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Record No. 5102

In the Supreme Court of Appeals of Virginia at Richmond

BOARD OF ZONING APPEALS OF THE CITY OF ALEXANDRIA, VIRGINIA, ET AL.,

v.

TRUDYE H. FOWLER

FROM THE CORPORATION COURT OF THE CITY OF ALEXANDRIA

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5102

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of October, 1959.

BOARD OF ZONING APPEALS OF THE CITY OF ALEXANDRIA, VIRGINIA, ET AL., Plaintiffs in Error,

against

TRUDYE H. FOWLER, Defendant in Error.

From the Corporation Court of the City of Alexandria

Upon the petition of Board of Zoning Appeals of the City of Alexandria, Virginia, and the Alexandria Dairy Products Company, Inc., a writ of error is awarded them to a judgment rendered by the Corporation Court of the City of Alexandria on the 13th day of April, 1959, in a certain proceeding then therein depending wherein Trudye Fowler was plaintiff and Board of Zoning Appeals of the City of Alexandria was defendant; upon the Alexandria Dairy Products Company, Inc., or some one for it, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three hundred dollars, with condition as the law directs, no bond being required of the Board of Zoning Appeals of the City of Alexandria.

RECORD

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Filed Clerk of Courts City of Alexandria Mar. 19, 1:56 P. M. '59.

EARL R. SULLIVAN, Clerk
By K. F. BRADFIELD, Deputy Clerk.

AMENDED PETITION OF APPEAL.

Now comes Trudye H. Fowler and files this her verified Petition of Appeal pursuant to Section 15-825 of the 1950 Code of Virginia, as amended, and in support thereof sets forth the following:

1. That by decision dated on or about February 24, 1959 on application of M. H. Burchell for The Alexandria Dairy Products Company, Inc., the Board of Zoning Appeals granted to the owner of the property at the rear of 509 Queen Street, Alexandria, Virginia, namely Alexandria Dairy Products Company, Inc. a variance in the regulations prescribed by the City of Alexandria Zoning Code and particularly that portion of the said regulations contained in Section 35-14 and 35-41 of the 1953 Code of the City of Alexandria, Virginia, as amended.

2. The decision of the Board in granting such variance was illegal and arbitrary in that the property owner, namely Alexandria Dairy Products Company, Inc. did not page 4 } nor can it show that the property for which the variance was sought was acquired in good faith nor is it exceptionally narrow or shallow nor does the shape of its property or exceptional topographical conditions or other extraordinary or exceptional situation exist whereby the application of the above mentioned regulation would unreasonably restrict the use of the property, nor was there any evidence to show that the granting of such variance would alleviate any clearly demonstrable hardship approaching confiscation as distinguished from a special privilege or convenience sought by the owner of the property.

3. That your Petitioner is a person aggrieved and in fact affected by the decision of the Board of Zoning Appeals

in that she is the beneficial owner of the property located at 511 Queen Street, Alexandria, Virginia which property abuts the property of the Alexandria Dairy Products Company, Inc. on which the variance was granted.

WHEREFORE Petitioner prays that she be granted a trial *de novo* of the application for a variance by the Alexandria Dairy Products Company, Inc. and that such application be denied, together with her costs in this behalf expended.

TRUDYE H. FOWLER.

State of Virginia,
City of Alexandria, to-wit:

This day TRUDYE H. FOWLER personally appeared before me, the undersigned Notary Public, and being duly sworn made oath that the allegations contained in the foregoing Amended Petition are true and correct to the best of her knowledge and belief.

Given under my hand this 19th day of March, 1959.

My commission expires January 22, 1963.

MARIAN J. HOEL
Notary Public.

ALBERT V. BRYAN, JR.
120 South Fairfax Street
Alexandria, Virginia
Attorney for Petitioner.

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ANSWER.

Comes now the Board of Zoning Appeals of the City of Alexandria, Virginia, in response to the amended Petition of Trudye H. Fowler, filed in this matter and states as follows:

1. It admits the decision granting the variance described in paragraph 1.

2. It denies that the decision of the Board in granting such variance was illegal as arbitrary and says that in fact, there was and is evidence to sustain the granting of such variance and that it was proper.

3. It neither admits nor denies that the Petitioner is the beneficial owner of the property located at 511 Queen Street as it has insufficient information upon which to base an answer, but calls for strict proof thereof.

It denied that the Petitioner is a person aggrieved to the extent that this court must give relief.

page 15 } 4. It denies any allegation contained in the Petition not above specifically admitted or denied.

WHEREFORE, having fully answered the Petition, the respondent prays that the decision of the Board of Zoning Appeals for the City of Alexandria, Virginia, be affirmed, and that the Petition of Appeal of the Petitioner, Trudye H. Fowler, be dismissed.

BOARD OF ZONING APPEALS OF
THE CITY OF *ALEXANDRIA,*
VIRGINIA
By ELDRIDGE K. HAYES
Assistant City Attorney

Filed Clerk of Courts City of Alexandria Mar. 23, 2:26 P. M. '59.

EARL R. SULLIVAN, Clerk
By K. F. BRADFIELD, Deputy Clerk.

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Filed Clerk of Courts City of Alexandria Mar. 23, 4:00 P. M. '59.

EARL R. SULLIVAN, Clerk
By K. F. BRADFIELD, Deputy Clerk.

ANSWER.

COMES NOW the Respondent, Alexandria Dairy Products Company, Inc., a Corporation, by Counsel, in response to the Amended Petition of Trudye H. Fowler, filed in this matter and states as follows:

1. It admits the decision granting the variance described in paragraph one (1).

2. It denies that the decision of the Board in granting such variance was illegal as arbitrary and says that in fact, there was and is evidence to sustain the granting of such variance and that it was proper.

3. It neither admits nor denies that the Petitioner is the beneficial owner of the property located at 511 Queen Street as it has insufficient information upon which to base an answer, but calls for strict proof thereof.

4. It denies that the Petitioner is a person aggrieved to the extent that this Court must give relief.

5. It denies any allegation contained in the Petition not above specifically admitted or denied.

WHEREFORE, having fully answered the Petition, the Respondent prays that the decision of the Board of page 17 } Zoning Appeals for the City of Alexandria, Virginia, be affirmed, and that the Petition of Appeal of the Petitioner, Trudye H. Fowler, be dismissed.

ALEXANDRIA DAIRY PRODUCTS COMPANY, INC., A CORP.
Respondent
By ALEVANDRIA DAIRY PRODUCTS CO. INC.
Counsel.

BENDHEIM, FAGELSON, BRAGG & GIAMMITTORIO
GEORGE M. GIAMMITTORIO
124-126 S. Royal St., Alexandria, Virginia
Attorneys for Respondent.

* * * * *

page 18 }

* * * * *

Filed 3/24/59.

F. P. B.

STIPULATION.

It is hereby stipulated and agreed, for the purposes of the trial of this matter, as follows:

1. That the attached plat, showing lot location and boundaries of the block bounded by Queen, Pitt, St. Asaph and Princess Streets, Alexandria, Virginia, may be introduced in evidence, without formal proof, as a true representation of the location of said lots, their boundaries and their dimensions.

2. That Lots 6, 7, 8, 9, 10A and 10B as shown on said plat are owned by the Alexandria Dairy Products Company, Inc.

3. That Lots 16 and 10C, also known as No. 511 Queen Street, Alexandria, Virginia, as shown on said plat are owned by Trudye H. Fowler.

4. That Lot 15 as shown on said plat is owned by L. B. Neal and wife.

page 19 } 5. That a copy of Chapter 35 of the 1953 Code of the City of Alexandria, Virginia, as amended, may be introduced in evidence, without proof; and that the zoning ordinances of the City of Alexandria, Virginia, need not be proved.

6. That Lots 15, 16 and 10C as shown on said plat are zoned RM.

7. That Lots 6, 7, 8, 9, 10A and 10B as shown on said plat are now zoned I-1, although part of Lot 10A was not so zoned until February 24, 1959.

Given under our hands this 24 day of March, 1959.

ALBERT V. BRYAN, JR.
Counsel for Trudye H. Fowler.

GEORGE M. GIAMMITTORIO
Counsel for Alexandria Dairy Products Co., Inc.

8. That the hearing of Feb. 24, 1959 before the Board was in conformance with the Statute and was properly advertised.

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ORDER.

This matter came on to be heard the First day of April, 1959 upon the Amended Petition of Appeal of Trudye H. Fowler; upon the answer of the Board of Zoning Appeals of

the City of Alexandria, Virginia; upon the record of the proceedings, including the transcript of testimony, before the Board of Zoning Appeals of the City of Alexandria, Virginia; upon the evidence adduced *ore tenus* before this court on March 24, 1959; and was argued by counsel.

Upon consideration whereof, the decision of the Board of Zoning Appeals of the City of Alexandria, Virginia of February 24, 1959 be and the same is hereby affirmed with the exception of that part of the decision of said Board of Zoning Appeals which granted the variation of the five foot set back on the west side of Lot 10A on the property of Alexandria Dairy Products Company, Inc. abutting the property of Trudye H. Fowler which part of the decision of the said Board of Zoning Appeals of the City of Alexandria, Virginia is hereby reversed for the reason that there is no evidence that the terms of the zoning ordinance of the City
page 25 } of Alexandria, Virginia actually prohibit or unreasonably restrict the use of the property of the Alexandria Dairy Products Company, Inc. by reason of:

(a) Exceptional narrowness, shallowness or shape of the Alexandria Dairy Products Company, Inc. property at the time of the effective date of the ordinance; or

(b) Exceptional topographical conditions; or

(c) Any other extraordinary or exceptional situation; nor is there evidence of a clearly demonstrable hardship approaching confiscation as distinguished from a special privilege or convenience.

To this ruling of the Court counsel for the Board of Zoning Appeals of the City of Alexandria, Virginia and counsel for the Alexandria Dairy Products Company, Inc. except on the following grounds:

1. Evidence was adduced in this proceeding to show an extraordinary or exceptional situation.

2. The court substituted its discretion for that of the Board in that the Board's action was, at least, open to a fair difference of opinion.

3. The decision of the Board was not contrary to law nor arbitrary nor did it constitute an abuse of discretion on the part of the Board.

4. No useful purpose will be served by a strict adherence to the terms of the Zoning Law as it bears upon side yard setback requirement in this case.

AND THIS ORDER IS FINAL.

FRANKLIN P. BACKUS, Judge.

Entered April 13, 1959.
Bk. 42, page 254.

SEEN AND AGREED:

ALBERT V. BRYAN, JR.
Counsel for Trudye H. Fowler.

SEEN AND EXCEPTED TO as to that part of the Order revising a portion of the decision of the Board:

ELDRIDGE K. HAYES
Ass't. City Attorney
Counsel for Board of Zoning Appeals.

GEORGE M. GIAMMITTORIO
Counsel for Alexandria Dairy
Products Company, Inc.

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Filed Clerk of Courts City of Alexandria Jun 9, 3:06 P. M. '59.

EARL R. SULLIVAN, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To Earl R. Sullivan, Clerk of the Corporation Court of the City of Alexandria, Virginia.

The Respondents, Board of Zoning Appeals of the City of Alexandria, Virginia, and Alexandria Dairy Products Company, Inc., by their attorneys hereby give notice pursuant to the provisions of Section 4, Rule 5:1, of the Rules of the Supreme Court of Appeals of Virginia, dated February 1, 1950, of their appeal from that certain Final Decree entered in the above styled cause on April 13, 1959, in which a part of a decision of the Respondent, Board of Zoning Appeals, relating to setback requirements of the Respondent, Alexandria Dairy Products Company, Inc. was reversed.

Further, pursuant to the said Rule, Respondents assign the following errors:

1. The Court erred as a matter of law and fact in holding upon the evidence that there was no extraordinary or exceptional situation as required by the City Zoning Laws, upon which to base the granting of a variance.

page 27 } 2. The Court erred as a matter of law in substituting its discretion for that of the Board of Zoning Appeals and in a matter of fact in finding that the Board's action was not open to a fair difference of opinion.

3. The Court erred as a matter of law in reversing a part of the decision of the Board of Zoning Appeals since, as is shown by the evidence, the decision of the Board of Zoning Appeals was not contrary to law nor arbitrary nor did it constitute an abuse of discretion on the part of the Board.

4. The Court erred as a matter of law in reversing a part of the decision of the Board of Zoning Appeals since, as is shown by the evidence, no useful purpose will be served by a strict adherence to the terms of the Zoning law as it bears upon side yard setback requirements in this case.

5. The Court erred as a matter of law and fact in holding upon the evidence that there existed no clearly demonstrable hardship, as required by the City Zoning Laws, upon which to base the granting of a variance.

ELDRIDGE K. HAYES
Attorney for Respondent.

GEORGE M. GIAMMITTORIO
Attorney for Respondent.

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page 22 } By Mr. Bryan:

Q. I want to call Mr. Burchell as an adverse witness.

M. H. BURCHELL,

a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Bryan:

Q. Will you state your full name, please, sir?

A. My name is M. M. Burchell.

M. H. Burchell.

Q. What is your connection with the Alexandria Dairy?

A. I am President.

Q. The Dairy owns, does it not, a lot shown on this map which has been stipulated in evidence as 6, 7, 8, 9, 10B and 10A?

A. Yes, sir.

Q. When, approximately, were those lots acquired by you?

A. The last one, the Wright property, was acquired in 1947, in September.

Q. Which was that?

A. That was the one we are talking about right now.

Q. 10A?

A. That is right.

Q. Wasn't 10B acquired shortly thereafter? Wasn't it acquired in 1949 from Mr. Hinky?

A. I think it was before that.

Q. But you do own all those properties?

A. Yes, sir.

Q. When you bought the lots on Pitts Street, page 23 } they were improved, were they not? They had buildings on some of them?

A. We had eight or nine pieces of property there on the west side of Pitt Street, altogether.

Q. And you tore down all of them?

A. Yes, sir.

Q. And Lot #10 is owned by a man named Andronovich?

A. I don't know.

Q. Have you ever tried to buy that property?

A. No, it has been offered to me, but I never wanted to buy it, except for a turn around arrangement.

Q. When you speak of a turn around arrangement what arrangement are you talking about, and describe it—don't just point it out.

A. The arrangement in the rear of the Dairy on the west side, Pitt Street. That whole area, the way it sits, with turning around, with trucks and tractor-trailers. Until we have a receiving room for tanks—and some of those tanks are 45 or 50 feet long.

Q. And your location is Lot #3?

A. That is our main building.

Q. Where else in this block are there any other buildings of yours?

A. There are no other buildings except adjacent to this building we are talking about.

Q. Point out the location of that on the map.

M. H. Burchell.

A. I don't know if I can. There is a garage there which is all connected to the same building.

Q. What lot is that on?

page 24 } A. I couldn't tell you.

Q. About what lot is that on?

A. I wouldn't be able to tell you because I don't understand this thing.

Mr. Giammittorio: Do you know, Albert, what lot it is on?

Mr. Bryan: No, I am trying to find out.

Q. If I told you 10A was the lot you proposed to build the building here in question, that is this lot here?

A. Yes, sir.

Q. Lot #15 belongs to the Neals and #10 and #16 to Mrs. Fowler. Where would that building be?

A. Right here.

Q. Where is the brick shack?

A. Right in here.

Q. It was already there?

A. Yes, it was already there, and we never tore it down. We wanted to tear it down.

Q. It doesn't show on these photographs.

A. No, because this is Colonel Neal's wall. This is Mrs. Fowler's property here.

Q. This shack is on this lot here?

A. It isn't a shack. It is a brick building. This is part of it right here.

Q. Part is shown, then, on this photograph which has been introduced which also shows Colonel Neal's wall,

page 25 } which shows in the lefthand corner the brick structure in which you pile milk crates, and that is the building you are talking about?

A. That is right.

Q. So other than that building and your main building on Lot #3, are there any other buildings, of your ownership, in this block?

A. No, sir.

Q. And the turn around area we talked about here, encompasses what area shown on this map?

A. It encompasses the area to the south of the main building.

Q. It goes to the southern extremity of your ownership?

A. Yes, sir.

M. H. Burchell.

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Q. When did you decide you wanted to put up a building on this property you bought in 1947?

A. We have been contemplating putting up a building for quite some time, but we never got around to it until recently.

Q. Who drew the plans for you?

A. Mr. Bill Saunders.

Q. This building is 27′ x 50′, isn't it?

A. 27′ x 60′, I think it is.

Q. Is that the size you decided you wanted, or did you decide upon that size after you realized it could fit

page 28 } into that little 27′ width?

A. We wanted to use that for some time. In fact, we used to store bottles there, but the bottles now are in paper containers. Now when we store out there anywhere, the paper containers are all over the yard, and it makes quite a problem.

Q. The size of the building, 27′ x 60′, is that the size building you needed, or did the alley dictate the size you needed?

A. I wouldn't say that. When we put up the building, we wanted to use it for dry storage, and that would be far better than bottles and cases lying in the yard.

Q. You decided you needed a building, and you decided you would put it in this location because it utilizes this space?

A. Not exactly. If we put it elsewhere it would interfere with the trucks coming in with the milk.

Q. And you block that alley sometimes coming in with your tanks?

A. We did not have an alley. There was no alley there.

Q. It is more convenient to put the building in that corner?

A. I don't say it is more convenient, but that is where we want to put it.

Q. But you want to put it there?

A. We could put it on King Street, but it wouldn't answer the purpose.

Q. On your property.

A. We couldn't put it anywhere else. It would interfere with traffic.

M. H. Burchell.

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Q. How was this land zoned when you bought it?

A. When I bought it fifteen or twenty years ago, if I remember correctly, it was residence, and it has been zoned commercial since that time.

Q. It wasn't all zoned commercial, was it?

A. One particular piece wasn't zoned commercial until recently.

Q. But you knew it wasn't zoned, didn't you?

A. No, I did not.

Q. Have you ever had to request the City or any board of the City, either personally or otherwise, on any property have you requested variances for any building before?

A. No, sir.

Q. That was never done of any building?

A. Yes, we did it on some building, but on our own property.

Q. You got a building permit?

A. Yes, of course, I had to do that.

Q. Have you ever been interested in any zoning?

page 33 } A. Yes.

Q. This also was zoned residential when you first bought it?

A. Yes, twenty years ago.

Q. How about what you say now is not an alley, south of that area?

A. That piece of ground we bought from Mr. Wright in 1947.

Q. That was zoned residential?

A. That was zoned residential.

Q. And then the City came along and zoned part of it commercial?

A. Yes, that one particular piece.

Q. That little strip of 20 feet, or about 20 feet?

A. That is right.

Q. When you applied for this permit and it was mistakenly issued to you, when was the permit issued?

A. I have the permit here. I don't remember the exact date, but I have it here.

M. H. Burchell.

(The permit was handed to the witness.)

A. December 11th.
Q. That was a Friday, wasn't it?
A. I wouldn't know. I think so.
Q. It was a Friday, though?
A. I don't know. December 11th is all I know. I will look it up for you.
Q. And your workman started work the following Sunday?
A. On Sunday, he started digging the foundation.

Mr. Hayes: I object to the phrasing of that
page 34 } question. Were these your workmen, Mr. Burchell?

A. The contractor.
Q. You got the permit?
A. No, he got the permit.
Q. Were you with him?
A. No, sir.
Q. Had you known at the time you got the permit, or had you known prior to the time you applied for the permit, or your contractor, that there was a requirement of the City that your setback from the Fowler land was five feet and the setback from the Neal land was 7½ feet, would you have been willing to set them back that way?
A. I don't think so.
Q. Would you have put the building elsewhere?
A. No, sir.
Q. What would you have done?
A. I wouldn't have put it up. I don't have any place else to put it.
Q. You don't contend this lot is exceptionally narrow or exceptionally shallow?
A. I don't contend anything. I don't know if you call 27 feet narrow or not.
Q. Do you think this is exceptionally narrow lot?
A. This is thirty feet wide, all told. I don't think thirty feet is narrow. The land itself is about thirty feet.
Q. So it is not an exceptionally narrow lot?
page 35 } A. I don't think so.
Q. Now is it exceptionally shallow? The ground is flat?
A. Yes, sir.
Q. So there are no exceptional topographical conditions.

M. H. Burchell.

What do you contend is your exceptional circumstances? You are supposed to abide by the law.

Mr. Hayes: I object. Abiding by the law is what he is trying to do.

Q. Well, abiding by normal law, without seeking variance from the law.

A. When we bought it in 1947, we didn't know what we would do about it. We used it for storage up to now. We didn't give no mind to it. Five feet wouldn't do Mrs. Fowler or anybody else any good.

Q. You couldn't use that land?

A. Nobody could use it.

Q. Nobody can use any setback land?

A. I don't think so.

Q. Not being able to use any land in front of a setback, you don't consider that confiscation?

Mr. Hayes: I object. That has not been established. You can use it for storage. That is exactly what the applicant wants—to cover it over.

Q. Could you use it for a building.

A. I could use five feet or 7½ feet very well. It would be very small, though.

page 36 } Q. Do you feel, then, not being able to use that five feet and the other 7½ feet would be confiscation, not being able to use it for building?

A. I think it would be a detriment to the company to have to throw away that much ground. I am not throwing it away, but I can't use it. It is the same thing.

Q. But had you known you were required to set back from the Fowler property five feet and the Neal property 7½ feet, what would you have done?

A. I would have applied for the permit and would also have gone to the Zoning Board and had it rezoned for the variance, just like we did when we found out we were wrong.

Q. Let me ask this again. What extraordinary or exceptional situation do you contend entitles you not to have to abide by the necessary setback?

A. I don't contend we want to break any laws of any kind at any time. I have been here twenty-nine years. I have not had a fight with anybody about laws at any time. We are

asking for these variances here so we can utilize the property we bought there, and we will not hurt anybody.

Q. You won't hurt Mrs. Fowler or Colonel Neal? Is that what you mean?

A. Yes. I don't think it will hurt Colonel Neal. We are going back 7½ feet and not going higher than this wall. And I had in mind I will work out something suitable with Colonel Neal that will not hurt him at all.

page 37 } Q. But the basis for your application, under exceptional circumstances, is that it really isn't going to bother Mrs. Fowler or Colonel Neal if you build up to the lot?

A. I don't think it would hurt them, at all. In Mrs. Fowler's case, I think this good brick wall would be a benefit to her property. Maybe she doesn't think so, but I do.

Q. But I ask you again. What extraordinary or exceptional situation do you feel confronts you and warrants a variance from the normal application of the zoning ordinance?

A. I make the same answer as a while ago. We would like to utilize the property, put in the building and use it to advantage. It is no advantage to anybody if we have to give up 7½ feet on one side and 5 feet on the other side.

Q. It is more economical to put it there than anywhere else?

A. I wouldn't say that. I said that is where we want it. I don't think we could put it elsewhere.

Q. You could put it there if you comply with the zoning setback. You wouldn't have any trouble then.

A. There are lots of things you have to do.

Q. But you feel if complying with the zoning ordinance, you would get a bigger building, then normally you would be able to get a variance?

A. I don't know.

Q. But is there anything about that setback that makes it any more of a hardship to you than any other commercial property would be to anyone else?

A. I didn't say that.

page 38 } Mr. Hayes: I object to that question. I don't think he is qualified to answer that question.

Judge: As I understand it, one of the reasons Mr. Burchell requested the Board of Zoning Appeals to grant a variance was because of the exceptional circumstances here.

Mr. Hayes: That is correct, the exceptional circumstances in this area, and cases point out the position of the applicant

should be unique, but what he is asking is, in light of the zoning laws of the City of Alexandria, how he differs from anyone else, and I don't think he is qualified to answer. I think, to answer the question, you would have to set up the circumstances, pointing out how the property is to be put to available of space. Then you would be asking him technical zoning information which he is not familiar with and not able to pass on.

Q. As he says, he doesn't think that is unique.

Judge: I have forgotten what the question is.

(The stenographer read back the question.)

Judge: I overrule the objection.

Q. So, under the circumstances, as an owner of commercial or industrial land abutting a residential zone, and being required to abide by the setback of the residential zone, is that any different from any other commercial or industrial land which abuts residential land, and therefore you must abide by it?

A. Mr. Bryan, I am not asking for any more than anybody else would have asked for. These cases have come
page 39 } up before, and have been granted, many cases. Maybe many have been turned down.

Q. I am asking, isn't it true every commercial or industrial land owner who abuts residential land is denied use for building purposes of that land next to the residential area, unless he gets a variance?

A. I can't answer that. This is the first case I have had anything to do with.

Q. Are you saying yours is different from the others?

A. No, I didn't say mine was different from the others.

Q. But you did say every commercial or industrial land owner who abuts residential property ought to be able to build up to the line?

A. I would say circumstances alter all cases.

Q. I have no further questions.

Mr. Giammittorio: No questions, Your Honor.

Mr. Bryan: Mr. Kenny as an adverse witness, please.

FRANK KENNY,

a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Bryan:

Q. State your full name, please.

A. Francis S. Kenny.

Q. Are you employed by the City of Alexandria?

A. Yes, Zoning Administrator of the City of Alexandria.

Q. Do there come to your office applications for
page 40 } building permits?

A. All permits are cleared through our office for compliance with the zoning regulations.

Q. And you examine them to see if the zoning is proper for the building applied for?

A. That is correct.

Q. And you also examine them to see if the setback is correct for the zoning applied for?

A. That would be part of the zoning examination.

Q. This building permit come through your office?

A. It did.

Q. Was it examined for these things?

A. Not completely.

Q. Was it approved by your office?

A. No, it was erroneous.

Q. What was in error?

A. It did not take into consideration the abutting zones and the setbacks for the abutting zones.

Q. What are those setbacks?

A. The setback would be five feet for the side yard and a 1-2 ratio for the rear yard, which in this particular building would be 7½ feet.

Q. But at that time, assume, even that variance or that setback, assumes the land was entirely zoned I-1, wasn't it?

A. Which land?

Q. The lot 10A.

page 41 } A. Yes, they did assume that Lot 10A was light industrial.

Q. And the southern portion of Lot 10A was zoned RM, was it not?

A. That is correct.

Q. From the north line of Lot #10 south?

A. That is correct.

Q. What would the setback be if the zoning had remained the same and hadn't been changed?

A. The setback would be the same, based on the lot line.

Frank Kenny.

However, in this case the setback would have to have been determined from the existence of the zone line. That sounds ambiguous, but the fact that there was an abutting zone and a portion of this property could not then have been used for industrial purposes.

Q. So when the building permit was issued, bearing approval of your office, it was issued erroneously for two reasons. There were two things Mr. Burchell and the dairy didn't comply with?

A. That is correct.

Q. In the first place the zoning was still RM, and he was putting a commercial building in an RM zone?

A. That is correct.

Q. And second, he was building to the lotline without first having obtained a variance or waiver?

A. He wasn't maintaining the required setback.

Q. Does December 11th agree with your office records?

A. The particular approved permit was part of the record that was turned in to the Court.

page 42 } Q. You don't know of your independent recollection?

A. No, I don't, but the building plan itself is part of the record. This approval is dated December 11th.

Q. That is Thursday, is it not, or do you know that? But it was issued December 11th?

A. Yes, sir.

Q. But it doesn't state the time of the day?

A. No, it does not.

Q. Was your office subsequently contacted to indicate there was a violation of the ordinance?

A. I believe we were contacted the following Monday.

Q. What action did your office take?

A. We advised the applicant that the permit had been issued in error. At the same time, we advised the building inspector that the approval was not valid.

Q. What then happened as far as your office was concerned? Was there any application filed with your office?

A. An application was then filed with our office for a variance to permit construction of the building on the lotlines.

Q. And a hearing was held on that in January?

A. That is correct.

Q. And through error or in some way, the fact that an extension of the zone was going to be requested at that hearing was not advertised?

Frank Kenny.

A. It wasn't advertised.

Q. Nor was it discussed at the hearing?

page 43 } A. To my knowledge, it wasn't discussed.

Q. But the Board did extend that lot at the January 13th hearing to the south end of Lot #10A?

A. That is correct.

Q. So the result was that the entire Lot #10A was then zoned I-1?

A. Yes, that is correct.

Q. And that was approved and they had another hearing and that was advertised?

A. That is correct.

Q. Have you examined the transcript of the testimony?

A. I have.

Q. Does it fairly represent what went on at the hearing?

A. It is a stenographic report of the hearing. As I remember, it does represent what went on at the hearing.

Q. Was there any evidence other than what went on at the meeting?

A. During the open session, no. During the executive session, the Board did go into other things.

Q. That is not reported?

A. That is not reported as part of the public hearing.

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Q. And as far as storage is concerned, he could

page 44 } use all the entire lot for that, could he not?

A. The storage for light industrial usage, or any light industrial usage, with the exception of certain specified uses, is required to be in a completely enclosed building.

Q. And if he uses the open part for storage, what conditions would he have to meet?

A. He would have to provide an eight-foot high masonry wall around the property.

Q. Had he done that?

A. To my knowledge, the only walls abutting the property are the two walls, Colonel Neal's and the wall next to Lot #10.

Q. There is no wall on his line and Lot 10C, the Fowler property?

A. No, sir.

Q. Are you generally familiar with that block, or have you become familiar with it?

A. Yes.

Frank Kenny.

Q. Is there an alley through there?

A. There is an opening through to St. Asaph Street, and the open area continues through to Pitt Street.

Q. So nothing blocks free passage from Pitt Street to St. Asaph Street, where there is an alley shown on this plot?

A. There is nothing to block it, no.

Q. And no part of that alley has ever been closed or vacated, to your knowledge?

A. Not to my knowledge, no.

page 45 } Q. Would you have a record in your office?

A. We don't always get all the records on closings.

Q. Do you know what the zoning of Lot #10A, 10B, 6, 7, 8 and 9 was in 1947?

A. By reference to zoning maps, yes.

Q. What was it?

A. Under the zoning maps for that time, it was C-1 residential.

Q. Do you know what that is comparable to now?

A. We don't have anything exactly comparable, but it would be fairly close to an RB apartment type dwelling.

Q. But it was residential in 1947?

A. It was residential in 1947.

Q. Do you know when that zoning became industrial?

A. December 28, 1951.

Q. That was the third revised zoning?

A. The third zoning map.

Q. That is all I have.

By Mr. Hayes:

Q. Mr. Kenny, had the Board, at the time of this hearing for which we have a transcript here, heard evidence relative to the request of the Alexandria Dairy for the variance that was subsequently granted?

A. Yes, they did, at the earlier hearing.

Q. Had they viewed the scene on one or more occasions prior to this hearing?

A. At least twice, probably three times before

page 46 } this particular hearing, and it was viewed again on this date.

Q. That is all I have.

By Mr. Bryan:

Q. The Board changed its membership between hearings? Is that right?

A. On February 1st, Mr. Holland was appointed to replace Mr. Duncan.

Q. So he had not heard the testimony that had taken place in the January hearing?

A. That is correct.

By Mr. Hayes:

Q. How many hearings were there prior to Mr. Holland's appointment, pertaining to this application?

A. I believe there was only one hearing.

Q. Were there any viewings subsequent to his appointment?

A. Yes, the property was viewed on the date of this hearing.

Mr. Bryan: Mr. Kenny may be excused insofar as I am concerned.

Mr. Bryan: Call Mr. Lopatin as an adverse witness.

BURT LOPATIN,

a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Bryan:

Q. State your full name, please, sir.

A. Burt Lopatin.

Q. Are you a member of the Board of Zoning Appeals of the City of Alexandria?

A. I am, sir.

page 47 } Q. In what capacity do you serve?

A. I am the Chairman.

Q. Were you the Chairman at the hearing on February 24, 1959, which is the latest hearing?

A. Yes, sir.

Q. Have you read the transcript?

A. I have, sir.

Q. Of the public part of that hearing?

A. I did, sir.

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page 48 }

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Burt Lopatin.

Q. But when he is correcting a bad situation, and you made reference to the health aspect, what did you have reference to?

A. Property storage of unsightly bottles and other things laying over and exposed.

Q. So unsightly storage of bottles and things on Mr. Burchell's own property was one hardship you took into consideration, is that it?

A. We not only took that into consideration. We took into consideration how it affected the other pieces of property, all the property.

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page 49 }

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A. The problem of safety is the first thing we discuss.

Q. That is of prime importance?

A. That is of prime importance, and we contend, on what might be a hardship variance, we don't take into consideration the application. We take into consideration how the variance would affect the people in the block, not only Mr. Burchell, but also the other people in the block.

Q. So your prime and first consideration is public safety?

A. Yes, sir.

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page 53 }

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Q. Did you have any evidence at all before you or before the Board as to the circumstances under which Mr. Burchell acquired this property?

A. No, sir.

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page 57 }

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Burt Lopatin.

Judge: Are we willing to agree no part of Section 35-68 (b) was considered except the parts of it that were in the transcript?

Mr. Hayes: Are you willing to go along with page 58 } that Mr. Giammittorio?

Mr. Giammittorio: Yes, that was definitely the conclusion of the Board.

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Mr. Bryan: Am I to understand it is considered by the Board and Mr. Burchell that there is no question of narrowness of this piece of property, and no topographical question?

Mr. Hayes: That is correct.

Mr. Bryan: On what portion is the contention based?

Mr. Hayes: Down at the bottom.

Mr. Bryan: I would like this to be part of the record, that the reason for the decision of the Board under Section 35-68 (b) is the same as given on Page 26 of the transcript, which is the existence of an exceptional situation whereby the strict application of the terms of the ordinance creating these requirements would unreasonably restrict the use of the property by the applicant, and that the granting of this variation will alleviate a clearly demonstrable hardship approaching confiscation.

Mr. Hayes: Is it my understanding you want to strike all the testimony of this witness previously as to why they granted the variance?

Mr. Bryan: Yes.

Mr. Hayes: As far as the reasons for granting page 59 } the variance, I don't think there is any question that these are the reasons. I don't think it is fair to have the other members of the Board state all the things they take into consideration. As far as this Board is concerned, those are the reasons.

Judge: This is a new case to me. I think this is the first time they have been up here under this section, but somewhere there has to be guidance to the Board of Zoning Appeals as to when they can and cannot grant variances. Is that the whole law, or this section of the Code? Zoning and Variances, are different propositions?

Mr. Hayes: There are policies of zoning that apply and not all reduced to writing in this particular instance. That is not part of the hardship, part of the exceptional circumstances.

These words can't be put in bottles and made the sole basis of this thing. They have to relate to all the general rules of this law.

Mr. Bryan: I think Mr. Hayes seeks to impart counsel powers to the Board of Zoning Appeals. I don't think Section 35-68 (b) allows him to go over this. It puts quite a hardship on the abutting owner to have to be familiar with all those items. The statute is pretty clear as to when it can be granted and when it can't be.

Mr. Hayes: I have cases, granting of hardship cases, when you can go in and say yes or no. How do you determine hardship?

Judge: Are you arguing the case now?

Mr. Bryan: I would like to question Mr. Lopatin on their decision on the part of the Board as to the reason given under Section 35-68 (b).

Judge: It is 10 after one. Do you want to go on or go to lunch?

page 59a } Mr. Hayes: All I want to point out is, as far as Section 35-68 (b) is concerned, it is things under that section that they base their opinion on. As far as the record is concerned, unless Mr. Lopatin has something else in mind, I think it would be best to restrict the questioning to those specific things.

Judge: What do you base that on?

Mr. Hayes: Page 26.

page 63 }

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Q. Mr. Lopatin, this part of the transcript beginning on page 26 is a summary, is it not, of what has gone on before the Board?

(Off-the-record. The transcript was handed to Mr. Lopatin.)

Q. This page 26 and 27, who prepared those pages and the following ones?

(No answer).

Q. Who prepared the statement contained on pages 26 and 27? Were they dictated to the stenographer?

Burt Lopatin.

A. She took a record of the proceeding, and in some things where we wanted to have some consideration, we talked over certain matters, too.

Q. But this page 26 and 27 was handed to her already written up, wasn't it?

A. I believe it was, although the first I came of it was when it was delivered to me.

Q. Who delivered it to you?

A. The stenographer.

Q. I am talking about who delivered the paper from which the paper was copied for pages 26 and 27?

A. It was never delivered to her.

Q. How did she get it?

page 64 } A. She took down the record.

Q. Do you mean to say you dictated it to her?

A. No, sir. It was a decision.

Q. Who wrote it up?

A. It was written up in conformity with our secretary and the secretary of the Zoning Administrator.

Q. Mr. Fannon prepared it?

A. No, sir.

Q. Mr. Kenney prepared it, then?

A. I can't say how it was finally arrived at, but it was finally arrived at by both our office and Mr. Fannon in Executive Session, and if I am not mistaken, for points of law, Mr. Hayes was present.

Q. Did he prepare this 26 and 27?

A. No. He asked questions of it.

Q. This doesn't purport to be any general question.

A. It is a statement of the Board.

Q. How did the stenographer get to take it down?

A. No. She took it down, and read to us what she had taken down, and we omitted certain phrases. The legality of it was then sent to Mr. Hayes.

Q. This doesn't seem to be quoted. This is her decision which she included in the stenographer's report? How did she get your decision?

A. She got our decision by listening and de-

page 65 } ciphering and reading it.

Q. How did she get your decision? Who wrote it down?

A. The stenographer came up with a rough draft of it, and then we—

Q. (Interrupting) A rough draft of what?

A. Of our deliberations.

Burt Lopatin.

Q. Did the stenographer compose what is on pages 26 and 27?

A. No, sir.

Q. Then who composed it? It purports to be your decision.

A. Yes, sir.

Q. It reports your views?

A. Yes, sir.

Q. And all the views of the Board, except Mr. Fannon?

A. That is correct.

Q. Then, who prepared it? Somebody must have written it down to give to the stenographer.

A. I think Mr. Fannon read the decision after we had decided on it.

Q. He read the decision?

A. Yes, sir.

Q. And what was it read from?

A. From the results of the deliberations of the Board.

Q. Who reduced it to writing and gave it to the stenographer?

Mr. Giammittorio: If you know. We will be here all day, Your Honor. I think this is ridiculous.

page 66 } Judge: I don't think it is ridiculous. He is asking who gave it to the stenographer. He may know, or he may not know. It seems to be a simple question. Who reduced this to writing and gave it to the stenographer?

Mr. Bryan: I am going to object to Mr. Giammittorio giving him the answer. The Court has already ruled on objections.

Judge: I overrule the objection.

Q. Who handed this to the stenographer, or who reduced the decision to writing?

A. Mr. Kenney, and there were three people who reduced it to writing. There were two people concerned in it. Mr. Kenney, plus our own secretary, Mr. Fannon, and then it was given to us for proofreading.

Q. Who was the third person?

A. The third person?

Q. You said there were three people who reduced it. Was it Mr. Hayes?

A. No, sir.

Q. Was it the stenographer?

A. Yes, sir.

Burt Lopatin.

Mr. Giammittorio: I object again on this basis. It is immaterial who took this down on paper. That is like asking the Judge whether the Clerk wrote a decision or whether he wrote a decision. It is their decision, and I think to waste fifteen minutes to half an hour is an imposition

page 67 } on anybody's time.

Mr. Bryan: I don't want to waste time.

Mr. Giammittorio: What difference would it make if it were John Doe's decision?

Mr. Bryan: I would like to know who prepared it.

Mr. Giammittorio: He has been trying to tell you it is a combination of the Zoning Administrator, the Board, and the secretary. In fact, it is their decision.

Q. Was this handed to you as representing that this was what the stenographer, Mr. Fannon and Mr. Kenney came up with?

A. No, sir.

Q. How did you vote on it?

A. I called an Executive Session. There were present members of the Board of Directors. As Chairman, I asked for a decision on the question. When it came to the decision, we adopted it. It was so given to the secretary to be put in our minutes.

Q. The voting seems to have taken place prior to the copy of the decision being put into the record, and I wonder if it is out of place, or by whose authority it was added, or by whose authority it was adopted. There is nothing in the record that indicates that this was adopted as the decision. According to this, it was never voted on.

A. If you will detect Mr. Fannon's records, you will find it was adopted by the Board of Zoning Appeals, and

page 68 } Mr. Kenney will know because we tell every applicant, "If you want to know the decision, call Mr. Kenney."

Q. Was Mr. Kenney in the meeting?

A. Yes, sir.

Q. Was anyone else present except Mr. Kenney, Mr. Fannon and Mrs. Thompson?

A. Yes, Mr. Hayes.

Q. Who said that this was to be voted on?

A. If I am not mistaken, Mr. Jim Douglas proposed the motion.

Q. This is on page 22 and 23. You might check with that.

A. It was seconded by one of the other members of the

Board and then voted on. That is our usual procedure. All of them have a right to vote for or against.

Q. Isn't it true on page 23 and 24 there is read to the Board what the action was that was taken on January 13th, and on page 25 Mr. Douglas again moved that the I-1 light industrial zone be extended to the south line of lot 10A. You called for a vote. It was seconded. Mr. Douglas said, "With regard to the request for a variance, I submit the motion made at the previous meeting again for this particular meeting with identical phraseology." Mr. Holland seconded that. You called for the question. Everyone voted "aye," but Mr. Fannon, he voted "Nay." On the next page is this statement.

page 69 } Then, on the last page Mr. Holland moved, and Mr. Douglas seconded, that the resume of reasons stated by the Board be incorporated in the minutes, in that it represents a portion of the discussions contained in the Executive Session.

A. Mr. Bryan, having a new member on the Board, having a new member of the Board, we certainly had to acquaint him with what had been done. We did not tell Mr. Holland how to vote, but we did acquaint him with what went on at the previous meeting.

Q. Do you mean your recollection of what went on at previous meetings?

A. Yes, because as a matter of fact, those were taken down and the voting at that time was also taken by Mr. Fannon, and at that time, on the 13th of January, it was a unanimous decision, including the previous Chairman, who is not here now.

Q. And this resume was prepared by Mr. Kenney, Mr. Fannon and Mrs. Thompson?

A. No. It was prepared by all of us. We got together, all of us, and gave our opinions, and it was co-related into one statement.

Q. And in that resume you say the Board based its opinion on the existence of an exceptional situation. What exceptional situation?

page 70 } A. The exceptional situation was that, after viewing the property and citing of the deliberations of the Board, and what had been presented to base our decisions on, primarily we used the case similar in a block, in one block, before. At that time, there was a case of Dwyer Plumbing Company. We had an identical situation, an abutting zone. Finally, it was agreed we would make it

three feet instead of seven and a half feet. The argument was identical.

Q. Let me interrupt.

Mr. Giammittorio: No. Let him finish.

A. After we finished, we found out there was a horrible mess behind that wall, that everybody was using it, that people were throwing away bottles, papers and everything, and we found out the people would have been better off because there there was no way of getting the smell and odor out when *when* you leave a little small area in. We are conscious of that. When asked to make a decision, we asked who would be better off, the public, the applicant, or who?

Q. Was that worked out by agreement with the property owner?

A. No. We made that decision.

Q. But the abutting property owners went along with you?

A. They didn't take it to Court. Let's put it that way. Since then, they have had to wire that area up, and the trash still accumulates in that little vacant space. When we go to look at the property we try to say the public interest has to be served, and we feel the public interest was

page 71 } served.

Q. And serving of the public interest was one of your reasons?

A. Yes, sir, that is one.

Q. And is there evidence of confiscation? You say "approaching confiscation."

Mr. Hayes: "Approaching confiscation" is not confiscation.

Q. "Approaching confiscation" is unusual for a piece of land which, like the other case, may become acceptable for trash and an uncared for piece of land.

A. Might I say, sir, that is the consideration that this Board deliberated on, and one of the things which had a bearing on the answer to your questions. That might have been one. In checking Col. Neal's place, we spent three separate trips in talking to Col. Neal, Mrs. Fowler and Mr. Burchell. We thought we wanted to be fair to everybody. When we suggested to Col. Neal would he be satisfied after looking at it, depriving some people of light, we felt rather than leave an unusual place where trash would accumulate, he should have

no objection to anybody using that. If we went back seven and a half feet, he would have objections to anybody using that. We felt in that case, when Mr. Kenney told us he could build seven and a half feet anyway, it was merely a concession of not leaving litter underneath there. Then, we thought we were right as far as Col. Neal was concerned, and as far as Mrs. Fowler was concerned. We looked page 72 } at it on the basis that here is a long strip of land. Certainly we thought we were not depriving anybody of the light. It is only about three feet high, but not higher than the building would be.

Q. This wouldn't hurt Col. Neal or Mrs. Fowler?

A. That is correct. That is our basic reason for it.

Q. No further questions.

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FRANCIS FANNON,

a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Bryan:

Q. Mr. Fannon, will you state your full name, please?

A. Francis H. Fannon.

Q. You are secretary of the Board of Zoning Appeals, are you not?

A. Yes, sir.

Q. I would like to establish something at first. Who prepared this resume of the decision of the Board of Zoning Appeals which appears on pages 26 and 27 of the transcript?

A. In just a minute I will compare this with one I actually prepared immediately after the January 15th session. I would say that what appears here represents the page 73 } report which culminated after all five members, in the presence of Mr. Kenney, had discussed it at length. Then Mr. Kenney wrote this as a reflection of what our decision was in this case.

Q. Mr. Kenney prepared this then?

A. Mr. Kenney prepared it at our direction and using my original transcript of January 15th as a basis for it.

Q. I see. And then, when you reconvened after the rest of the testimony was written up, you adopted it formally? Is that right?

A. That is right.

Q. On Mr. Holland's motion?

Francis Fannon.

A. It was adopted as a reflection of the legal opinion of the Board as a Board.

Q. And Mr. Kenney had reduced it to written form and then presented it to you when you reconvened and you all adopted it?

A. That is my understanding.

Q. You voted against the granting of the variance, did you not?

A. Yes, sir.

Q. Why?

A. Your Honor, may I ask this question?

Judge: Yes.

page 74 } A. Do I have to answer that question, sir, because my job as *as* a secretary is to reflect the opinions of the four members of the Board?

Judge: Why do you want Mr. Fannon to say why he voted against it?

Mr. Bryan: I want to show that if he so felt whether or not there was any hardship.

Judge: I would ask that question. I wouldn't ask why he voted against it. Somebody on a Board like this goes into all the facts, and if the vote is yes or no, why they voted that way is not necessary to go into.

Q. Did you feel it was a hardship case within the meaning of that ordinance? When I say ordinance I have reference to 68-b of Title 4.

A. I didn't vote for it because I didn't think it was a demonstrable hardship approaching confiscation.

Q. Did you feel that this was a situation common to all commercial land owners or industrial land owners who abut residential properties? I mean Mr. Burchell's situation?

Q. Would you ask that question in a little different form, Mr. Bryan, please?

Q. Did you feel that the situation regarding setback which confronted Mr. Burchell and the Dairy was a situation which also confronts nearly every commercial landowner

page 75 } who abuts residential area, as far as setback is concerned?

A. The answer is yes, with this "but." In most cases the needs of an applicant are resolved at least 50

per cent of the way so that they are in full compliance with the Code or the zoning ordinance.

Q. And what do you mean by that, sir?

A. I mean that for many, many years people come—for example, George's Radio Station up on the fifteen hundred block of King Street—they have to have 30 places for automobiles. They could possibly only have 19 places, and we granted them and have done it for years, and years, and years on the basis that we thought that was the best solution to a problem in which an applicant was concerned, and the best interest of the City was concerned.

Q. You did not feel such a hardship was in existence here?

A. My own individual thought, which was not shared by the other four members, was that Mr. Burchell could use 85 per cent of his land.

Q. And still comply with the law?

A. That was my feeling.

Q. I have no further questions of Mr. Fannon.

By Mr. Hayes:

Q. Mr. Fannon, was it your opinion that the application of the Alexandria Dairy was made in good faith?

Mr. Bryan: In his opinion? I object to that unless that opinion is supported by evidence. We have been page 76 } asking for opinions all along.

Judge: What do you mean by application for the ownership?

Q. Application, whether it was a sincere one based on good faith.

Judge: I know Mr. Fannon's answer will be yes.

Q. I will withdraw that question then.

Judge: I think the Code says ownership must be in good faith, doesn't it?

Mr. Hayes: Yes, Your Honor.

Mr. Giammittorio: That the property was acquired in good faith?

Q. Was it your opinion that the property was acquired in good faith?

Francis Fannon.

Mr. Bryan: I object to that on the grounds that it is not relevant.

Mr. Giammittorio: You contended about an hour or so ago that it was material.

Judge: The objection is overruled.

A. I have no doubt, not the remotest doubt, that it was acquired in good faith.

Q. Would you consider in your decision, and reject the premise that the terms of the ordinance would actually prohibit or unreasonably restrict use of the property, in making your decision?

A. I want to be sure I know what you are asking.

page 77 } Q. In making your decision, did you consider this condition in here? Have you got 35-68(b) there?

A. I am looking right at it.

Q. "* * * or other extraordinary or exceptional situations, the strict application of the terms of the ordinance actually prohibits or unreasonably restricts the use of the property." Would you consider that and reject that as the basis for granting of this variance?

A. I gave consideration to that, but when people are on the Board, they take the composite thing which induces one man to change one way and the other man to change the other way. I just said nay because of the way the thing impressed me.

Q. All right.

By Mr. Bryan:

Q. In answer to Mr. Hayes' question as to whether, I think he said, you considered that the property was acquired in good faith, you said you assumed that it was, did you not?

A. The lady will tell you.

(The stenographer read that part back.)

Q. There was no evidence concerning that particular point, though, offered at the hearing, was there?

A. I would like to say this. In all the years all of us have been on the Board that has never come to the mind

page 78 } of a single human being on the Board to ask such a question. We would assume a man acquired it in good faith, just like attorneys practice before this Court: we would assume a lawyer was acting in good faith.

Q. In view of the presumption and assumption with which

you treated all these hearings, that question of whether he acquired it in good faith never came up as an express matter to be considered by you?

A. Mr. Bryan, you very ably presented Mrs. Fowler's case, and you, as her attorney, you never thought what you in good faith?'', so you who are so vitally interested, and we never thought, with all our years on the Board, quite naturally didn't give consideration to it.

Q. Then neither I nor any Board member have inquired into that situation?

A. There was no need to inquire. It was just like inquiring whether you as a lawyer are acting in good faith.

Q. You didn't inquire?

A. I know you are a lawyer in good faith.

Q. No further questions.

Judge: Any further questions?

(No reply).

TRUDYE FOWLER,

a witness of lawful age, being first duly sworn, page 79 } testified as follows:

By Mr. Bryan:

Q. Will you state your name, please?

A. Mrs. Trudye H. Fowler.

Q. And you are the owner, are you not, of the property at 511 Queen Street?

A. That is right.

Q. Which consists, does it not, of lot 16 and 10C shown on this plat which has been introduced?

A. That is correct.

Q. And part of your property abuts lot 10A?

A. Yes, sir.

Q. And that is the lot, is it not, on which Mr. Burchell and the Dairy seek to erect their building?

A. That is correct.

Q. And you object?

A. I object.

Q. When did you acquire your property?

A. In 1940.

Q. At that time, did Mr. Burchell or the Dairy own any part south of what is shown on this plat as an alley?

A. They did not.

Trudye Fowler.

Q. Insofar as what is shown on the plat as an alley is concerned, will you describe to the Court what use, if any, you made of that alley or that area called an alley?

page 80 } A. To my knowledge there has never been any question, even in my talks with Mr. Burchell, that this alley existed. When I bought this property, and lived in the property myself from 1940 to 1947, for five or six years the trash was picked up on the back of the alley and they went all the way through.

Q. They went all the way through from where?

A. From St. Asaph to Pitt Street. The lot in question was owned by Mrs. Wright. She had a garage on that lot on a small piece of ground adjacent thereto.

Q. When you say lot, do you mean lot 10A?

A. That is right. She had a lot that still exists in this right-hand corner as I am facing it.

Q. The right-hand corner would be the northeast corner of lot 10A?

A. That is right. And, Mrs. Wright always used the alley coming from Pitt Street until the property was sold to Mr. Burchell, to park her car.

Q. So that area shown on this plat as an alley has been used as an alley?

A. That is true. I continued to use it as an alley while I lived on Queen Street, but Mr. Burchell would have to move all his trucks. He said one day, "Since we are always moving this equipment to let you in, won't you please park across the street in our lot?" As long as I lived there, I

page 81 } continued to have parking space in Mr. Burchell's lot.

Q. When did you live there?

A. I lived at 509—511 from 1940 until the present time.

Q. And during that time, you used that alley?

A. Yes, indeed. When I could get Mr. Burchell to move his equipment it was used as an alley, yes.

Q. Did you want Mr. Burchell and the Dairy to build their building five feet from this line?

A. That is true.

Q. What useful purpose would be served insofar as your property is concerned by keeping this wall five feet from your line?

A. I think anybody who understands the site in the old section of Alexandria understands how important garden area is to us, and almost all garden area is used seven months of the year as additional room in the house. Anybody

knows to construct a twelve to fifteen foot wall next to the line which will house bottles constantly being used and thrown around, and trucks backing up, and so forth, for me to be able to put a masonry wall up, and he built his building five feet away, there is no comparison as far as light, heat, and so forth are concerned. As a matter of fact, there is a City Ordinance that completely supports this argument. Just imagine a 50-foot wall overlooking a garden 12 to
page 82 } 15-feet high. I don't know how anybody who could visualize that and who understands this old section, it would be very clear to me. I think to have my wall plus his wall to cut light from the garden and air from the house, to say nothing of the wall and any sort of bumping, knocking noise, is not pleasant.

Q. In addition to the unpleasantness which might be occasioned by blocking that five feet, can you think of any other need, for one reason or another?

A. I certainly can. I own the property, and expect to go back there when my children are married, and perhaps put an addition on. There is plenty of ground to do it which would mean I would be coming further into the garden, and certainly when I get my permit for addition I will not be able to build to the property line. I will have to setback not only in a commercial area, but also in a residential area.

Q. Is that necessary for a fire lane?

A. I think so, I certainly do.

Mr. Hayes: I think the witness is being led by the attorney for the plaintiff.

Judge: All right.

Q. When you first bought the property in 1940, the land south of the alley presently owned by the Dairy was zoned residential, was it not?

A. Residential.

page 83 } Q. And it was not zoned industrial until 1951?

A. That is right.

Q. In 1940 up to now, for instance, have there been buildings on part of this block south of the alley, and if so, where?

A. There were actually houses all the way to the alley.

Q. On what lots?

A. On all of these lots.

Q. Will you enumerate them?

A. There were four. I am sure there was also one on number 4.

Trudye Fowler.

Q. Are the lots you are pointing to 6, 7, 8 and 9?
A. Yes, sir.
Q. They were torn down by the Dairy?
A. That is true.
Q. And there is a building on lot 10?
A. That is correct.
Q. And it is still there?
A. Yes, sir.
Q. And there are buildings on 10, 11, 16 and 17?
A. That is correct.
Q. You testified, I believe, Mrs. Fowler, you considered the garden almost another room in the house seven months out of the year?
A. I think everybody in the Old Town Section does.
Q. Could it in any way, and how do you think it would affect the sale or rental value of this property?
page 84 } A. I think it would affect it appreciably, very appreciably.
Q. In what way?
A. On the downgrade. I don't think there is any question of that.
Q. I have no further questions, Your Honor.

By Mr. Giammittoria:
Q. Mrs. Fowler, the property you own and that you rent on Queen Street, is that row or is it detached property?
A. It is free standing.
Q. The other houses along there, are they row houses or free standing, for the most part?
A. All except two, and the house on the corner of Pitt Street are free standing.
Q. You testified you bought the property in 1940, is that right?
A. That is right.
Q. And the Dairy operation was in there when you bought your property?
A. That is true, and very small on the corner of Pitt was one building.
Q. Is it still one building?
A. Yes, sir.
Q. How many buildings are there now?
A. It is hard to tell how many buildings because there has been an addition year after year up to the alley—
page 85 } the alley that isn't there.
Q. Do I understand then that there has been a

continuous growth of the Dairy and rezoning of space available to the Dairy?

A. I am sure that is true.

Q. Would you say then all the property the Dairy has is very essential to the minimum operation?

A. As it is to every property owner.

Q. With respect to the garden area, which you say is important to you and to the Old Towners, I want to show you this photograph which I would like to have identified. Your Honor, could we mark it so it would be clear in the records?

Judge: Whose exhibits are these?

Q. By stipulation, both sides, Your Honor.

(The exhibits were marked.)

Q. Mrs. Fowler, I show you Exhibit A, and ask you if this ramshackled half of the shed here belongs to you, and if that is what you consider as an advantageous part of your property?

A. This is the end of the wall which has an old garage. It was not in such a ramshackled stage until the Dairy started using it as an opened mechanics' shop, and with all those trucks and going back and forth in there it has become ramshackled, and the Dairy has been using it up to this property.

page 86 } Q. Have they used it with your permission?

A. They never had my permission.

Q. Have you taken any police action to prevent it?

A. No. I never did that. As Mr. Burchell said, we wanted to get along, and I have done everything I could do to get along together.

Q. And was it true you did get along together until Mr. Burchell wanted to buy this lot designated on the plat here as 10C, and when he refused to buy that lot that is when the hostility broke out?

A. Buy my lot?

Q. Yes.

A. My lot could not possibly have been for sale.

Q. I am asking, isn't it true you offered it for sale and insisted the Dairy buy this lot?

A. That is very untrue.

Trudye Fowler.

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page 91 } Judge: What was this other section?
Mr. Bryan: 35-41. Here it is.

* * * * *

page 92 } Mr. Bryan: Wording of the ordinance, 35-41, is that the setback ratio and yard provision of the more restrictive zones applies to the less restrictive zone.

Judge: So there is a side yard of five feet on the industrial lot. On which side of the industrial lot?

A. Isn't the other side zoned industrial property, and not this side? And, doesn't it say whereever residential abuts industrial you must make a setback? It is my understanding he would also have to set back five feet on the other side, but he couldn't have because it is already industrial property.

Judge: I think that is what they meant, Mrs. Fowler, but it would have been simpler to say so.

A. That is how it was explained at all the hearings when we were adopting this residential zone.

Judge: Looking at 35:41 it would have to be as Mrs. Fowler thinks that the setback would be along the zone line.

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Mr. Giammittorio: I am willing to pass that point for the time being, but I will not concede it. I show you Exhibit A, and point to this brick wall which I believe is at the north end of the Neal property, which is your former property. Are you familiar with that?

A. Yes, I am.

page 95 } Q. It appears to be a rather impressive wall to me. I ask you, did you build this?

A. Yes, I did.

Q. Will you tell me what the height of it is?

A. It was six feet, but when Mr. Burchell bought or made use of the property, he excavated considerably. That foundation was in the wall.

Trudye Fowler.

Q. I am talking about above the foundation. How high is that wall?

A. I don't know how high it is. As you can see, Mr. Burchell excavated a great deal. Somebody said today it is three feet lower than this ground here, but this ground is higher.

Q. You have heard the testimony here today in this Courtroom haven't you?

A. Yes, sir.

Q. You have heard the Board found it was twelve feet from the industrial side?

A. Yes, I did.

Q. You have heard that the Board, taking that into consideration, permitted the applicant to proceed to a height of twelve feet, and then set back seven feet?

A. Yes, sir.

Q. You built this wall and it conformed with your idea of privacy, the sun, and the light, and the health
page 96 } standpoint and the viewpoint of the Old Town?

A. Yes. That was built before Mr. Burchell came by my property.

Q. So what you are saying, and what you said to the Board, is that the walls will go up and, "I will no longer be able *us* use my beautiful garden because the wall is up three more feet". Is that right?

A. I don't think I have to let you put words in my mouth.

Q. You lend a lot of stress on the outdoor value and it was used seven months of the year?

A. That is true.

Q. And what you are asking the Board to do is prohibit them from going up three more feet than what you did ten years ago?

Mr. Bryan: I object to that. She is objecting on her own property.

Judge: As I understood Mrs. Fowler's testimony, one of the reasons she objected was because of the reason she wanted light, air and ventilation.

A. That is true.

Judge: Mr. Giammittorio has just examined Mrs. Fowler that if the twelve-foot wall gives adequate light and ventilation, why doesn't a fifteen-foot wall?

A. I will answer that. When I built the wall, the wall

Trudye Fowler.

wasn't twelve feet high. The only reason it is
page 97 } twelve feet high now is because Mr. Burchell
excavated below, and the wall is now cracking and falling down.

Q. I am using the same twelve feet that is on the industrial side. I am not jumping back and forth as you are doing, from this side to the other side. I am asking do you object if they go up an additional three feet from what you put there?

A. I am going to object to anything. There is a difference in a twelve-foot wall and a fifteen-foot wall, and I must point out I did not have a twelve-foot wall overlooking my garden.

Q. I understand, but neither will you have a fifteen-foot wall.

A. I will have a twelve.

Q. We will use your designation. Do you say to the Court that the difference between what you have now will, subtracting your elevation three feet, will leave you nine?

A. I will subtract again.

Q. On the other side the fifteen feet will leave twelve feet, so this now is nine feet and twelve feet?

A. I don't think you can state this as a fact until you have measured the wall on the other side of the garden. *You* You are trying to prove I had a twelve-foot wall instead of a nine-foot wall.

Q. Can we agree on that premise that the wall
page 98 } is twelve-feet high?

A. I will not agree because I have not measured it. I am sorry.

Q. But in any event you built that wall, and it did comply with the historical effect and plan of the Old Town's historical effect?

A. I don't know if it applied to the historical effect and plan of the Old Town. I didn't even bring up the historical views. I am not concerned with it at all. I think a fifteen-foot wall is a terrible thing.

Q. I will pace off five feet from this jury box. 1-2-3-4-5. Now, what you are saying to the Court is that you want to move that wall five feet, and you won't interfere if it is fifteen feet, or it can go to twenty feet as long as you have this five feet in here?

Mr. Bryan: I want to object to this for the reason that Mr. Giammittorio shifts the burden. It wouldn't make any

difference if Mrs. Fowler wanted to build on her line. She couldn't do it until the Board granted a variance.

Q. Would you say whether it is fair or unfair makes no difference?

Mr. Bryan: That is right. It is whether or not granting of the variance results in a hardship to Mr. Burchell; not how it happens to affect Mrs. Fowler or Col. Neal

page 99 } Q. Let me answer, may I? One, this is cross-examination. Mr. Burchell and Mrs. Fowler introduced the Old Town and the very valuable use of the rear yard.

A. Seven months out of the year.

Q. She herself built this wall. She has objected to this use here.

Judge: Let me ask a question. Are we interested in this case purely from a technical standpoint, whether it is fair to Mr. Burchell or fair to Mrs. Fowler?

Mr. Giammittorio: I am willing, Your Honor, and I would have stipulated the entire case this morning, but Mr. Bryan has covered the complete football field, and we have no choice but to continue with this case.

Judge: I am going to overrule the objection on the ground that we got into this thing on the wall and garden cross examination. Anything she testifies to, she testifies to direct.

Mr. Bryan: I object on the ground that the issue is not whether Mrs. Fowler objects, or whether it is fair to her or Mr. Burchell, but whether it is a hardship.

Mr. Giammittorio: And the issue is not a hardship.

Judge: Wait until we get through the testimony. Mr. Giammittorio has used the word "hardship", Mrs. Fowler.

Q. Will you answer my question? I have marked off five feet away from the jury wall. I am asking the question if what you want and what you are asking the Court to do is move the wall five feet?

page 100 } A. I am asking the Court to reduce the wall and have a space of five feet as described to me when this was put into effect.

Q. And you contend this would be detrimental to your property?

A. Yes, sir.

Q. In what respect?

A. That a fifteen-foot length and a twelve to fifteen feet

Trudye Fowler.

on my side is a very-very bad thing to have to put up with.

Q. That is all we want to know. In what respect? Why is it bad?

A. In the first place, they are handling bottles on the other side of that wall. As I understand it, he is going to build it for bottle storage.

Q. They are handling bottles now and in just a wooden structure before. Do you contend the noise would be more or less in the building?

A. No.

Q. That is what you wanted

A. No. If I honestly felt that, I certainly wouldn't be going through all of this if I didn't feel it would injure my property.

Q. How would it injure your property?

A. In the first place, it is a very small building hanging over a narrow lot for a distance of fifty feet. You can't imagine what a fifteen-foot wall would do hang-
page 101 } ing over fifty feet—

Q. It is a long wall?

A. Yes, sir.

Q. And a long yard?

A. Yes, sir.

Q. If your yard had been short would you have to put that up?

A. Of course. But having an empty lot and having industrial buildings up against you, I don't think that is comforting at all.

Q. You are saying this erection of this building disturbs you very much, and I am sure it does, but assuming it is going and the man will use it for storage, why is it so bad to put a roof over storage space?

A. Because the wall is three-feet higher. In all the years he has been using it for storage. He is supposed to construct an eight-or-nine foot masonry wall.

Q. Would you prefer an eight or nine foot wall along that line in a five-foot space, and his space used for storage?

A. Without a doubt.

Q. There would be less dirt?

A. I am not concerned with his dirt. That is not my problem.

Q. But you say that would be preferential to you to have two walls side by side, five feet apart?

A. Absolutely.

Trudye Fowler.

Q. And you think that would not be detrimental to your building?

page 102 } A. Of course, he has the right to bring the issue up. He is there and he has the right.

Q. Exactly so.

A. And that is the whole issue. The whole issue is that there is a city ordinance upholding the arrangement.

Q. And you know Mr. Burchell has not applied this building for acceptance to this zoning. He has accepted the city's zoning changes as they came, and you have been there about one-third of the time, have you not?

A. In this property? He bought in 1947. I bought in 1940.

Q. The Alexandria Dairy had nothing to do with changing of this zoning?

A. I don't know. Ask Mr. Burchell.

Q. If I told you they had nothing to do with it, and that the city did this in changing the neighborhood, would you deny it?

A. I would not deny it. I would say that.

Q. You are quite familiar with the operation of the variance procedure of this City. You have availed your own self of the Board of Zoning Appeals, have you not?

A. That is true.

(Mr. Bryan stood up.)

Q. Sit down, Mr. Bryan. I am not making a comparison. I am asking Mrs. Fowler isn't it true the very purpose of the Board of Zoning Appeals is to grant exceptions

page 103 } in just cases under the law and setting it up?

A. I am sure that is true.

By Mr. Bryan:

Q. Mrs. Fowler, when you bought the property in 1940, the description of your property described the property in one lot, is that right?

A. Yes, sir.

Q. And your deed does not divide it into two lots as set forth in the assessment?

A. I think so.

Mr. Giammittorio:- Just a minute. She doesn't know that.

Judge: I believe you are correct.

Mr. Giammittorio: I defer your knowledge of the title law. Certainly I think that is a correct authority on it.

Edward S. Holland.

Q. The wall is a wall, not the side of a building, is that right?
A. Yes, sir.
Q. And it is six feet high from the side of the garden?
A. That is true.

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EDWARD S. HOLLAND,
a witness of lawful age, being first duly sworn, testified as follows:

page 106 } By Mr. Hayes:
Q. You are Mr. Holland, are you not, a member of the Zoning Board?
A. Yes, sir.
Q. And you are one of the members who casted the vote that resulted in the ruling that this appeal has been taken from? Is that correct?
A. That is correct.
Q. I want you to tell the Court on what basis you consider these requests for variance, how or why you feel qualified to consider them, and what you considered in this particular instance?

Mr. Bryan: I don't have any personal objection to Mr. Holland's testifying along that line, but I don't think it is proper to here go into his qualifications as a member of the Board. We all assume that he is qualified, although we may not agree with their decision.
Judge: I think you can qualify them if you want to. What you are going to show here is that he is an expert as a member of the Board of Zoning Appeals.
Mr. Hayes: I understand he has worked on these plans. I will rephase the question. What did you consider when you heard the request for variance, and what did you consider in this instance?

Edward S. Holland.

Mr. Bryan: I think the question should be
page 107 } what he considered in this particular instance.
Mr. Hayes: We have gone through this all day long.
Judge: Divide the question into two parts.

Q. What do you consider when you hear requests for variance in a case of this nature, a variance under 35-69(d)?

Mr. Bryan: I think it is not a question of what he wants to consider.
Judge: You and Mr. Hayes differ.
Mr. Hayes: I think I can go into his knowledge about zoning.
Judge: If the statute is clear, I don't know why we have to have this argument all day long about it.
Mr. Bryan: I think it is perfectly clear as to what he can consider.
Mr. Hayes: I would like to direct your attention to the end of that regarding harmony and spirit.
Judge: I will have to read the whole thing. Is that Section 35-68?
Mr. Hayes: Yes, that is right.
Judge: What I mean is this thing here, "or other extraordinary or exceptional situations, the strict application of the terms of the ordinance actually prohibit or unreasonably restrict the use of the property." That can cover almost everything, can't it?
Mr. Bryan: Provided there was evidence of
page 108 } such a situation before the Board.
Judge: If they went out and looked for it—
Mr. Bryan: I have said that they have evidence, but if Mr. Holland considers he has other evidence other than what is in the record—
Mr. Hayes: I again direct you to this last part regarding harmony and spirit. That goes into the problem of policy. That is what Mr. Bryan was asking all morning long. I don't see why it should be permitted in one instance and refused in the other.
Judge: "Harmony and spirit". That means everybody can testify as to what spirit the zoning ordinance is.
Mr. Hayes: Your Honor, it all goes back to what I said in my opening statement, that applicants come to the Board

for mercy, and for amelioration from the strict lettering of the law. As the situation stands by itselfs, if the thing is reduced to simple language, we wouldn't need the Board to decide when to grant and when to deny it. It isn't simple and not easy, and not something you can reduce to two or three easily acquired rules.

Judge: The question is what Mr. Holland measures these things on.

Mr. Hayes: What does he take into consideration?

Judge: How will that help me?

page 109 } Mr. Hayes: It will give the Court some inside information as to what can be decided by the Court. You, Your Honor, are required in this case to determine whether or not the Board acted outside of its discretion, whether it exceeded its discretion, or acted improperly, The only way to determine it is to find out what the discretion is, and talk to someone who has a good knowledge of what the Board considers. We have been trying to bring in what we would consider. This is the first witness, and the first attempt to put evidence before the Court.

Judge: Mr. Hayes, I will let you examine Mr. Holland on everything he would consider.

Mr. Hayes: But not as to what he considers in cases of this sort?

Judge: I will let him to testify to everything he considered in this particular case. It wouldn't help me in judging this case if Mr. Holland, out in Rosemont, gave me eighty things which should be considered.

Mr. Hayes: I think Mr. Holland considered everything important in this case, so I will defer to his ruling, and ask Mr. Holland what he considered in this instance.

A. The very first thing I brought to my own knowledge in this matter was immediately before our public hearing. I did ascertain from Mr. Kenney, the Zoning Administrator, that Mr. Burchell had been in possession of this property a number of years, namely since 1947.

page 110 } Q. Why did you ask him that question?

A. It had come to my attention in my private practice that sometimes people will buy one more piece of property in order to remove themselves slightly from a zoning ruling. That usually shows up in view of the fact that trying to get a satisfactory zoning ruling, they buy a little more piece of land and thereby get around the zoning ordinance. That would be my example of not buying in good

faith. In this case, Mr. Burchell had owned the land a number of years, and during those years he had done nothing to coerce or change the trend of the zoning in that property.

Q. Would it be fair to say you believe he purchased in good faith?

A. I made an effort to determine if he acted and bought in good faith.

Q. Go ahead.

A. The next point of considerable interest to me was the topographical condition. In this case, the number of feet involved was very small, and that was in keeping with the fact that we were dealing with small areas within congested areas of the City, so just a distance of three feet was the most topographical distance. Finally, we found on the ground, and I viewed this and the ground, we a brick wall with the same general texture one finds in brick walls

page 111 } throughout Alexandria in the Old Town section. This wall was several feet higher than Mr. Burchell's land and had some height with relation to the premises south of it. In discussing with one of the members of the Board a proper solution, I was attracted to the thought that if the wall was there at present as built by Mr. Fowler, whom we have heard today and who built another wall against it, just inside Mr. Burchell's land, it did not exceed the height of the wall which was there, so far as it pertained to the top of the wall, affecting either Mr. Burchell's property or the premises to the south, there seemed to be a peculiar situation best satisfied by having those walls immediately together, rather than have them spaced some 7½ feet apart, and leaving in there between the two walls a piece of land in their congested section of the City, where not only is the land for expansion of a growing plant is most difficult to obtain. Since the property owner had no view of this space, which is 7½ feet in width, and because of double walls, no sound could pass through, I took into consideration the direct benefits to residential property of having the noise of men moving around and moving equipment around, the unsightliness of miscellaneous stockpiles of known perishible goods. I say perishible goods because around a Dairy, health regulations would provide for any matter which would

page 112 } deteriorate and become a health hazard. However, in the section which deals with that, I find nothing which prevents the use of all of that part of lot 10A and 10B which are abutting properties to the south, and the property to the front, namely the Fowler property, lot 10C.

Edward S. Holland.

I found nothing to guide me, as a member of the Board, to say that they could not pile goods there, if that stockpile became noxious from a health standpoint. In fact, there was a Dairy that could immediately gain relief from health laws. But that is not the issue here. Trash or debris has a hiding place, and a place for stray animals, pets and rodents would be noxious to the residential property, and it was my firm opinion there that so far as the residential property was concerned, it would be better off if sheltered from these things I have just named, which I consider noxious. In the discussion at the Board meeting, I felt this situation was entirely unique, and I expressed myself on that point, and referred to the RM zone. The RM zone, so far as I have examined the zoning ordinance, is rather unusual and unique. It was set up as a separate zoning here in Alexandria in order that Old Town section could continue to survive in the case of major alterations or replacements of destroyed buildings. As a matter of fact, it is said by the ordinance that a lot less than 25 feet wide that would not have any side yard, page 113 } was an effort on the part of the writers to permit a row house aspect of a house to continue on the narrow lot. I was asked here what I considered the day I voted on the ordinance, and, Your Honor, I do not want to contradict what was said in the Courtroom today about separate lots, but I did at that time consider lots 10A, B and C had occurred on the land records as separate parcels of land at the time recorded, and regardless of how lot 10C might have been conveyed to the Fowler owners, the Zoning Administrator might, if he were to apply for a building permit, say, "This was a lot of record because it is described in other years. You, therefore, need not have any side yard."

Mr. Bryan: We object to the speculation as to what the Zoning Administrator would do in this case, and I don't believe it is a problem.

A. I discussed these things right in the meeting.

Judge: The Berkhardt case of the Combs case say what? If they exercise reasonable discretion, then the Court cannot substitute its judgment for that of the Board. Isn't that what you say?

Mr. Hayes: Yes.

Judge: I overrule the objection.

Edward S. Holland.

A. I want to restate. I remarked on these things during the open hearing, but there were more questions during the Executive Session, and as far as I can recollect,
page 114 } I am describing here my reasons and arguments in answer to the questions, "To what did I use to presume my judgment as of the time I voted?" I further examined in my mind what would happen if this was a building just five feet away from Mr. Fowler's side line, and 7½ feet away from Col. Neal's line, as to the reasonableness of this. On one interpretation of the industrial section, I-1. It seemed to me that you need not put up any wall, and Mr. Burchell to my personal knowledge, for a long period of years, has been expanding that he needed to use these extra areas, the 5-foot corridor and the 7½-foot corridor. He could put on evidence as to the things he wished to put there in storage, and he would not be able to use to their fullest extent because he would have to put in doors or get some outside of the building. Therefore, he is being deprived of useful land without any improvement to the adjoining owner.

Q. Did you consider his difficulty to that effect?

A. In observing the plant that afternoon, it was quite obvious you couldn't put such a building out of reach of where he was using his trailer and dispatch area. He could put it in the same corner, 10A, 10B and 10C. He certainly couldn't put it there and leave it there in the middle of the premises. The only place was off to the side, and not in the premises for egress. It was material that he had used in
page 115 } this area, and my only thought was that it would be to some interest, the interest to the resident's property and the entrance to the business located on this lot, and it was my firm opinion that this housing condition to which the owner had a right to apply the land is to presume protection to the property, and therefore presume protection to the public.

Q. You have dealt to some length with the effect of this construction on the Fowlers and the Neals. I wonder if you could testify what effect the erection of this wall a little longer and higher would have on the Fowler property?

A. I did not at that time see any difference between a high wall that happened to have a roof resting on it, and in which he has an industrial activity, or any wall of the same height that happens to house a residence, which is occurring throughout the City of Alexandria.

Q. Would you say that is your personal knowledge?

A. Yes.

Edward S. Holland.

Q. Do they have abutting gardens?
A. Yes.
Q. On one side?
A. Some are on one side. In my business I have to go into those backyards such as this. I see them constantly. Some are brick, some frame, but to have this brick
page 115a } wall forming this end actually makes usuable garden space better than if she had to erect the wall on her line.
Q. No further questions.

page 116 } By Mr. Bryan:
Q. Did I understand you to say there was a topographical condition that warranted granting the variance? It is flat land, isn't it?
A. No, it is not flat land. The yards as you go on up the street, Queen Street has quite a slope to it, and each yard is higher than the other lot.
Q. How does that affect Lot #10C?
A. Mrs. Fowler's lot, #10C, is slightly higher than this premises, so to build a building on Lot #10B, which is a usable and projectable height, doesn't project the building up to great height into Mrs. Fowler's property, then the Neal land—if that was lower than Mr. Burchell's land, but Mr. Burchell, rather than make any changes in land, would expect to keep certain areas flat. In doing that, it places him below the other land, so the walls do not become excessively high. I examined the wall. It does form a screen, a barrier.
Q. You don't contend the wall itself is lower? You just contend it is lower than the Fowler land?
A. Which affected my opinion, yes.
Q. Why would it be different, if the land was lower, to grant this variance or not?
A. I would feel Mr. Burchell's lines, before we start any buildings at all, would have a situation above the Neal and Fowler lots, so it would unreasonably exclude light and air, then I would have said that was a point in favor of
page 117 } denying it, but contrary to that, the only obstacle we wished to approve or grant was an obstacle there already.
Q. So you feel it would not affect seriously or otherwise the adjoining land owner's use of his property?
A. Yes.
Q. And you also said the 5 foot or 7½ foot corridor might become the place for noxious odors, a place for rats, etc.?

Edward S. Holland.

A. No, I didn't say that. My answer was nonperishable goods, which excludes odors or rats or other matter. I said it could be a place, if there were no walls, that you might find among cartons, crates of a nonperishable inorganic matter, that the animals of the neighborhood could congregate, but I did not say they would cause the odors.

Q. That is true of any setback where the building is built within five feet of the zoning. Wouldn't that leave a corridor, if you adhered to the setback?

A. It wouldn't be comparable to this case. The five-foot corridor would possibly have a corridor at one end, the 7½ feet against a blank wall.

Q. Isn't that true of any zone that abuts another zone as it makes a turn, if it isn't absolutely straight line, where they abut, then this is true in every residential section where they abut. Isn't that true?

A. No, absolutely not, because the other end may not be by a brick wall. This happens to be enclosed by a
page 118 } brick fence.

Q. If it were not enclosed or were not a dead end on what would be the east end of the 7½ foot corridor, do you visualize what I am saying? You say that is a dead end?

Mr. Giammittorio: That is not the question. That is not what he considered. He considered it was there.

Judge: I overrule the objection.

Mr. Hayes: You wouldn't allow me to ask a question on what basis.

(The Court recessed from 4:35 o'clock p. m. until 4:50 o'clock p. m.)

Judge: You are now asking Mr. Holland what would be the effect if it wasn't a dead end on the east side?

Mr. Bryan: Yes, Your Honor.

Judge: Mr. Hayes, if there would be two walls 7 feet apart, with one end blocked off, if that is the situation, I sustain your objection. We will have to judge this case as the situation changes, and Mr. Bryan is going to prove there was not a blank wall there.

Q. Mr. Holland, you said the first thing you did when you went into this case was to check the zoning. Is that correct?

A. I said to check the ownership, and the extent of the ownership.

Edward S. Holland.

Q. Did you make inquiry as to the zoning?
A. Yes, sir.
Q. Do you know how Lot #10 is zoned, on this map. That is not owned by the applicant or Mrs. Fowler. That is owned, I think, by a man by the name of Andronovich.
A. I can't say I do know how his land is zoned. The only inquiry I made is where is this zone line, and I
page 119 } didn't inquire as to any zone line changing.
Q. Didn't the RM zone extend across the southern part of Lot #10A? Isn't that what you extended at the last meeting?
A. Yes, sir.
Q. Did that RM extend to the street through Lot #10?
A. Yes, sir.
Q. So Lot #10 is zoned RM?
A. Yes, sir.
Q. How about the variance and setback on Lot #10? He is building up to that line, too, isn't he?
A. Yes.
Q. But no application for variance was made on that?
A. I have to see the application before I could state that.

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Q. Wherever Lot #10A abutted Lot #10 or
page 124 } #15C or #10C, you assumed you were granting variances to allow them to build to the property line on the sides?
A. Yes, sir.

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page 126 }

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Q. Why do you think that they put the setback like this, of having the more restrictive setback apply to the less restrictive area, if it isn't just to meet such a situation as this?
A. In answer to your question, Mr. Bryan, I sat on the com-

mittee that formulated this ordinance, and particularly this RM ordinance. As a general rule, the setback was the main thing that we thought was necessary, speaking in general. But in the same action that we formulated that statement, that there should be setbacks, we formulated the draft of the ordinance that said, "There shall be a Zoning Board of Appeals. If you are speaking of one type of property, the rule must be applied absolutely, but when you get into another rule of circumstances, you must accept the fact that property values, topographic conditions, and all things cited in the ordinance, may give the Board of Zoning Appeals reason and cause to vary from the rule. If that is not so, there would be no Zoning Administrator.

Q. I would like to read to you from Line 3: "The setback ratio and yard provisions of the more restrictive zone shall apply to the less restrictive zone." The clearcut page 127 } case of that is where there is one straight line dividing the two zones, is it not? That doesn't give you any problem.

A. I can't answer direct. Yes, if we were treating with two zonings, neither of which was RM zone, the answer would be yes, but the RM zoning is peculiar in itself.

Q. So you feel that the application of this differs with the two zones? Is that correct?

A. The answer is yes.

Q. And that RM being a peculiar zone is entitled to different treatment on this particular setback?

A. Not the RM zone. Conditions on which there exists an RM zone may get different treatment than in less congested areas of the city.

Q. So unless RM is abutted by industrial, then the industrial itself—I will rephrase that. From what I gather, it isn't so much the restriction of the less restrictive zone, but the provisions of the more restrictive zone that govern how you should interpret Section 35-41, according to you. Is that right?

A. I would like to answer yes. The RM zone, yes, in this case is a flexible zone, and interpretation becomes necessary more often than if it were an old routine zone. However, this type of exception could have occurred where we are dealing with RM on one side and many other zones, less restrictive, on the other side. Do I make myself clear? This zone could have been zoned another thing, and having use of it, I would expect to have examined very carefully the RM zone, its uses

Edward S. Holland.

page 128 } and provisions, and compare it on the other side of the line, and I have found more times, when interpretation and decision would come to pass, then for instance if I had to make a decision on a clearcut zone, on RM or R-5 zone, * * * from the other lot zone. They have no peculiarities, they are routine zones and call for routine treatment.

Q. The Section 35-41 is either strictly adhered to or more flexibility is given by you in your interpretation of it, depending on whether the more restrictive zone is RM or, as you say, is R-5 or some other?

A. I would have to say that.

Q. Now you testify, I believe, that the two walls, side by side, which would be the case with the Neal property, would better insulate you from noises, etc. than would the one wall?

A. I want it understood that is by a very, very slight degree, but nevertheless it would be some.

Q. And if you moved those walls further apart, it would further insulate the same?

Mr. Hayes: I object to that question. I don't think the witness is qualified as an audio engineer to say the varying effects of distance. Maybe an echoing effect or wave lengths might make it louder.

Mr. Bryan: Mr. Holland testified on direct examination that two walls side by side would insulate better than one wall.

page 129 } Mr. Hayes: I think anyone with common knowledge could testify to that, but when you get into whether they would be better insulated further apart, I think he is not qualified to answer.

A. I don't think I can give a specific answer. If further apart, the direct contact is less, but then you may get noises from their being further apart. Just for the record, it is possible it would decrease.

Q. You said, in a business expanding like the Alexandria Dairy, that they need this area to build on that would otherwise be set back, that would otherwise be set back by a corridor. Is that right?

A. They need to use all of their land, yes.

Q. Isn't that true of every expanding business?

Mr. Hayes: Your Honor, I don't think that question lends

itself to an answer. You have to qualify with where it is located and what type of business it is.

Judge: The answer to that is obvious. You would have to give him the same situation. I presume that is what you are driving at.

Mr. Bryan: Anytime an expanding business reaches a residential zone, you would have to give them variances?

Judge: I think you will have to bring it down to a similar situation as this. If you want to bring every industrial zone down to qualify to make it the same as this, I think the question is proper. If not, it is improper.

Q. In every area where residential abuts industrial in Alexandria and hereabouts and business on industrial land is expanding, isn't there nearly always the need to utilize every bit of space they can?

A. No, not as a general statement, that is not page 130 } true.

Q. You felt that there was a need here greater than other expanding businesses, or just that there was a need here?

A. In my direct testimony, I stated in this congested area it was very difficult to expand and secure additional land, and no one of these points caused me to vote the way I voted on the Board. It was judged on the average in balance of all of them. In my opinoin, in this area conjestion has reached the point that, when a man, having owned land for a term of years with the obvious intentions given here today, is pressed to seek balance of what he bought many years ago for a definite and clearly described purpose, that he should be allowed to use it provided it was consistent with the ordinance. It would be one of the three things discussed in Section 35-68(b), that if he, having his business in a congested area, where use in the neighborhood of the residential property is such and such, that the combined effect of those conditions of a few included the fact that they were to waste land in this area from productive use where it does not directly, and in my opinion, does not directly injure any other party, it would be a productive space from a taxable standpoint and the welfare of this city.

Q. You feel this, regardless of the fact that the statute says it should be set back from the existing zone?

Mr. Hayes: I object to that. We have gone through all the

restrictions, and the question is ill-phrased and based upon a false premise.

Judge: I think he has answered the question.

page 131 } You are just trying to get him to say it again.

Mr. Bryan: All right. I will withdraw the question. That is all I have.

By the Judge:

Q. Mr. Holland, I am looking at this picture marked Exhibit A. I am looking at the front—this would be the southeast corner. This is the east corner of that wall?

A. Yes, sir.

Q. Coming north, is there a brick wall there, coming east, is there a brick wall between Lots #10 and #10A?

A. Lot #10—for a slight distance this white structure extends back here. Then there was a wall right about to here. There was a piece of a wall, still standing, then this piece of wall there had been connected by a wall straight across, but most of it was torn down the day I was there. This projects out this way. The house on Lot #10 projects toward the north so as to pass along the east side of Lot #10A a short distance from its south corner.

Q. Any further questions, Mr. Hayes?

Mr. Hayes: No, Your Honor.

Judge: May Mr. Holland be excused?

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FRANCIS FANNON,

returned to the stand and further testified as follows:

By Mr. Bryan:

Q. Mr. Fannon, when this matter was considered on request for variance, was it your understanding you were voting on a request for variance for three sides of this property, or two sides?

A. For two sides.

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FRANK KENNY.
returned to the stand and further testified as follows:

By Mr. Hayes:

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page 136 }

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A. I don't know what Mr. Fannon testified to, but as far as I am concerned, they were voting on the three sides in granting the variances.

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page 137 }

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BURT LOPATIN,
returned to the stand and further testified as follows:

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page 141 }

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A. They will have to say for themselves, but I know I was voting on three sides, and I asked every person there if they had a question. My point is, definitely I was voting on all sides.

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JACK L. WHEATLEY,
a witness of lawful age, being first duly *duly* sworn, testified as follows:

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A. Mr. Bryan, let me stipulate my answer to that question. I am reflecting on individual feelings and not on feelings of the Board. I honestly thought it pertained to only two sides, the west and south sides.

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JAMES S. DOUGLAS, JR.,
a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Bryan:

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A. Today is the first time I knew anything was involved other than the south and west lines. In other words, when the Zoning Administrator gets a notice out, he briefly describes the type of variance requested. Very seldom do we make any effort to do or to go beyond that. I thought it was two sides.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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