development, and are not even mentioned in the Zoning Ordinance. *J.A.*, pp. 296, ll. 17-21. Some landowners do not request verifications before submitting a subdivision or site plan, knowing that whether their use

complies with the Ordinance will be addressed when the plan is reviewed. *J.A.*, p. 307, ll. 18-22.

Mr. Schardein testified that he would not have written the same zoning verification, i.e. that a school could develop by right, subsequent to the Board enacting the CUP Ordinance in August 2005 to require that facilities, like that proposed by Crucible, obtain a conditional use permit first. *J.A.*, p. 293, ll. 15-17.

Crucible submitted a site plan for the proposed facility on the new site to the County on or about May 17, 2005.[5] It was not reviewed by County staff because the storm water management plan was incomplete, and Crucible never sufficiently completed the application for review to occur. *J.A.*, pp. 250, ll. 4-9; 262, ll. 12-22; 263, ll. 1-19; 456-463; 502. Crucible's agent conceded that Crucible never provided a complete storm water management plan. *J.A.*, pp. 250, ll. 4-16; 262, ll. 12-22; 263, ll. 1-19; 307, ll. 9-17.

The Board of Supervisors was notified of the zoning verification on or about June 7, 2005, by neighboring landowners. In August 2005, following statutory requirements for notice and public hearing,

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[5] County records for this site plan reflect other required aspects of a completed site plan were also missing. *J.A.*, pp. 456-66.

the Board enacted the CUP Ordinance, which amended the Zoning Ordinance such that Crucible was required to obtain a conditional use permit before developing its new facility. This ordinance reflected Board concerns that facilities like Crucible's proposed facility should not be permitted in a rural residential area without conditions. *J.A.*, pp. 496-97. The Board was concerned that a training facility to fight terrorists that included a firing range, a driving track, as well as classroom and other facilities, and attendant training activities might not be consistent with a rural residential environment. Application for a CUP would involve public hearings before the Planning Commission and Board of Supervisors that would permit the public an opportunity to be heard, and adverse impacts from the use to be mitigated by development conditions. *J.A.*, pp. 496-97.

Crucible sued, claiming, among other things, that it had vested rights to proceed without a CUP. The Board responded, claiming that Crucible must seek a vested rights determination from the zoning administrator in the first instance, before proceeding to Circuit Court, and Crucible did not have vested rights. The trial court disagreed, holding that (1) Crucible could obtain a vested rights determination from the Circuit Court without having to first seek a zoning

administrator's determination, and (2) Crucible had vested rights to proceed with its proposed facility. The Circuit Court, however, also stated that not all zoning verifications constitute vested rights but that "the factual circumstances here are somewhat unique.[6]" *J.A.*, p. 364, ll. 17-21.

STANDARD FOR REVIEW

Whether the Circuit Court properly interpreted the statute to give it the authority to decide the issue of vested rights without a determination pursuant to § 15.2-2286 VA Code Ann., and correctly interpreted § 15.2-2307 VA Code Ann., as to what constituted a SAGA, so as to convey vested rights are pure questions of law. This Court reviews these issues of law *de novo* on appeal. *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 492, 659 S.E.2d 296, 300 (2008), *citing Miller v. Highland County*, 274 Va. 355, 364, 650 S.E.2d 532, 535 (2007), and other opinions. To the extent that the Circuit Court applied § 15.2-2307 VA Code Ann. to the essentially undisputed facts here a *de novo* standard for appellate review also applies. *Hilton v. Martin*, 275 Va. 176, 180, 654 S.E.2d 572, 574

[6] The Court's opinion was factually incorrect when it suggested that no appeal to the verification had been filed. *J.A.*, p. 371.

(2008), *citing Janvier v. Arminio*, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

ARGUMENT

I. The trial court's *ad hoc* decisions undercut the predictability of vested rights determinations deemed critical by the legislature which has enacted specific statutes in this regard.

This Court has determined that a landowner does not have a right to a particular zoning status and private land is subject to local zoning enacted before or after the property is acquired. *City of Suffolk v. Bd. of Zoning Appeals for the City of Suffolk*, 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

Under limited circumstances, however, a landowner may have vested rights to a certain use of the land, which cannot be infringed upon by localities changing their ordinances. *Id.; see also Goyononaga v. Bd. of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008).

The General Assembly has enacted a specific process for determination of vested rights and set forth with specificity the criteria for vested rights. The legislature adopted the process for determining vested rights in response to a decision by this Court and codified criteria for vested rights based on prior decisions of this Court. The

trial court's decisions undercut the predictability which the legislature has deemed critical to vested rights decisions.

First, the trial court decided, contrary to § 15.2-2286 VA Code Ann., that a landowner is not required to seek a vested rights determination from the zoning administrator in the first instance before pursuing a determination in Circuit Court. In 1993 the General Assembly amended § 15.2-2286 VA Code Ann. in the wake of this Court's decision in *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991). The legislative amendments establish an administrative vested rights determination process for localities, in lieu of the pre-amendment, case-by-case court determinations.[7] Since adoption of the amendments, vested rights determinations are regularly requested by landowners and issued by the zoning administrator, after consultation with the attorney for the governing body, as

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[7] *Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985) (internal citations omitted).

> In construing legislation, we are aided by the legislature's evident interpretation of its earlier enactments . . . we will assume that its amendments to the law are purposeful and not unnecessary or vain . . . we will presume that the legislature acted with full knowledge of the law as it stood bearing on the subject with which it proposed to deal . . . we will adopt that construction which gives effect to the legislative purpose.

required by § 15.2-2286 (A)(4) VA Code Ann. Allowing this Circuit Court decision to stand will return both landowners and localities to the pre-*Holland* state of confusion, and ignore the consistent process that the General Assembly has legislated throughout Virginia.

Second, the trial court expanded the scope of the "without limitation" language in § 15.2-2307 VA Code Ann. to find that Crucible had a SAGA by virtue of a zoning verification, not the six enumerated SAGAs, and then limited its action to just Crucible. Again the Circuit Court decision was not consistent with the General Assembly's desire for consistency in determining vested rights. Its decision does not follow pre-1998 vested rights case law, which the Virginia Attorney General has stated is applicable to interpreting the "without limitation" phrase. 2006 Op. Va. Att'y Gen. 80, at 3. The decision is particularly problematic because, contrary to the statute's specific delineation of categories of acts that explicitly constitute a SAGA, the Circuit Court took an *ad hoc* approach to making its determination.

Because the trial court's decision is decoupled from the six explicit SAGAs and is not based on prior case law, neither landowners nor localities have guidance going forward as to what types of other governmental acts can become a SAGA. Zoning

administrators routinely tell landowners what uses a particular zoning district permits. It is, therefore, critical that localities and landowners know whether these "verifications", which are frequently made before work on a project even begins, can constitute a SAGA.[8] While the trial court stated that it was not making a sweeping decision that all zoning verifications were SAGAs, its decision has just that effect. The Circuit Court established a precedent that a run-of-the-mill governmental decision, which bears none of the normal indicia of a SAGA, nonetheless can be treated as a SAGA. The exception can now essentially swallow the rule. The phrase "[w]ithout limitation," not the six explicit SAGAs, will be the focus of § 15.2-2307, destroying the rationale, predictability and clarity behind the statute. This approach is also at odds with the concept of vested rights as the exception, not the rule, which are intended to cover a very narrow set of circumstances where legislative action will not bind a certain landowner.

The Circuit Court's *ad hoc* decision creates broader practical problems as well. This new analysis, if applied, is inequitable to

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[8] The zoning administrator testified that zoning verifications are a "weekly occurrence." *J.A.*, p. 286, l. 5.

landowners who proceed with preparing and filing a site plan without requesting a zoning verification. *J.A.*, pp. 307, ll 18-22; 308, ll 1-7. Despite equivalent expenditures to Crucible, these landowners would not have a SAGA until the locality approves the site or subdivision plan simply because they did not request a non-mandatory zoning verification. Certainly neither the trial Court nor the General Assembly would intend such a serendipitous inequity.

Perhaps realizing its decision might have unintended ramifications, the trial court said the ruling only applied in this factual situation. *J.A.*, p. 64, ll. 17-21. Yet that caveat favoring Crucible is itself inconsistent with a clear legislative test of using categories of actions as SAGAs. The trial court's selective nature for Crucible, but not all zoning verifications or determinations, makes the character of this SAGA again inherently different than the legislature intended for the other criteria.

The lower court's decision does not comport with the legislative goal of consistency and predictability. Its decisions allow Crucible to avoid the otherwise required public process of obtaining a CUP.

II. Crucible should be required to obtain a zoning administrator's vested rights determination first; it should not be permitted to proceed directly to Circuit Court.

The trial court, which attached so much significance to the zoning administrator issuing a zoning verification, incongruously did not recognize the statutory importance of the zoning administrator in making vested rights determinations in the first instance.

Section 15.2-2286 (A) (4) VA Code Ann. states:

> The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance . . . includ[ing] . . . making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of [vested] rights accruing under § 15.2-2307.

The zoning administrator testified that Crucible had not asked him for a vested rights determination, and he had not otherwise made one. *J.A.,* p. 285, ll. 1-10. The trial court allowed Crucible to circumvent the statutorily established administrative process by first bringing its vested rights claim directly to the Circuit Court through a declaratory judgment action.

The Circuit Court should not have taken jurisdiction of Crucible's request for a determination of vested rights because Crucible had not exhausted its administrative remedies. *Dick Kelly*

Enterprises v. City of Norfolk, 243 Va. 373, 378, 416 S.E.2d 680, 683 (1992) (It is the "settled rule that exhaustion of administrative remedies where zoning ordinances are involved is essential before a judicial attack may be mounted against the interpretation of such ordinances"). (Emphasis added.). "[A] zoning applicant in a case involving ordinance interpretation must exhaust administrative remedies by appealing to the appropriate board of zoning appeals before resorting to court action." *Phillips v. Telum, Inc.*, 223 Va. 585, 589, 292 S.E.2d 311, 314 (1982). *See also Bd. of Sup's v. Market Inns, Inc.*, 228 Va. 82, 86, 319 S.E.2d 737, 739-40 (1984); *Gayton Triangle Land Co. v. Henrico County*, 216 Va. 764, 766, 222 S.E.2d 570, 572 (1976).

The Circuit Court's decision bypasses a well-structured and effective, statutory administrative process. This process was enacted by the General Assembly following this Court's decision in *Holland v. Johnson*, which found that the statute prior to 1993 did not authorize the zoning administrator to specifically adjudicate property rights. *Holland v. Johnson, 241 Va. 553, 556, 403 S.E. 2d 356,* 357 (1991); *See Chapter 672, 1993 Va. Acts of Assembly*. The post-*Holland* language in § 15.2-2286(A)(4) VA Code Ann. provides a clear and

orderly means for landowners and others to ascertain whether vested rights exist in the first instance. By meshing with § 15.2-2311 VA Code Ann., appeals of determinations by zoning administrators in this regard go first to the Board of Zoning Appeals then to the Circuit Court.[9] The statutory processes, therefore, ensure a remedy of adjudication of an appeal by a court and ensure the process does not run afoul of concerns evidenced in *Holland*.

Crucible did not challenge the constitutionality of § 15.2-2286 VA Code Ann. Furthermore the trial court was careful to make clear that it did "not reach any of the constitutional issues raised by Crucible." *J.A.*, pp. 373, l. 22; 374, l. 1. Crucible has not assigned error to the trial court not making any determination as to constitutionality.

The Court erred in accepting Crucible's argument that the General Assembly should have enacted additional language to make clear that the administrative remedy had to be pursued first, and was

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[9] "A zoning administrator has 'all necessary authority on behalf of the governing body to administer. . . the zoning ordinance.' Code § 15.2-2286(A)(4). And a person aggrieved by any decision of the zoning administrator has the right to appeal to the board of zoning appeals. Code § 15.2-2311." *Lilly v. Caroline County*, 259 Va. 291, 296, 526 S.E.2d 743, 745, *citing Dick Kelly Enterprises*, 243 Va. 373, 378, 416 S.E.2d 680, 683.

not simply elective. The trial court determined that § 15.2-2286 (A)(4) VA Code Ann.

> in response to *Holland* did not place exclusive jurisdiction in the zoning administrator for vesting decisions in the first instance; that if it intended to place exclusive jurisdiction in the hands of the zoning administrator it would have done so explicitly.

J.A. p. 199, ll. 5-10. This rationale disregards the General Assembly's deliberate structuring of this process post-*Holland*. The zoning administrator now has specific powers to make vesting determinations under § 15.2-2307 VA Code Ann. Crucible's argument was a straw man. No reasonable doubt can exist as to the legislative intent. By establishing an administrative process for determining vested rights in § 15.2-2286(A)(4) VA Code Ann., with a right of judicial appeal, the General Assembly made it the exclusive process. There was no need for clarifying statutory language.

From a policy perspective, the General Assembly found the zoning administrator and BZA well-suited to address vested rights issues in the first instance. They have local experience, knowledge, and expertise in zoning matters. *Lamar Co., LLC v. Bd. of Zoning Appeals, City of Lynchburg*, 270 Va. 540, 547, 620 S.E.2d 753, 757 (2005).

> [Z]oning administrators and boards of zoning appeals charged with applying zoning ordinances are able to ensure consistent application consonant with a local government's intent for specific ordinances. Such agencies develop expertise in the relationship between particular textual language and a local government's overall zoning plan.

(Emphasis added.). They offer layers of experienced and knowledgeable review, and an effective opportunity to flesh out the facts and legal arguments before a case is brought in the Circuit Court, and perhaps obviate the need for any judicial appeal.

This Court has decided at least one vested rights case involving this process since *Holland* and the subsequent legislative changes, without expressing any Fifth Amendment or other due process concerns regarding the process in § 15.2-2286(A)(4) VA Code Ann. *See Suffolk*, 266 Va. 137 at 142, 580 S.E.2d 796, at 798 (noting that landowner requested and received a vested rights determination from the zoning administrator, before appealing to the BZA).

III. Crucible does not have vested rights to proceed with its proposed facility because it does not satisfy the vested rights requirements of § 15.2-2307 VA Code Ann.

By statute, only if the criteria of § 15.2-2307 VA Code Ann. are met, does the landowner have a right to pursue a particular use when

the zoning changes. *See Suffolk,* 266 Va. at 143-44, 580 S.E.2d at 798-99. The Circuit Court completely misapplied statutory intent, disregarded this Court's rulings and its decision essentially rewrote § 15.2-2307 VA Code Ann. by setting a lower hurdle for Crucible when it could not meet the statutory criteria for a SAGA.

Pursuant to § 15.2-2307 VA Code Ann., a landowner must satisfy a three-pronged test to establish vested rights.

> [A] landowner's rights shall be deemed vested . . . when the landowner (i) obtains or is the beneficiary of a <u>significant affirmative governmental act</u> which remains in effect allowing development of a specific project, (ii) <u>relies in good faith</u> on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses <u>in diligent pursuit of the specific project in reliance on</u> the significant affirmative governmental act.

(Emphasis added.). Because these requirements are stated in the conjunctive, extensive obligations and substantial expenses based in good faith reliance on a SAGA must be met for vested rights to attach.

The trial court erroneously found the zoning verification to constitute a SAGA for Crucible's proposed facility after Crucible artfully exploited the expenditures which it had made to create an illusion of the linchpin SAGA. The Circuit Court's *ad hoc* holding is inconsistent with § 15.2-2307 VA Code Ann., this

Court's decisions prior to codification of this statute,[10] an Attorney General Opinion,[11] and a sister court,[12] all indicating that something so mundane as a zoning verification cannot be a SAGA.

A. Crucible is not the beneficiary of a SAGA because a zoning verification does not constitute a SAGA.

The SAGA requirement remains the most important aspect of vested rights law because, without a SAGA, the landowner does not meet the threshold test. "[T]he requirement of a significant official governmental act creates a bright line test that enables landowners to know precisely when they have acquired a vested right in a land use." *Town of Rocky Mount v. Southside Investors, Inc.*, 254 Va. 130, 132,

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[10] *See Bd. of Sup's of Fairfax County v. Med. Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972); *Board of Zoning Appeals of Bland County v. CaseLin Sys., Inc.*, 256 Va. 206, 501 S.E.2d 397(1998); *Notestein v. Bd. of Sup's of Appomattox County*, 240 Va. 146, 393 S.E.2d 205 (1990).

[11] 2006 Op. Va. Att'y Gen. 80, at 3.

[12] *See In re Zoning Ordinance Amendments enacted by the Bd. of Sup's of Loudoun County*, 2005 WL 174486, at *3 (Loudoun Cir. 2005) ("The absence of further qualifying language [in § 15.2-2307 VA Code Ann.] with respect to such a process would suggest a legislative intent to exclude earlier subdivision reviews and approvals in the unspecified significant governmental acts.") (Emphasis added.).

487 S.E.2d 855, 856 (1997). (Emphasis added.). *See also CaseLin*, 256 Va. at 210, 501 S.E.2d at 400.

While not an enumerated SAGA set forth in the statute, Crucible claimed it relied solely on a "determination by the zoning administrator that the proposed use of the Property would be classified as a school" for the premise that it is the beneficiary of a SAGA. *J.A.*, p. 6 ¶ 24. It is undisputed that Crucible is not the beneficiary of any of the SAGAs specifically enumerated in § 15.2-2307 VA Code Ann. (Crucible never challenged the decision that its site plan submission was incomplete before the CUP Ordinance was enacted.)

1. Section 15.2-2307 VA Code Ann. does not make a zoning verification a SAGA.

A zoning administrator's verification or determination is not an action "deemed to be [SAGAs]" under § 15.2-2307 VA Code Ann.

> For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has

> approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property.

(Emphasis added.).

The trial court held 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 § 15.2-2307 VA Code Ann. Crucible can not demonstrate that it has any of the other enumerated SAGAs. (Its engineer suggested that it might need a variance. JA. p. 416.)

2. The "without limitation" language in § 15.2-2307 VA Code Ann. does not make a zoning verification a SAGA.

The trial court erroneously accepted Crucible's argument and found that Crucible obtained a SAGA through the "without limitation" language of § 15.2-2307 VA Code Ann. But this language is only a legislative safety valve, accommodating the rare, unforeseen situation where a governmental act is not on the list but is nonetheless sufficient for vesting purposes. A zoning verification for Crucible is inconsistent with the categories enumerated as SAGAs.

The Board asks this Court to interpret the subject "without limitation" language in § 15.2-2307 VA Code Ann., as consistent with the six (6) criteria for a SAGA listed therein and with vested rights case law decided prior to this statute.[13] The General Assembly set out the six discrete actions in § 15.2-2307 VA Code Ann. to limit the expanse of governmental actions that qualify as SAGAs.[14] Each of the enumerated categories involves an approval, as part of a formal or regular process, without which the specific project could not be developed; by contrast a project can be developed without a zoning verification. These actions should guide the courts when applying the "without limitation" language. *See Virginia Elec. and Power Co. v. Bd. of County Sup's of Prince William County*, 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983) ("Whenever possible, however, it is our

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[13] Before the 1998 amendments, the courts determined whether a landowner acquired vested rights based on a common law test. *Suffolk*, 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

[14] *Suffolk*, 266 Va. at 143, 580 S.E.2d at 798 ("In 1998, the General Assembly enacted substantial changes to Code § 15.2-2307 that established certain criteria which, when satisfied, conclusively vest property rights in a landowner regardless of changes in an otherwise applicable zoning ordinance."); *Barr v. Town and Country Props.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) ("We must . . . assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.").

duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal."). In the instant case the trial court set forth a standard which might be acceptable but then proceeded not to follow it

> [T]he county says, and I believe this to be true, in order to be another criteria, it has to be substantially similar and equally serious. That's the language they use, and I think that's as good as any other definition of what would – what that limitation in the statute language is.

J.A., p. 371, ll. 13-18.

Only the six explicit actions or substantially similar and equally serious actions should qualify as SAGAs. *See Kohlberg v. Virginia Real Estate Comm.*, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971) ("The meaning of a word, under the doctrine of *Noscitur a Sociis* ...takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole."); *Cape Henry Towers*, 229 Va. at 603, 331 S.E.2d at 481 (*quoting Martin v. Commonwealth*, 224 Va. 298, 302, 295 S.E.2d 890, 893 (1982) ("[A]ccording to the maxim *noscitur a socciis* . . . when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace

only objects similar in nature to those things identified by specific words.").

Interpreting "without limitation" without referring to the listed acts undermines the statute, which should be considered in its entirety, rather than by isolating particular words or phrases. *See Bd. of Zoning Appeals v. Bd. of Sup's of Fairfax County*, 275 Va. 452, 457, 657 S.E.2d 147, 149 (2008), *citing Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001).

The Circuit Court's decision would allow a landowner <u>in the subdivision or site plan process</u> to always meet the threshold requirement of a SAGA <u>before</u> obtaining the actual approval of his preliminary plat or plan. This would render the General Assembly's legislative decision to draw a "bright line" at the point when a preliminary subdivision plat or site plan has been approved meaningless. Crucible had only filed an incomplete site plan. As this Court has recognized, "the partial processing of a proposed and filed subdivision plat and site plan does not constitute the necessary 'approval'" for a SAGA. *Bd. of Zoning Appeals v. CaseLin Systems, Inc.*, 256 Va. 206, 212, 501 S.E.2d 397, 401 (1998). *See also Town of Stephens City v. Russell*, 241 Va. 160, 164, 339 S.E.2d 814, 816

(1991) (holding that the landowner had not obtained a SAGA because "[e]ven though Russell had filed a proposed subdivision plat and a site plan, neither the plat nor the plan had been approved").

Having dealt with zoning interpretations and determinations in other Code provisions (e.g., § 15.2-2286 VA Code Ann.), the General Assembly chose not to include them as SAGAs in § 15.2-2307 VA Code Ann. as part of the "bright line" test.

The trial court's decision that a zoning verification is a SAGA devalues the listed SAGAs because a landowner could request and receive a zoning verification without undertaking any development or making any substantial commitment. Consistent with the statute, the approval should be significant as well as affirmative; a zoning verification is not significant. This is particularly true and unsettling when the local government does not even know that it is providing a SAGA. The zoning administrator did not view his zoning verification as similar to any of these acts in formality or permanency.

> Q. Mr. Schardein, how would your processes when you were zoning administrator, your office, change if you believed that or were told that a zoning verification constituted an affirmative governmental act in terms of how you would treat those processes?
>
> A. I would probably stop doing them and would require everything to be in writing and consider it – have to

> consider that this is going to be determined to be a vesting or affirmative act towards a vesting. I think you have to look at it in a whole different light. I would be very concerned, because so many questions are made in a day that virtually everything could be construed.

J.A., p. 303, ll. 5-17.The trial court's decision gave no deference to the zoning administrator's or Board's view that a zoning verification was not a SAGA.

Even if the zoning verification is characterized as a zoning determination or interpretation, the act takes on no more than what it was on its face, a snapshot in time of the permitted activity. The verification was never a SAGA and nothing that occurred subsequently, such as expenses related to filing an incomplete site plan, could transform it into one.

Furthermore the trial court's use of a zoning verification, as a fall back where a site plan submission is not even complete, improperly circumvents the statutory requirements for the respective subdivision or site plan approval as a SAGA. The trial court's decision essentially ignored the statutory language in favor of its own sense of equity. The Circuit Court was incorrect in departing from the statute's text and the legislature's intent and in a real sense legislating. *See Anderson v. Commonwealth*, 182 Va. 560, 566, 29

S.E.2d 838, 841 (1944) ("Courts are not permitted to rewrite statutes. This is a legislative function.").

3. Case law decided prior to the 1998 amendments is applicable and does not support a zoning verification being SAGA.

The Attorney General has stated that "previous case law on the identification of significant governmental acts remains dispositive on situations falling outside of the six enumerations of § 15.2-2307." 2006 Op. Va. Att'y Gen. 80, at 4, n.14. (Emphasis added.). Before the 1998 amendments, the courts determined whether a landowner acquired vested rights based on a common law test.[15] This relevant and illustrative pre-1998 case law holds there are no vested rights until, at a minimum, a special use permit ("SUP") is granted, a bona

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[15] *Snow v. Amherst County Bd. of Zoning Appeals,* 248 Va. 404, 407, 448 S.E.2d 606, 608 (1994):

> A landowner who seeks to establish a vested property right in a land use classification must identify a significant official governmental act that is manifested by the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed. . . . The landowner [must] establish that he has diligently pursued the use authorized by the government permit or approval and incurred substantial expense in good faith prior to the change in zoning.

(Emphasis added.).

fide site plan is filed *and* diligently pursued, *and* substantial expenses are incurred in good faith.[16] Crucible cannot have vested rights because (1) under pre-1998 case law it does not have an approved site plan, and (2) it cannot prove that it is the beneficiary of a SAGA under § 15.2-2307 VA Code Ann. *CaseLin*, 256 Va. at 210-11, 501 S.E.2d at 400; *Town of Stephens City v. Russell*, 241 Va. 160, 164, 399 S.E.2d 814, 816 (1991).

The leading vested rights case remains *Bd. of Sup's of Fairfax County v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972); *see Snow v. Amherst County*, 248 Va. 404, 406-07, 448 S.E.2d 606, 608 (1994). *Medical Structures* held that a landowner is vested when a SUP has been granted, a *bona fide* site plan has been filed and diligently pursued, and substantial expenses have been incurred in good faith. (The Court restated this position in *Bd. of Sup's of Fairfax County v. Cities Service Oil Co.*, a case "factually similar" to *Medical Structures*. 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972). *Medical Structures* focused on the importance of a site plan

[16] *Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); *Bd. of Sup's of Fairfax County v. Cities Service Oil Co.*, 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972).

as "a monument to the developer's intention." 213 Va. at 358, 192 S.E.2d at 801.

Shortly before the 1998 amendments took effect, this Court decided *Bd. of Zoning Appeals of Bland County v. CaseLin Systems, Inc.* *CaseLin* illustrates that this Court does not intend Crucible to be the beneficiary of a SAGA.[17] In *CaseLin*, the local board of supervisors resolved to write a letter supporting a proposed incinerator project. The board chairman wrote state and regional agencies informing them of the board's support, and certifying that the project was "in accordance with all local ordinances." *CaseLin*, 256 Va. at 208, 501 S.E.2d at 399. Relying on those actions, CaseLin purchased land, contracted to build a road, and applied for the requisite state agency approvals. The county administrator also wrote state agencies regarding CaseLin's permit applications. *Id.* The board later rescinded its resolution amid significant citizen opposition. Finally, four years after rescinding its resolution, the

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[17] 2006 Op. Va. Att'y Gen. 80, at 3 ("Although *CaseLin* was decided before the 1998 amendment to § 15.2-2307 was enacted, to the extent it is consistent with § 15.2-2307, <u>it remains relevant to a vested rights analysis; particularly, with respect to the unspecified governmental acts that the General Assembly has declared may give rise to a vested property right</u>."). (Emphasis added.).

board rezoned the land to a district that did not permit the incinerator use. *Id.* at 209, 501 S.E.2d at 399-400. The Court still found governmental approval wanting. Under the Court's "bright line test," a landowner must identify a "significant governmental act that is manifested by the issuance of a permit or other governmental approval authorizing the landowner to conduct a use on his property." *Id.* at 210, 501 S.E.2d at 400. (Emphasis added.).

This Court had never before defined the term "other approval," but the textual context "impl[ies] that such 'approval' is of <u>similar character and formality as a 'permit.'</u>" *Id.* at 211, 501 S.E.2d at 400-01.

> The [zoning] administrator's certification that the location and operation of the planned incinerator were in accordance with the local ordinances was nothing more than a statement of the facts existing at that time, not an authorization to proceed.

Id. at 212, 501 S.E. 2d at 401.

The zoning administrator certified the project's operation before CaseLin received the necessary approvals. The resolution and letters of support were "merely a short-lived expression of the [b]oard's enthusiasm for the project which was later withdrawn in the face of public criticism." *Id.* The board's actions did not specifically

authorize the project, "bind the [b]oard to CaseLin's 'irrevocable' right to use the land for the incinerator," or constitute a SAGA. *Id.* at 213, 501 S.E. 2d at 401-02. The zoning verification which Crucible obtained cannot be more than that which the zoning administrator gave to Caselin, and this Court found it insufficient to constitute a SAGA.

In *Notestein v. Bd. of Sup's of Appomattox County*, this Court held that informal assurances of future approval by local officials do not constitute approval and, therefore, do not constitute a SAGA. 240 Va. at 151-52, 393 S.E.2d at 207-08.The county administrator/ zoning administrator advised landowners seeking to operate a landfill that the County could not prevent them from using their property as a landfill or regulate its operation as a landfill. *Id.* at 149, 393 S.E.2d at 206. Relying on these statements, the landowners secured financing and spurned offers to sell the property at an increased price. After individual members of the board of supervisors and the county administrator assured the landowners that any prospective zoning ordinance would not affect their project, the board adopted an ordinance placing the property in a district that did not permit the landfill use. *Id.* at 150, 393 S.E. 2d at 207.

The County also advised the Department of Waste Management of the ordinance and asked it to deny the Notesteins' permit application. This Court held that none of the original assurances to the Notesteins constituted a SAGA. *Id.* at 152, 393 S.E.2d at 208. If the actions of local officials in these cases do not rise to the level of a significant affirmative governmental act, surely a zoning verification to which the zoning administrator attached no governmental imprimatur and which the Board repudiated, cannot constitute a SAGA.

4. The General Assembly has not acted to overturn an Attorney General's Opinion which supports the Board's position that a zoning verification is not a SAGA.

Discussing the 1998 amendments to § 15.2-2307, including the original Senate Bill 570, the Attorney General noted that the General Assembly considered whether the "filing" of a preliminary site plan should constitute a SAGA, and rejected it. 2006 Op. Va. Att'y Gen. 80, at 3. The original version of Senate Bill 570, proposed the following vesting test:

> Without limiting the time when rights might otherwise be vested, . . . a landowner's rights shall be deemed vested in his zoning and not affected by a subsequent amendment to a zoning ordinance when (i) the governing body has accepted proffers or proffered conditions related to a zoning amendment or has approved the request of

> an applicant for a rezoning for a specific use or density; (ii) the governing body or board of zoning appeals has granted a special exception with conditions; (iii) a board of zoning appeals has approved a variance with conditions; or *(iv)* the landowner in good faith has filed a preliminary or final plat or plan of subdivision, a preliminary or final site plan, or plan of development for such landowner's property and he has materially changed his financial position in reliance on that plat or plan.

(offered January 26, 1998). (Emphasis added). Had this version of the 1998 amendment been adopted, a landowner could become vested upon the filing of a site plan. But the General Assembly rejected this version, which clearly is not the law today.

Certain governmental acts simply occur too early in the development process and are too uncertain to be a SAGA. The legislature's

> clear amendment of the legislation, as introduced, indicates that the General Assembly intended to exclude earlier reviews and approvals in the category of unspecified significant governmental acts that may establish a vested property right in a particular land use.

Id. (Emphasis added.).

Therefore, merely filing a site plan does not create a vested right. *Id.* at 1, 4. "[A] preliminary site plan must be filed and approved before a significant affirmative governmental act occurs that

forms the basis of a vested right in a land use classification." *Id.* at 4. (Emphasis in original.).

The General Assembly has not amended the statute following this Opinion, evidencing the legislature's acquiescence in the Attorney General's view. Therefore, while not binding on this Court, the Opinion is entitled to due consideration in support of the Board's position. *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004), *citing Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1008).

B. <u>Crucible does not have vested rights because it could not and did not rely in good faith on a SAGA pursuant to the second criteria for a vested right in § 15.2-2307 VA Code Ann.</u>

The Court erred in finding Crucible met the second criteria for vested rights. Crucible did not and could not rely in good faith on a SAGA, because at the time the zoning verification was made, Crucible could not have reasonably believed that it was a SAGA: (1) there was no legal authority indicating that it was a SAGA, and (2) it was on notice that the verification was "subject to change if, in fact, the county code was changed or zoning was changed." *J.A.*, p. 244, ll. 15-17.

Reliance on an act which is not a SAGA does not convert it into one nor does it enable the landowner to meet the second criteria for vested rights.

C. Crucible does not have vested rights because it did not incur extensive obligations or substantial expenses in diligent pursuit of a specific project pursuant to the third criteria for a vested right in § 15.2-2307 VA Code Ann.

The Circuit Court used expenses and diligent pursuit to cobble a SAGA, rather than determining that a threshold SAGA existed and only then considering whether Crucible incurred extensive obligations or substantial expenses in diligent pursuit of a specific project as required by the second and third criteria for vested rights in § 15.2-2307 VA Code Ann. Crucible did not incur expenses in reliance on a SAGA because there was no SAGA. Crucible incurred expenses while trying to obtain a SAGA, i.e., site plan approval, not based on a SAGA. The Circuit Court juxtaposed the vested rights requirements, and misapplied circular logic in accepting Crucible's claims.

Furthermore, extensiveness of obligations and substantiality of expenses are factual determinations that must be made on a case-by-case basis. 2004 Op. Va. Att'y Gen. 93, at 1, 3. This Court has not specifically indicated what obligations are "extensive" and which expenses are "substantial." *See Suffolk*, 266 Va. at 148, 580 S.E.2d

at 801. The Circuit Court made a relatively brief finding in this regard with no apparent legal support for its conclusion. *J.A.*, pp. 369, ll. 17-22; 270, ll. 1-5.

Finally, little case law addresses "diligent pursuit," the final element needed to acquire vested rights under § 15.2-2307 VA Code Ann. In *Suffolk*, the Court noted that the record reflected a regular series of events and activities by the landowner over a 14-year period. ("The record shows a train of regular, although not constant, events occurring in the period of some [14] years between the purchase of the property and the adoption of the UDO.") *Suffolk,* 266 Va. at 147, 580 S.E.2d at 800-01.

But 11 years of "diligent pursuit" after obtaining a SAGA in *Suffolk* differs markedly from Crucible's single year of trying *to* obtain a SAGA. (The SAGA in *Suffolk*, a rezoning, occurred in 1988, 11 years before the Board's rezoning that affected the owner's development rights. But this Court discussed diligent pursuit in a 14-year timeframe, from the property's purchase in 1985 to the Board's actions in 1999. *Suffolk,* 147, 580 S.E.2d at 800-01.)

CONCLUSION

The trial court erred in not requiring Crucible to follow the statutory administrative process and it improperly held Crucible to be vested to develop under a zoning, which was no longer in effect and avoid the public land use process otherwise required prior to commencement of its desired use.

The Board respectfully requests that this Court reverse the Circuit Court, and hold that a landowner, including the Crucible, must seek a vested rights determination from the zoning administrator in the first instance. If this Court reaches the issue of vested rights, the Board requests that this Court reverse the Circuit Court and hold that Crucible does not have vested rights to proceed with its proposed facility based on the zoning administrator's zoning verification.

Respectfully submitted,

BOARD OF SUPERVISORS OF STAFFORD COUNTY, VIRGINIA & STAFFORD COUNTY, VIRGINIA

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RULE 5:17(e) and 5:27 CERTIFICATE

Appellants hereby certify the following, as required by Rules 5:17(e) and 5:27 of the Rules of the Supreme Court of Virginia:

1. Appellants filing this Petition are the Board of Supervisors of Stafford County, Virginia and Stafford County, Virginia.

2. The name, address, and telephone numbers of counsel for Appellants, Board of Supervisors of Stafford County, Virginia, and Stafford County, Virginia, is Sharon E. Pandak, Esq., VSB #17846, and Brandi A. Law, Esq., VSB #76961, Greehan, Taves, Pandak & Stoner, PLLC, 4004 Genesee Place, Suite 201, Woodbridge, VA 22192, (703) 680-5543 (phone), (703) 680-5549 (facsimile).

3. The name of the Appellee is Crucible, Inc.

4. The names, addresses, and telephone numbers for counsel for the Appellee, Crucible, Inc., are H. Clark Leming, Esq. and John E. Tyler, Jr., Esq., Leming & Healy, P.C., P.O. Box 445,

Garrisonville, VA 22463, (540) 659-5155 (phone), (540) 659-1651 (facsimile); and Grayson P. Hanes, Esq., Reed Smith, LLP, 3110 Fairview Park Drive, Suite 1400, Falls Church, VA 22032, (703) 641-4292 (phone), (703) 641-4340 (facsimile).

5. Counsel for Appellants desires to present oral argument in person in support of this Appeal.

6. Twelve (12) Copies of the foregoing Opening Brief of Appellants were filed in the Office of the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed on February 20, 2009, to all opposing counsel as required by Rule 5:26(d). Furthermore in accordance with that rule an electronic copy of the brief and appendix has been filed with the Clerk contemporaneous with this Opening Brief of Appellants.

Sharon E. Pandak, VSB #17846