IN THE

Supreme Court of Virginia

RECORD NO. 121526

H. CURTISS MARTIN, *et al.*,

Appellants,

v.

THE CITY OF ALEXANDRIA, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF

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ASSIGNMENT OF ERROR

1. The trial court erred in upholding the BZA's decision granting variances because the BZA acted unconstitutionally and contrary to and in excess of the limited authority granted to it by the General Assembly by considering irrelevant design variables, by failing to find undue or unnecessary hardship if the variances were not granted and substantial detriment if the variances were granted, and by granting the variances where an amendment to the Zoning Ordinance or approval of a development application were reasonably practical solutions. (error preserved: Joint Appendix (JA) 369-71; 59-68; 80-84).

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is a zoning variance case of first impression in Virginia involving whether aesthetic variables of a preferred design may be considered in determining undue or unnecessary hardship in light of the General Assembly's removal of the phrase "approaching confiscation" in the City Charter and Virginia Code provisions pertaining to variances. This case also involves whether a board of zoning appeals can legislate, rather than decide variance applications within the narrow confines set forth by the General Assembly.

In its particulars, this case involves whether, as part of the required undue hardship analysis for a variance application, a board of zoning appeals can grant a variance based on its determination that a preferred design is more aesthetically pleasing or more consistent with historic concerns than what could be built without variances. It also involves whether a board of zoning appeals can grant a variance based on speculation that what could be built without the variances might have an even worse impact on adjoining property than the design proposed with the variances. Finally, this case involves whether a board of zoning appeals can grant variances where a zoning ordinance amendment or approval of a development application would resolve the general or recurring condition or situation that purported to justify the variances.

Curtiss Martin and Virginia Drewry, husband and wife, ("Martin & Drewry") own a historic townhouse located at 118 Prince Street in the district of the City of Alexandria called the Old and Historic District. On July 28, 2011, the Board of Zoning Appeals for the City of Alexandria (the "BZA") considered two variance requests from James and Christine Garner (the "Garners"). The Garners own a vacant lot located at 122 Prince Street, adjoining and west of the Martin & Drewry property. One variance request sought a two-foot side yard setback where a five-foot side setback

would have otherwise been required under the City of Alexandria Zoning Ordinance (the "Zoning Ordinance"). The other variance request sought a three-foot rear yard setback where a sixteen-foot rear yard setback would have otherwise been required under the Zoning Ordinance.

The City Staff presented the BZA with extensive written materials regarding the variances (JA 119-249) including a one-page memorandum from City Staff for the Old and Historic Alexandria District Board of Architectural Review (BAR) advising the BZA that the BAR had approved a Certificate of Appropriateness for the particular building design sought by the Garners "*subject to approval of necessary yard variances by BZA*." (JA 184, emphasis in original). The BZA also received letters in support and opposition to the variances from citizens and citizen groups. (JA 190-210).

The BZA heard from the attorney for the Garners and Barbara Ross, the City's Deputy Director of Planning and Zoning as well as Al Cox, the City's Historic Preservation Manager, and staff for the BAR. (JA 250-73; 308-15; 335-37). The BZA also heard from neighbors for and against the Garners' variance applications. (JA 273-308; 318-26). The various BZA members then asked questions and made comments. (JA 327-56). The BZA did not make any findings prior to or as part of its decision. It

proceeded directly to a unanimous vote in favor of both variance applications. (JA 357). The vote was on the motion of BZA member Koenig based on his opinion that the scale and mass of the variance-dependent design was appropriate for the neighborhood. (JA 351-56).

Martin & Drewry timely filed a Petition for a Writ of Certiorari pursuant to Va. Code Ann. § 15.2-2314. The City filed a Demurrer and Motion to Quash Martin & Drewry's Writ of Certiorari on the grounds that Section 9.20 of the City Charter controls appeals from the BZA to the Alexandria Circuit Court, rather than Va. Code Ann. § 15.2-2314. The Garners also filed a demurrer on this basis.

The City also demurred to a claim for uncompensated taking and asserted that the City Council was not a proper party. It also demurred to a claim that the City engaged in illegal action by contracting away the power of its Director of Planning and Zoning.

Martin & Drewry filed oppositions to the Demurrers and a Motion for Leave to Amend its Pleading. Martin & Drewry attached their proposed Amended Petition for Appeal that cited the Charter provision and omitted the claim for an uncompensated taking and a claim for illegal contracting away of zoning power (the "Amended Petition"). The Amended Petition did not name the City Council of the City of Alexandria as a party. On

December 7, 2011, the trial court entered a consent order that dismissed the City Council and allowed Martin & Drewry to file the Amended Petition. (JA 26-29).

In Count I of the Amended Petition, Martin & Drewry claimed that the BZA's action was in contradiction to Charter Section 9.18 because the BZA did not, and indeed could not, make findings of fact mandated by the Charter as a predicate for granting the variances. In Count II, Martin & Drewry claimed that the BZA's action was outside its authority under Charter Section 9.18 because of the lack of a demonstrated unnecessary and undue hardship, and because any condition or situation of the Garner property complicating or preventing development in the manner desired by the Garners, and implicating applicable City ordinances, was so general as to be addressed by an amendment to the relevant ordinances. In Count III, Martin & Drewry alleged that the BZA decision was premised on the consideration of factors outside the permissible scope of its authority under Charter Section 9.18, including a design negotiated pursuant to an illegal and ultra vires Stay of Litigation Agreement and City Staff's desire to preserve a view of a historic wall at 126 Prince Street.

Martin & Drewry identified Tom Basham, P.E., a professional surveying and engineering expert, to testify about the various physical

characteristics of the Garner property, the ability to build a reasonably-sized dwelling on the Garner property without a variance and the substantial detriment to the Martin & Drewry property if the house predicated on the variances was constructed. The Garners filed a Motion in *Limine* seeking to exclude Basham's testimony. Martin & Drewry also filed a Motion in *Limine*. Martin & Drewry's Motion in *Limine* sought to exclude any additional testimony of Al Cox and Barbara Ross, as well as any testimony about whether the BAR would issue a Certificate of Appropriateness for a house on the Garner lot that complied with setbacks.

Both Motions in *Limine* were briefed and there was argument on May 14, 2012. The trial court ruled that no evidence outside the BZA record would be allowed and denied both Motions in *Limine* as moot. (JA 54). With respect to the Garner's Motion in *Limine* to exclude Mr. Basham, the trial court explained that it would not allow Mr. Basham to testify because it was clear at the BZA hearing that a house could be constructed on the Garner property without variances. (JA 50-51). The trial court directed the parties' counsel to submit trial briefs of no more than five pages setting forth their legal theories of the case. (JA 49).

On June 7, 2012, the trial court heard argument from counsel in addition to their respective trial briefs. In accord with the trial court's

May 14 ruling, no evidence outside the BZA record was allowed. The trial court ruled from the bench immediately after the conclusion of argument. The trial court adopted the pretrial memorandum that had been filed by counsel for the Garners as the rationale for its ruling upholding the BZA's decision. (JA 84-86). The trial court entered its final order on June 7, 2012 from the bench immediately after announcing its decision. (JA 369-71).

On June 25, 2012, within twenty-one days of the Final Order, Martin & Drewry filed a cover letter and Motion for Reconsideration/Clarification on the grounds that the trial court's statements from the bench following its ruling indicated that it did not review the entire BZA record, but only one small component, namely the transcript of the BZA proceeding. (JA 373-85). Martin & Drewry argued that the result was that Martin & Drewry were denied their right of judicial review required by the Charter. Martin & Drewry asked the Court to suspend its final order and reconsider after reviewing the entire BZA record, as opposed to just the BZA hearing transcript.

On the same day, the Garners filed a cover letter and Opposition to Motion for Suspending Order and Motion for Reconsideration/Clarification stating that it was clear that the Court had reviewed the entire record. The Garners attached to their cover letter and Opposition a sketch order

denying the motion. On June 28, 2012, the trial court entered the sketch order without argument or endorsement of counsel. (JA 391-92). Martin & Drewry timely filed their Notice of Appeal on July 2, 2012.

STATEMENT OF FACTS

The Garners sought to build a house of a particular design on their property. This design required variances from the side and rear yard setbacks required for properties in the RM zoning district. The case originated in 2003 when the Garners sought to build a single-family house of a particular design on a vacant lot at 122 Prince Street. (JA 122). The Garners filed applications for variances in 2003 and 2005 in support of the house design sought by them at those times. City Staff recommended denial in response to both of these applications on the grounds that there was no hardship and the variance would be detrimental to the Martin & Drewry property. (JA 172-74). In 2003, City Staff found in pertinent part that:

> The lot is level and there is no condition of the lot which restricts the reasonable use or development of a single-family dwelling. . . . The lot is a large buildable lot that can be developed without the need of a variance. . . . Granting the variance will be detrimental to the adjacent property to the east . . . . The neighbor will now view 44.33 feet of building wall.

(JA 173-74).

In response to the Garner's 2005 applications, City Staff found in pertinent part that

> A new house (23 feet wide facing Prince Street by 28 feet deep by three stories) can be constructed on this property in compliance with the east side and rear yard setbacks. . . . The lot is level and no trees will be affected by the placement of the new house. Although, the lot is less than half the depth (44.33 feet) compared to the standard Old Town lot of 100 feet deep it is twice as wide as the minimum lot width required for an RM zoned lot. The wider lot does compensate for the loss of lot depth, but does not limit the placement of a new house on the lot.

(JA 172).

A private alley 8 feet in width abutted the Garner property along the east property line adjoining the Martin & Drewry property. (JA 122). There were legal issues concerning the ownership of the alley. Id. Faced with the above negative staff recommendations to the BZA, the Garners withdrew their 2003 and 2005 variance applications to address these legal issues concerning the alley. Id.

Following withdrawal of their 2005 application, the Garners asked the City for a zoning determination about their ability to count any portion of the alley owned by them as part of the required five-foot side yard setback. (JA 123). The Director of Zoning and Planning issued an opinion on February 19, 2010 that the alley could not be counted as part of the side yard setback. Id. The Garners appealed this determination to the BZA and

the BZA upheld the determination. Id. The Garners then appealed the BZA decision to the Alexandria Circuit Court (the "Zoning Setback Litigation"). Id.

Prior to trial in the Zoning Setback Litigation, the Garners and the City entered into a Stay of Litigation Agreement dated January 18, 2011 whereby, in consideration of the Garners' agreement to stay the litigation, the City agreed that its staff would support the Garners' application for a three (3) foot variance from the side yard setback requirement, measured from the edge of the alley. (JA 196-99).[1] The Stay of Litigation Agreement also recognized that the Garners wished to build a house that would likely require a rear yard variance and other approvals in addition to a side yard variance. (JA 197). The City and the Garners agreed to work cooperatively with respect to these other approvals. Id.

The Garners then filed with the BZA their variance applications for a two-foot side yard setback where a five-foot setback would have otherwise been required and a three-foot rear yard setback where a sixteen-foot setback would have otherwise been required. (JA 126). The variances were necessary for the particular house design negotiated by the Garners

[1] The question of whether the Stay of Litigation Agreement incorporated an illegal quid pro quo bartering of the revised staff recommendations and findings in exchange for litigation relief sought by the City was outside the scope of this BZA appeal. (JA 26-30).

and City Staff pursuant to the Stay of Litigation Agreement. (JA 125). City Staff set forth the following in its staff report to the BZA:

> After eight years, two variance cases, one BZA appeal and one court case, the opposing parties have negotiated a building design which staff finds to be appropriate for the 100 block of Prince Street from the standpoint of both zoning and historic preservation.

Id.

In addition to variances, the proposed design required a Certificate of Appropriateness from the BAR. Generally, the role of the BAR is to determine whether the proposed height, mass, scale and architectural style is appropriate for the historic character of the Old and Historic Alexandria District. (JA 184). The BAR approved the Garner's application for a Certificate of Appropriateness for the particular design presented to it subject to approval of the necessary yard variances by the BZA. Id. The BAR specified that it "took no position on the rear portion of the building and its impact on the neighbor's light and air, believing this to be uniquely and specifically within the purview of the BZA." Id. The BAR also did not consider the appropriateness of a different design conforming to zoning setbacks. Indeed, the Garners have never submitted a conforming design for BAR approval.

The BZA received the City Staff report and other materials and held its hearing on the requested variances on July 28, 2011. The BZA was presented the same design that had been considered by the BAR. The BZA did not make any findings prior to or as part of its decision. It voted unanimously to approve the variances on the motion of BZA member Koenig based on Koenig's opinion that the proposed design was appropriate in mass and scale. (JA 351-57).

ARGUMENT

I. STANDARD OF REVIEW

The issue in this appeal is whether the BZA acted contrary to or outside its authority in granting the variances or in an arbitrary or capricious fashion. These are questions of law. For questions of law, this Court applies the *de novo* standard of review that was applicable to the trial court in the appeal from the BZA. Shilling v. Baker, 279 Va. 720, 724-25, 691 S.E.2d 806, 808 (2010). This standard of review is supplied by Section 9.21 of the City Charter which states that the BZA's decision should be reversed if it is contrary to law or arbitrary and constitutes an abuse of discretion. Alexandria City Charter § 9.21 (JA 94).

II. SUMMARY OF ARGUMENT

The BZA gets its authority from the City Charter and Zoning Ordinance and must strictly adhere to those provisions. The City Charter and Zoning Ordinance required the BZA to make certain findings before granting the variances. The BZA did not make any findings before granting the variances, including the required findings that the strict application of the Zoning Ordinance would produce undue hardship to the Garners. Nor was there evidence of the other factors required by the City Charter and Zoning Ordinance before a variance may be granted, namely that: (1) an extraordinary situation or condition of the Garner property would effectively prohibit or unreasonably restrict the use of the Garner property or would result in a clearly demonstrable hardship as distinguished from a mere inconvenience if the variances were not granted[2] or (2) that the condition or situation of the property or its intended use is not so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.[3] In addition, the BZA failed to make the required finding of absence of substantial detriment to adjoining property if the variances were granted.[4]

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[2] Zoning Ordinance § 11-1103 (A) (JA 98).
[3] City Charter § 9.18 (JA 92).
[4] Id.

These required factors and findings survived in the City Charter and Zoning Ordinance following removal of the phrase "approaching confiscation" from the City Charter in 2009. In interpreting these factors and findings, this Court has consistently rejected the notion that preference of design is sufficient to satisfy a variance where a reasonable house can be constructed in strict compliance with the zoning ordinance. Yet the BZA based its decision on the appropriateness of the design favored by the Garners and City Staff following the Stay of Litigation Agreement, and the trial court upheld the BZA's decision by summary opinion on the same basis.

The City Charter prohibits a variance where the condition or situation of the property complicating or inhibiting the desired development is so general or recurring such that an amendment to the Zoning Ordinance is reasonably practicable.[5] Similarly, the Zoning Ordinance prohibits a variance where relief is available from another body of the City.[6] The condition or situation of the Garner property purporting to justify the variance application was that it was a vacant lot zoned RM in the Old and Historic District. According to City Staff, such lots were supposedly not intended to be subject to the same setbacks as developed lots. The vacant

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[5] Id.

[6] Zoning Ordinance § 11-1103(I) (JA 98).

nature of the Garner property in the Old and Historic District was the epitome of a general condition that could be resolved by City Council through a Zoning Ordinance amendment. Further, the Garners have never applied to the BAR for approval of a design based on strict application of the Zoning Ordinance. Therefore, the BZA was prohibited from granting the variances even if it had been able to find undue or unnecessary hardship.

The BZA also failed to find absence of substantial detriment to adjoining property if the variances were granted, or lack of interference with light and air, as required by the City Charter and Zoning Ordinance.

Instead of making the findings required by the City Charter and Zoning Ordinance, the BZA sought to fashion an ad hoc change to the Zoning Ordinance based on concerns about aesthetic design in a historic area. In so doing, the BZA acted outside of and in contradiction to the Charter and Zoning Ordinance and as an unconstitutional legislative body.

A. THE BZA DID NOT, AND COULD NOT, FIND UNDUE OR UNNECESSARY HARDSHIP.

A variance "'allows a property owner to do what is otherwise not allowed under the zoning ordinance.'" Sinclair v. New Cingular Wireless, PCS, LLC, 283 Va. 567, 577, 727 S.E.2d 40, 45 (2012) (quoting, Bell v. City Council, 224 Va. 490, 496, 297 S.E.2d 810, 813-14 (1982)). A BZA's

power to grant variances is limited to "insuring that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity." Hendrix v. Board of Zoning Appeals, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981). The removal of the words "approaching confiscation" in 2009 did not change the fundamental constitutional principle that a board of zoning appeals derives its authority to grant variances only from legislated provisions. Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 765, 594 S.E.2d 571, 576-77 (2004). It is as true today, as it was before the removal of the "approaching confiscation" phrase, that when granting a variance, a BZA acts in an administrative capacity as opposed to a legislative capacity. Id. (citing Gayton Triangle Land Co. v. Board of Supervisors of Henrico County, 216 Va. 764, 222 S.E.2d 570 (1976)). It is still the case that "[u]nder fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law." Id.

The City Charter and Zoning Ordinance provided the legislative standards to which the BZA was required to adhere. In language identical to Section 15.2-2309 of the Code of Virginia, the City Charter provides that

> No such variance shall be authorized by the board unless it finds:
>
> (1) That the strict application of the ordinance would produce undue hardship.
>
> (2) That such hardship is not shared generally by other properties in the same zone and the same vicinity and is not created by the owner of such property.
>
> (3) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the zone will not be changed by the granting of the variance.[7]

The City Charter (and Virginia Code) requirement that a BZA find "undue hardship" means that a BZA must apply this Court's definition of "undue hardship" rather than fashioning its own meaning, as the BZA did here.

In defining this separate requirement of "undue hardship," this Court has consistently held that undue hardship does not exist where the variances would merely enable a design preferred by the landowner. For example, this Court held that a landowner did not experience unnecessary hardship simply because he was unable to build a home on his lot without adjusting the location of the home. Board of Zoning Appeals v. Nowak, 227 Va. 201, 205, 315 S.E.2d 221, 223 (1984). In Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980), this Court held that undue hardship is

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[7] City Charter § 9.18(b) (JA 92). See also Zoning Ordinance § 11-1103 (JA 98).

not present where the owners already had a dwelling and merely preferred to expand to have a better floor plan with a better view of the ocean. 221 Va. at 122, 267 S.E.2d at 143. More recently, this Court followed its decisions in Packer and Nowak and held that a landowner does not experience undue hardship where he had enjoyed the use of his home on the property for many years and the purpose of the variance would be to facilitate a preference to demolish that structure, subdivide the property into two lots and erect new residential structures on each lot. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 268 Va. 441, 453, 604 S.E.2d 7, 13 (2004).

In this case, it was undisputed at the BZA hearing that the Garners could build a home on their lot without the variances and that they wanted the variances to enable a design they preferred over what could be built by right. (JA 276-77; 265-66; 50-51; 248-49; 363-64). Under Packer, Nowak, and Board of Supervisors, mere preference in design is not sufficient to meet the definition of undue or unnecessary hardship, whether or not that hardship also approaches confiscation.

It does not matter that City Staff also preferred the design based on negotiation following the Stay of Litigation Agreement. Staff's support for a design that violates the zoning ordinance does not cure the lack of required

undue or unnecessary hardship to a landowner. City Staff's preference of design is no more relevant to the required undue hardship analysis than the landowner's preference. Yet BZA Chairman Allen appears to have adopted the City Staff's position in his comments from the dais. Seeing it as a close call, he voted for the variances because "I am a bit fearful that without variances we may get—and the neighbors who oppose this may, in fact, get a structure that they would ultimately find more objectionable to them in a greater degree than what they are going to see now." (JA 350).

Under the City Charter, the issue before the BZA was whether the strict application of the Zoning Ordinance would produce an undue hardship on the Garners. As shown by the facts of this case, the BZA did not, and could not, find undue or unnecessary hardship. The BZA acted contrary to law to the extent it voted for the variances because it viewed the variance-dependent design as more aesthetically pleasing or consistent with historic concerns than what potentially could be constructed under strict application of the Zoning Ordinance. The trial court also acted contrary to law because of its summary ruling upholding the BZA action on this basis.

B. A ZONING ORDINANCE AMENDMENT AND ADMINSTRATIVE RELIEF WERE REASONABLY PRACTICABLE SOLUTIONS.

When asked by the BZA Chairman to "explain to us as succinctly as you can why you can't simply live within the footprint of these current zoning laws,"[8] the Garners' counsel, Ms. Puskar, replied in pertinent part that "we have a vacant lot that's trying to build a new house under current zoning standards, but at the same time is in the old and historic district next to one of the most historic facades in the district that we are trying to become compatible with." (JA 328). Continuing, Garner's counsel stated that "[s]o we do have a hardship here that the older houses don't share in trying to marry the current RM zoning ordinance regulations with the standards in the old and historic district." (JA 329).

The BZA Chair correctly understood this argument: "there's a certain part of your argument that makes the zoning code itself your hardship." (JA 331). Garner's counsel readily conceded this to be the case: "[m]ost of the houses that you see coming forward to the BAR, and in some instances to you, is an existing older home that's looking to build on an addition. Here we have a brand new home. We're trying to fit a new home into modern zoning ordinance regulations with historic considerations." Id.

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[8] JA 327.

Speaking for City Staff, Deputy Zoning Administrator Barbara Ross agreed with the summary of hardship by Garner's counsel: "But I would like to echo what the applicant's attorney has said, that the RM zone in the main is designed to apply to old buildings, not new buildings, in this case we have a new building." (JA 335). Ms. Ross stated: "It's got to be special, it's got to work for this lot on this block, and the zoning ordinance that applies across the board to every piece of property in Old Town, typically old buildings with additions, we shouldn't follow here if it screws up a good house." (JA 336-37). As described by the Garners and the City, the hardship in this case was that the RM District setback standards apply to every piece of property zoned RM but, in the opinion of the Garners and City Staff (implementing the Litigation Stay Agreement), those setback standards should not apply to the construction of new buildings on vacant lots.

The City Charter specifically prohibits the BZA from granting a variance "unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." City Charter § 9.18 (JA 92). Similarly, the Zoning Ordinance prohibits the BZA

from granting a variance unless it finds that no other remedy exists whereby the same relief would be available through approval of a development application by another approval body. Zoning Ordinance § 11.1103(I) (JA 98). The record fails to reveal any such findings by the BZA. On the contrary, the description of the condition or situation of the property resulting in hardship offered by the Garners and agreed to by City Staff—the fact the Garner lot is an undeveloped lot in the RM zone—is by definition general and recurring in nature such that it was reasonably practicable to solve the problem for all undeveloped lots in the RM Zone through an amendment to the Zoning Ordinance. Further, the Garners never applied to the BAR for approval of a house design that strictly complied with the Zoning Ordinance. Therefore, the BZA acted contrary to the City Charter and Zoning Ordinance in granting the variances, as did the trial court in its summary decision upholding that ruling.

C. THE BZA DID NOT FIND ABSENCE OF SUBSTANTIAL DETRIMENT TO ADJACENT PROPERTY.

Regardless of hardship, both the Charter and the Zoning Ordinance prohibit the BZA from granting a variance unless the BZA finds that the authorization of the variance will not be of substantial detriment to an adjacent property. City Charter § 9.18(b)(3) (JA 92); Zoning Ordinance § 11-1103(F) (JA 98). The Zoning Ordinance also prohibits the BZA from

granting a variance unless it finds that the proposed variance will not impair an adequate supply of light and air to adjacent property. Zoning Ordinance § 11-1103(E) (JA 98). Just as the BZA failed to find undue or unnecessary hardship if the Zoning Ordinance were strictly enforced, it also failed to find lack of substantial detriment to adjacent property or lack of impairment of an adequate supply of light and air if the variances were granted.[9] Therefore, the BZA acted contrary to law, regardless of undue or unnecessary hardship, as did the trial court because of its summary ruling upholding the BZA's decision.

The only indication in the record of even an attempt by a BZA member to address the issue of impact on adjacent property comes from the remarks of Chairman Allen that, without the variances he was fearful that the neighbors possibly would be faced with an even more objectionable situation than what was proposed with the variance application. Supra p. 19. Not only were Mr. Allen's comments speculative, but they also show that the BZA granted the variances based on an erroneous legal inquiry. The BZA has no authority to grant a variance because of concerns that strict application of the zoning ordinance might

[9] Staff found that the 2003 and 2005 applications would be detrimental to the Martin & Drewry property even though the depth and separation of the structure in those applications would be approximately the same as proposed in the subject 2011 application (JA 137; 172-74).

cause even more substantial detriment to adjoining property than if the variances were granted. Rather, the BZA is required to determine whether authorization of the variance will cause substantial detriment to adjacent property. Mr. Allen's remarks demonstrate an additional way in which the BZA acted contrary to law in granting the variances and the trial court acted contrary to law in summarily upholding the BZA's decision.

D. THE BZA ACTED AS AN UNCONSTITUTIONAL LEGLISATIVE BODY.

Zoning "is purely a legislative function and is not within the authority of a board of zoning appeals." Prince William County Board of Zoning Appeals v. Bond, 225 Va. 177, 180, 300 S.E.2d 781, 783 (1983).

> In passing upon requests for variances, a board of zoning appeals exercises the limited function of insuring that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. The power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body.

Hendrix v. Board of Zoning Appeals, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981).

To the extent the BZA's vote upholding the variances was predicated upon Ms. Ross's statement that the RM Zone setback standards should not

apply to new buildings[10] (even though they do) or that they should not apply if they would "screw up a good house"[11] (even though strict application of RM zoning could alter the preferred design), then the BZA engaged in unconstitutional legislative conduct. The BZA was not empowered to legislate a change to the Zoning Ordinance such that the Zoning Ordinance would not apply to new buildings in the RM zone or "screw up" what the City Staff perceived as a good design. Similarly, the BZA was not empowered to legislate an ad hoc change to the Zoning Ordinance because of its view that strict enforcement could produce an even worse impact on adjacent property than what was proposed with the variance applications. In so doing, the BZA acted as an unconstitutional legislative body and the trial court erred in summarily upholding these unconstitutional acts.

CONCLUSION

For the reasons stated herein, Martin & Drewry pray this Honorable Court reverse the rulings of the BZA and the trial court and enter judgment in their favor.

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[10] JA 335.
[11] JA 337.

Respectfully submitted,

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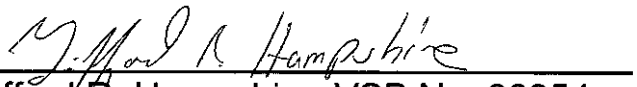
By Counsel



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CERTIFICATE OF SERVICE

I have complied with Virginia Supreme Court Rule 5:26(h) by filing fifteen (15) copies of this Opening Brief in the Office of the Clerk of the Supreme Court of Virginia and by mailing three (3) copies of same to:

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on this 22nd day of January, 2013. On the same date, I have filed an electronic copy of the brief with the Clerk via CD.

Counsel for Appellants respectfully requests oral argument.

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