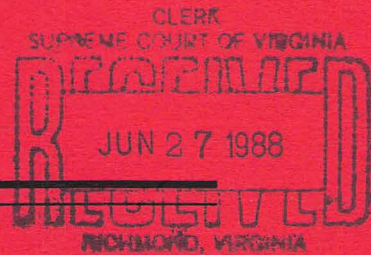


238 VA24



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IN THE

**Supreme Court of Virginia**

AT RICHMOND

---

RECORD NO. 87-0500

---

JACK E. RINKER AND  
DAVID E. FELDMAN, TRUSTEES,  
and  
JUDICIAL DRIVE ASSOCIATES,  
A VIRGINIA GENERAL PARTNERSHIP,

Appellants,

v.

THE CITY OF FAIRFAX, VIRGINIA,  
CITY COUNCIL OF FAIRFAX, VIRGINIA,  
ALLEN GRIFFITH, PATRICK RODIO,  
GLENN WHITE, JOHN MASON,  
DORRIS REED, R. ARTHUR VON HERBULIS,  
GEORGE T. SNYDER, JR., EARL BERNER,

Appellees.

---

JOINT APPENDIX

---

Dexter S. Odin  
Sally Ann Hostetler  
ODIN, FELDMAN & PITTLEMAN, P.C.  
10505 Judicial Drive  
Post Office Box 367  
Fairfax, Virginia 22030  
(703) 385-7700

Counsel for Appellants

Leslie M. Alden  
VERNER, LIPPERT, BERNHARD,  
McPHERSON AND HAND, CHARTERED  
8280 Greensboro Drive  
6th Floor  
McLean, Virginia 22102  
(703) 749-6000

Counsel for Appellees



## TABLE OF CONTENTS

	<u>Appendix Page</u>
Bill of Complaint filed 7/25/86 .....	1
Demurrer to Bill of Complaint filed 9/2/86 (Exhaustion of Administrative Remedies) .....	10
Demurrer to Bill of Complaint filed 9/2/86 (Immunity) .....	12
Opinion Letter written by the Honorable Johanna L. Fitzpatrick dated 11/7/86 .....	15
Notice of Motion to Reconsider filed 1/2/87 .....	18
Transcript of Proceedings heard before the Honorable Johanna L. Fitzpatrick on 1/16/87 .....	20
Defendant's Response to Complainants' Motion to Reconsider filed 1/29/87 (Includes Fairfax City Zoning Sections 26 - 5, 26 - 6, and 26 - 168) .....	29
Complainants' Memorandum in Support of Motion to Reconsider Granting of Demurrer Based Upon Failure to Exhaust Administrative Remedies filed 2/3/87 .....	39
Order entered 2/10/87 .....	44
Order entered 3/2/87 .....	46
Final Order entered 4/18/88 .....	48
Fairfax City Ordinance 1986 - 24 .....	50
Selected Provisions of Fairfax City Zoning Ordinance:	
26 - 3 .....	52
26 - 8 .....	53
26 - 103 .....	58
26 - 104 .....	59
26 - 159-167 .....	61
26 - 255 .....	66
Assignments of Error .....	67

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

Chancery No. 97940

and

CITY COUNCIL OF FAIRFAX,  
VIRGINIA, a body politic,  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

and

ALLEN GRIFFITH  
10318 Confederate Lane  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

and

PATRICK RODIO  
3801 Richardson Place  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

and

✓ 10600 Howerton Avenue  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

JOHN MASON

3548 Queen Anne Drive  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

✓ DORRIS REED  
3854 University Drive  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

R. ARTHUR VON HERBULIS  
4138 Virginia Street  
Fairfax, Virginia 22032  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

GEORGE T. SNYDER, JR., Mayor  
3130 Flintlock Road  
Fairfax, Virginia 22030  
SERVE: William F. Roeder, Jr.  
3900 University Drive  
Suite 30  
Fairfax, Virginia 22030

2

EARL BERNER, Zoning Administrator \*  
10455 Armstrong Street \*  
Room 309 \*  
Fairfax, Virginia 22030 \*  
SERVE: EARL BERNER, Zoning \*  
Administrator \*  
10455 Armstrong Street \*  
Room 309 \*  
Fairfax, Virginia 22030 \*  
Defendants. \*

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. Complainants, Jack E. Rinker and David E. Feldman, are the trustees for Complainant Judicial Drive Associates, a Virginia General Partnership, the owner of a parcel of ground containing 1.0066 acres, more or less, located at 10509 Judicial Drive in the City of Fairfax, Virginia, which parcel is more particularly described upon City of Fairfax Tax Map 57-4((2))33 (hereinafter referred to as "subject property").

2. Defendant Fairfax City Council, a body corporate and politic, is the governing body of Fairfax City, Virginia, and is charged with the responsibility of adopting, amending and administering the zoning ordinances and zoning maps of the City of Fairfax, and has the power of eminent domain, all pursuant to the statutes and the Constitution of the Commonwealth of Virginia.

3. Defendant, Earl Berner, is the Zoning Administrator for the City of Fairfax and charged as the agent and employee of Defendant Council with the responsibility, inter alia, for overseeing implementation of the Zoning Ordinance and as such, in his ex officio capacity, is a proper party in litigation.

4. Defendants, Allen Griffith, Patrick Rodio, Glenn White, John Mason, Dorris Reed, R. Arthur Von Herbulis, are duly elected members of the Fairfax City Council. George T. Snyder, Jr. is the Mayor of Fairfax City.

5. The subject property is contiguous to the 48.6 acre Fairfax County Governmental Center to the north and commercial office buildings to the east and west.

6. In February, 1984, Complainants filed an application requesting the City to rezone the subject property from Cl-L to C-1. Complainants' proposed development of the subject property under the C-1 category is compatible with adjacent uses and is in general conformance with the City's Future Land Use Plan and its Comprehensive Plan as amended February 22, 1983. Development of this parcel under the C-1 category is not detrimental to any of the adjoining properties and would help fulfill the need for commercial space in the area.

7. However, in December 1984, the Fairfax City Planning Commission recommended to the Fairfax City Council denial of Complainants' application. Complainants withdrew their application from Council consideration in order to reassess the situation and work further with the City staff.

8. On December 12, 1985, Plaintiffs filed a revised application to rezone the subject property from Cl-L to C-1. The application initially included seven proffers. This application was patterned after a recent rezoning from Cl-L to C-1 of a similarly situated property located two lots to the west of the subject property.

9. Subsequent to this application, the City began discussing a comprehensive revision to its zoning ordinance. Accordingly, in order to preserve their rights, Complainants amended their proffers on February 11, 1986 to provide that the seven original proffers would be null and void "if after the date of execution there is a comprehensive implementation of a new or substantially revised zoning ordinance."

10. After a public hearing on March 10, 1986, the Planning Commission voted to recommend approval of the rezoning with certain modifications. The Planning Commission specifically rejected the condition set forth in Paragraph 8 above because as stated by City staff, "its effect would be to render this property zoned C-1 without proffers in the event of any future changes to the zoning ordinance." (Emphasis in original.) In addition, the Planning Commission further modified Complainants' proffers.

11. On March 11, 1986, the Fairfax City Council adopted an amendment to the Zoning Ordinance which substantially changed the use restrictions imposed on owners of commercial property. The regulatory measures enforced by this ordinance are arbitrary, capricious, not in accordance with state and federal law, bear no reasonable relation to the affected properties, and are unduly oppressive on these Complainants and other property owners similarly situated.

12. On May 27, 1986, Defendant Council illegally and improperly rezoned the subject property to C-1 with the imposition of certain involuntary "proffers". During the public hearing prior to Council's vote, Complainants made it clear that because

council refused to consider the rezoning of the subject property under the commercial district restrictions in effect at the time of rezoning application, in accordance with the condition set forth in proffer #8 and the Council's subsequent amendment of the zoning ordinance, all prior written proffers were withdrawn and Complainants were requesting C-1 zoning without proffers. Defendant Council's actions in rezoning the subject property was in violation of Virginia Code §§15.1-491.1-491.2.

13. Enactment by Defendant Council of the afore-referenced ordinances on March 11, 1986 and May 27, 1986 ("Zoning Ordinances") affecting Complainants' property was beyond and contrary to the delegated powers of Defendants and in conflict with the powers and duties reserved to the Commonwealth and its other agencies under the laws of Virginia.

14. Based upon the facts and allegations stated herein, Defendant Council, under color of the Zoning Ordinances has violated and is violating Complainants' rights, privileges and immunities secured by the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections One and Eleven of the Constitution of Virginia; and the Civil Rights Act, 42 U.S.C. §§1981-1983.

15. The Zoning Ordinances adopted by the Defendant Council bear no reasonable or substantial relationship to the public health, safety, morals or general welfare.

16. The Zoning Ordinances adopted by the Defendant Council create non-uniform zoning within the zoning districts affected by the Ordinances.



17. The Zoning Ordinances are contrary to, and without reasonable relationship to, the most suitable use of the property, especially in consideration of the trends of growth and change in the immediate vicinity and the current and future requirements of the Community; nor do they encourage economic development activities that will provide employment and enlarge the tax base.

18. The effect of the Zoning Ordinances is to deprive Complainants of legitimate reasonable uses of the subject property and result in the confiscation of the subject property without compensation and due process, all in violation of State and Federal Constitutions.

19. As a result of Defendants' actions and policies, Complainants are suffering and will continue to suffer irreparable harm.

20. For the reasons stated herein, the actions of Defendant Council in adopting and applying the Zoning Ordinances referenced herein are arbitrary, capricious, unreasonable, confiscatory, discriminatory and contrary to the Virginia Code and the Constitutions of Virginia and the United States.

21. An actual controversy exists between the parties, and Complainants have no adequate remedy at law.

WHEREFORE, Complainants pray this Court enter a decree as follows:

A. Declaring the actions of Defendant Council in imposing involuntary proffers on Complainants to be null and void, as confiscatory, arbitrary, unreasonable, discriminating, illegal and ultra vires, and enacted contrary to the requirements of the

Virginia Code and Constitution and therefore unenforceable and that the subject property is therefore zoned C-1 without any proffered conditions;

B. Declaring the actions of the Defendant Council in amending the commercial zoning classifications on March 11, 1986 to be null and void, as confiscatory, arbitrary, unreasonable, discriminatory, illegal and ultra vires and enacted contrary to the requirements of the Virginia Code and Constitution and therefore unenforceable;

C. Declaring the action of the Defendant Council in imposing C-1 zoning with involuntary proffers on the subject property to be a violation of the Virginia and United States Constitution and the Civil Rights laws of the United States, specifically 42 U.S.C. 1983;

D. Declaring that the lawful zoning on the subject property is C-1 and that Complainants' right to C-1 use on the subject property is in accordance with the C-1 zoning classification existing prior to March 11, 1986;

E. Permanently enjoining the Defendant Council and its agents from interfering with the use of the subject property in the C-1 district;

F. Issue a mandatory injunction directing Defendants, their agents and employees, to continue to accept and process all plans, drawings and applications submitted by Complainants in compliance with Fairfax City Zoning Ordinances in furtherance of development of subject property in the C-1 district;

ODIN, FELDMAN & PITILEMAN, P.C.  
ATTORNEYS AT LAW  
10505 JUDICIAL DRIVE • FAIRFAX VIRGINIA 22030  
(703) 385-7700

G. Awarding Complainants their attorney's fees (pursuant to 42 U.S.C. 1988), costs of this action and such further relief as this Court may deem appropriate.

Respectfully Submitted,

JACK E. RINKER, Trustee  
DAVID E. FELDMAN, Trustee  
JUDICIAL DRIVE ASSOCIATES  
By Counsel

ODIN, FELDMAN & PITTLEMAN, P.C.  
10505 Judicial Drive  
P.O. Box 367  
Fairfax, Virginia 22030  
(703) 385-7700

BY:

  
DEXTER S. ODIN

BY:

  
SALLY ANN HOSTETLER  
Counsel for Complainants

ODIN, FELDMAN & PITTLEMAN, P.C.  
ATTORNEYS AT LAW  
10505 JUDICIAL DRIVE • FAIRFAX VIRGINIA 22030  
(703) 385-7700

EARL BERNER, Zoning Administrator \*  
10455 Armstrong Street \*  
Room 309 \*  
Fairfax, Virginia 22030 \*  
SERVE: EARL BERNER, Zoning \*  
Administrator \*  
10455 Armstrong Street \*  
Room 309 \*  
Fairfax, Virginia 22030 \*  
Defendants. \*

DEMURRER TO BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Come now all Defendants, by/Counsel, and file this Demurrer to the Bill of Complaint for Declaratory Judgment and Injunctive Relief against the City of Fairfax and state as follows:

1. The pleadings should be dismissed because the Complainants have failed to state a claim upon which relief can be granted.

2. In zoning cases, where it is alleged that state and federal constitutions have been violated, the available administrative remedies of a Complainant must first be exhausted. Board of Supervisors of Henrico County v. Market Inns, Inc., 228 Va. 82, 319 S.E. 2d 737, (1984).

3. Patently the Complainants have failed to allege that they have exhausted all their administrative remedies.

4. WHEREFORE, the Defendant prays that the Demurrer to the Bill of Complaint for Declaratory Judgment and Injunctive Relief be granted and the matter be dismissed.

Respectfully Submitted,

THE CITY OF FAIRFAX,  
By Counsel

MCCARTHY, ROEDER, DURRETTE  
& DAVENPORT, P.C.  
3900 University Drive  
Suite 300  
Fairfax, Virginia 22030  
Counsel for Defendants

By:

  
LESLIE M. ALDEN

  
WILLIAM F. ROEDER, JR.



V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JACK E. RINKER and  
DAVID E. FELDMAN, Trustees,

and

JUDICIAL DRIVE ASSOCIATES,  
a Virginia General Partnership: IN CHANCERY NO. 97940

Complainants,

vs.

THE CITY OF FAIRFAX,  
CITY COUNCIL OF FAIRFAX,  
VIRGINIA,  
ALLEN GRIFFITH,  
PATRICK RODIO,  
GLENN WHITE,  
JOHN MASON,  
DORIS REED,  
R. ARTHUR VON HERBULIS,  
GEORGE T. SNYDER, JR.,  
and  
EARL BERNER,

Defendants.

DEMURRER

COME NOW the Defendants, City Council of Fairfax Virginia, Allen Griffith, Patrick Rodio, Glenn White, John Mason, Doris Reed, R. Arthur Von Herbulis, George T. Snyder, Jr., and Earl Berner, by counsel, and file this their Demurrer to the Bill of Complaint for Declaratory Judgment and Injunctive Relief and state as follows:

1) Defendants Allen Griffith, Patrick Rodio, Glenn White, John Mason, Doris Reed, R. Arthur Von Herbulis, George T. Snyder, Jr. and Earl Berner, are members of the City Council of Fairfax, Virginia.

2. Defendant George T. Snyder is the mayor of the City of Fairfax, Virginia.

3. Defendant the City Council of Fairfax, Virginia is a legislative body for the City of Fairfax, Virginia and is responsible for enactment of all zoning ordinances for the City.

4. Defendant Earl Berner is the Zoning Administrator for the City of Fairfax, Virginia.

5. At all times relative to the Bill of Complaint for Declaratory Judgment and Injunctive Relief, the named defendants, to the extent any were acting at all, were acting in their legislative capacities and therefore they enjoy absolute legislative immunity for their conduct in making zoning decisions that make up the legislative process. Fralin & Waldron, Inc. v. County of Henrico, Va. 474 F. Supp. 1315 (E.D. Va. 1979)

WHEREFORE, the named Defendants pray that this Court grant their Demurrer and dismiss the Bill of Complaint for Declaratory Judgment and Injunctive Relief as to them, allow them their costs and fees expended herein and such other relief as the Court deems just.

CITY COUNCIL OF FAIRFAX,  
VIRGINIA,  
ALLEN GRIFFITH,  
PATRICK RODIO,  
GLENN WHITE,  
JOHN MASON,  
DORIS REED,  
R. ARTHUR VON HERBULIS,  
GEORGE T. SNYDER, JR.,  
and  
EARL BERNER,

By Counsel

MCCARTHY, ROEDER, DURRETTE  
& DAVENPORT, P.C.  
3900 University Drive, Suite 300  
Fairfax, Virginia 22030  
(703) 691-1700

By: Leslie M. Alden  
Leslie M. Alden

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed by postage prepaid, first class mail this 2 day of September, 1986 to Dexter S. Odin, Esquire and Sally Ann Hostetler, Esquire, counsel for Complainants, at Odin, Feldman & Pittleman, P.C., 10505 Judicial Drive, Post Office Box 367, Fairfax, Virginia 22030.

Leslie M. Alden  
Leslie M. Alden



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

COUNTY OF FAIRFAX

CITY OF FAIRFAX

CITY OF FALLS CHURCH

BARNARD F. JENNINGS  
WILLIAM G. PLUMMER  
THOMAS J. MIDDLETON  
RICHARD J. JAMBORSKY  
LEWIS HALL GRIFFITH  
F. BRUCE BACH  
QUINLAN H. MANCOCK  
JOHANNA L. FITZPATRICK  
J. HOWE BROWN  
JACK B. STEVENS  
THOMAS A. FORTKORT  
JUDGES

JAMES KEITH  
LEWIS D. MORRIS  
BURCH MILLSAP  
RETIRED JUDGES

November 7, 1986

Leslie M. Alden, Esq.  
McCarthy, Roeder, Durette & Davenport, P.C.  
3900 University Drive, Suite 300  
Fairfax, Virginia 22030

Dexter S. Odin, Esq.  
Sally Hostetler, Esq.  
Odin, Feldman & Pittleman P.C.  
10505 Judicial Drive  
P. O. Box 367  
Fairfax, Virginia 22030

Re: Jack E. Rinker, Trustee, et al  
v. The City of Fairfax, et al  
Chancery No. 97940

Dear Counsel:

This action was brought on behalf of a partnership property owner by trustees who challenge the authority of the Fairfax City Council to re-zone the subject property with the imposition of involuntary proffers. Complainants [hereinafter "the Partnership"]; also raise statutory and constitutional challenges to the Council's amendment of the City Zoning Ordinance. Defendants demurred, alleging that the Partnership improperly failed to exhaust its administrative remedies. I agree and sustain the demurrer as to all Defendants.<sup>1/</sup>

<sup>1/</sup> Defendants filed a second demurrer based on legislative immunity which, in light of this ruling, I need not and do not consider now.

*apexion letter*

Leslie M. Alden, Esq.  
Dexter S. Odin, Esq.  
Sally A. Hostetler, Esq.  
Re: Rinker v. The City of Fairfax  
Chancery No. 97940  
November 7, 1986  
Page 2.

The controversy arose when the Fairfax City Planning Commission, recommending approval in part of the Partnership's application for C-1 re-zoning, rejected one proffer which provided that all other proffers would be void if the Zoning Ordinance ever was revised. Subsequently, but prior to City Council approval of the re-zoning, the Zoning Ordinance was revised. The Council later approved, under the revised Ordinance, the Partnership's re-zoning application subject to multiple proffers, including those which the Partnership had attempted to make conditional and which the Partnership at some point had attempted to withdraw. The Partnership now asks the Court to classify the property C-1, without proffers, pursuant to the unrevised version of the Ordinance. These facts, as pled, suggest the gravamen of this declaratory judgment action is that the Amended Ordinance is invalid as applied to the subject property.

Although these facts present an interesting case, when a Virginia landowner claims a zoning ordinance is invalid as applied, "he must exhaust adequate and available administrative remedies before proceeding by declaratory judgment to make a direct judicial attack on the applied constitutionality of the ordinance. [Citations omitted.]" Gayton Triangle Land Co. v. Board of Supervisors, 216 Va. 764, 766 (1976). Nothing in this case warrants a departure from the stated rule.

The Partnership relies on Board of Supervisors v. Rowe, 216 Va. 128 (1978), for the proposition that exhaustion of administrative remedies is not always required. Rowe, however, is too factually dissimilar to govern here. In Rowe, parties owning nearly fifty percent of the affected parcels challenged the James City County Board decision to re-classify a single large tract of land. Noting that the only way to "vindicate the rights asserted" would be to allow a sweeping total exemption which would be contrary to the overall zoning scheme and thus beyond the constraints of the Virginia Code, the Court concluded that there was no adequate administrative remedy. 216 Va. at 133.

In contrast, the Fairfax City Zoning Ordinance provides adequate administrative options to the Partnership. Among the available remedies is an application to the City Council for a special exception. See Fairfax City Code § 26-168(f). This procedure is meant to accommodate the diverse needs of owners of commonly zoned property and so is exactly the type of remedy for which the exhaustion principle was designed. In conformance with the law of Virginia, then, the Partnership must attempt the administrative route at this time.

Once such administrative remedies are exhausted, the Partnership will be entitled to seek judicial relief, if necessary. Of course, should the Partnership be granted a satisfactory special exception, it would no longer be prejudiced by the Ordinance. It thus may not be



Leslie M. Alden, Esq.  
Dexter S. Odin, Esq.  
Sally A. Hostetler, Esq.  
Re: Rinker v. The City of Fairfax  
Chancery No. 97940  
November 7, 1986  
Page 3.

necessary to consider the constitutional challenge and so I will not rule on it today.

The demurrer is sustained as to all Defendants. Ms. Alden will please submit an appropriate order to Ms. Hostetler for endorsement as to form.

Very truly yours,

A handwritten signature in cursive script, reading "Johanna L. Fitzpatrick". The signature is written in dark ink and is positioned above the printed name.

Johanna L. Fitzpatrick

JLF/lld

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY 3:57

JACK E. RINKER and  
DAVID E. FELDMAN, Trustees,  
  
and  
  
JUDICIAL DRIVE ASSOCIATES,  
a Virginia General Partnership,  
  
Complainants,  
  
vs.  
  
THE CITY OF FAIRFAX,  
CITY COUNCIL OF FAIRFAX,  
VIRGINIA, ET AL.,  
  
Defendants.

In Chancery No. 97940

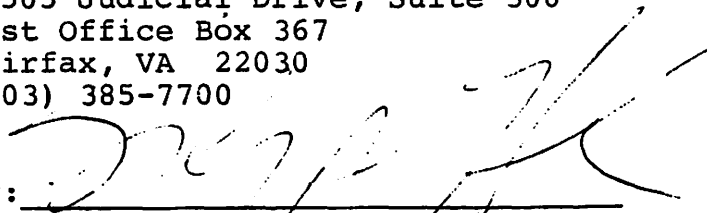
NOTICE AND MOTION TO RECONSIDER

PLEASE TAKE NOTICE that on Friday, January 16, 1986, at 10:00 a.m. or as soon thereafter as counsel may be heard, the Plaintiffs, by counsel, will move the Court to reconsider the Opinion rendered by Judge Fitzpatrick in this action on November 7, 1986. Plaintiffs, by counsel, specifically request that this motion be heard before the Honorable Johanna L. Fitzpatrick.

JACK E. RINKER, Trustee  
DAVID E. FELDMAN, Trustee  
JUDICIAL DRIVE ASSOCIATES

By Counsel

ODIN, FELDMAN & PITTLEMAN, P.C.  
10505 Judicial Drive, Suite 300  
Post Office Box 367  
Fairfax, VA 22030  
(703) 385-7700

By:   
SALLY ANN HOSTETLER  
Counsel for Complainants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Notice and Motion to Reconsider by first class mail, postage prepaid, to Leslie M. Alden, Esquire, Counsel for Defendants, Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, 8280 Greensboro Drive, Sixth Floor, McLean, VA 22102, on this 2nd day of January, 1987.

  
SALLY ANN HOSTETLER

870500

3/2  
du 4/2  
PUL 6/16

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

1987 MAR 26 PM 4:04

CLERK  
SUPERIOR COURT OF VIRGINIA  
FAIRFAX COUNTY, VA

JACK RINKER, et al,

Complainant,

versus,

CITY OF FAIRFAX, VIRGINIA,

Defendant.

IN CHANCERY NO. 9794

MAY - 4 1987

RICHMOND, VIRGINIA

Fairfax, Virginia

Friday, January 16, 1987

The above-entitled action came on to be heard before the Honorable Johanna L. Fitzpatrick, a Judge in and for the Circuit Court of Fairfax County, in Courtroom 4-H, Fairfax County Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia 22030, beginning at approximately 10:45 o'clock a.m.



1 APPEARANCES:

2 For the Complainant:

3 MS. SALLY ANN HOSTETLER  
4 Odin, Feldman & Pittleman  
5 10505 Judicial Drive  
6 Fairfax, Virginia 22030

7 For the Defendant:

8 MS. LESLIE M. ALDEN  
9 McCarthy, Roeder, Durette & Davenport  
10 3900 University Drive  
11 Fairfax, Virginia 22030

12 C O N T E N T S :

13 Argument of counsel

14 Page 3

15 E X H I B I T S :

16 None.





P R O C E E D I N G S :

(The Court Reporter was sworn.)

MS. ALDEN: Your Honor, this is on this morning on two motions, one is my entry of an order reflecting the court's letter opinion of November 7th, 1986, and I have an endorsed order.

MS. HOSTETLER: The second motion, Your Honor, is on my motion to reconsider the court's ruling, and if I can just make two very brief points.

As Your Honor will recall, the suit was filed as a declaratory judgment suit complaining that the City of Fairfax wrongfully rezoned some property.

The gravamen of the lawsuit was that the six conditions imposed in the ordinance were not voluntary by the plaintiffs. To that extent, it violates Virginia Code 15.1-491, -492.

To the extent that Your Honor was not able to pick that up from the pleadings, and the pleadings were inartfully pled, we would ask for the relief to be able to replead those facts.

Your Honor's letter opinion stated that there were administrative remedies that were available to these plaintiffs that would give them the full relief of essentially

22



1 deleting those six proffers, and as an example, Your Honor  
2 cited the special exception requirement.

3 The special exception requirement set forth  
4 in the Fairfax City ordinance in no way would allow these  
5 plaintiffs to remove all six of those conditions. We would  
6 ask Your Honor to reconsider the motion, just on those two  
7 bases, that if in fact it was inartfully pled, we would like  
8 to replead it, but to the extent that there were administra-  
9 tive remedies out there that we failed to exhaust, they  
10 could not protect the plaintiffs at this point.

11 That is it, Your Honor. Thank you.

12 MS. ALDEN: Your Honor, I think the court's  
13 considered opinion which was reflected in the letter ruling  
14 is exactly correct and rests upon the rather extensive case  
15 authority that was both quoted in the opinion and argued  
16 at the time.

17 I do not think that counsel denies that there  
18 are administrative remedies, and I think that the case the  
19 Board of Supervisors of Henrico versus Market Ends  
20 provides that the plaintiff may not seek some judicial  
21 remedy merely because they allege that the administrative  
22 remedy may not be adequate or as burdensome or slow, and  
23 I think that the plaintiffs only position in this case is



1 that they don't feel like having to go through that process  
2 all over again.

3 And I think the motion should be denied.

4 THE COURT: Anything else?

5 MS. HOSTETLER: Your Honor, only to the extent  
6 that in discussions before this court and in discussions  
7 with the City, they have yet to proffer to us anything that  
8 would resolve the issue of thsoe six proffers, the special  
9 exception deals with bulk and height requirements. It does  
10 not deal with dedication of land.

11 To the extent that the City has required  
12 involuntarily for these particular plaintiffs to dedicate a  
13 certain part of their land, there is absolutely no relief  
14 that is set forth in the Fairfax City ordinance that would  
15 provide for it.

16 THE COURT: Let me just ask you the question.  
17 If you went through the process and they came and granted  
18 you no relief based on whatever position it was, what would  
19 be different then than now except that two months would have  
20 gone by?

21 MS. HOSTETLER: The difficulty that we are  
22 having Your Honor, even in trying to frame the special  
23 exception, is that we cannot ask for relief from all six



1 of those provisions under the guise of a special exception.  
2 There would be two of the items could potentially be  
3 granted by the City Council under special exception; the  
4 other four could not.

5 So we would be back in here arguing not only  
6 that we did exhaust our administrative remedies, but the  
7 difficulties we are having is trying to find out what else  
8 we could do.

9 We sat down with the City and tried to find  
10 out in addition to the special exceptions what else we can  
11 do if in fact the City is saying, look you can have what  
12 you want, or you may be able to have what you want if you  
13 go through the proper procedure.

14 And to this date we stand before the court  
15 saying that there has been no procedure outlined to us.

16 THE COURT: Tell me exactly what the special  
17 exception, which is what I think you basically relied on,  
18 could possibly do in order to clear this situation?

19 MS. ALDEN: Your Honor, I don't believe that  
20 the special exception is the only administrative remedy that  
21 is available to the plaintiffs. They could also seek  
22 amendments to the proffers or complete deletion of the  
23 proffers through the amendment process.

25



1           They proffered those proffers in the first  
2 place. They knew the process they had to use by which to  
3 do that. They did that. I cannot imagine there is any  
4 confusion in their minds about how they go about changing  
5 those proffers that they initially proffered, and I suggest  
6 to the court that they have made advances to City Council  
7 through the City Attorney's office trying to seek some type  
8 of declaratory judgment or some kind of opinion from the  
9 City Council as to what the City Council would do if the  
10 plaintiffs filed for exception or if the plaintiffs  
11 engaged in some other course of conduct, and of course the  
12 City Council or any other authority cannot make any kind  
13 of a decision or proffer to them that something will happen  
14 under a certain set of circumstances.

15           I think that the plaintiffs are quite well  
16 aware of the process that they have to go through. They  
17 simply don't want to bother. And because the City Council  
18 will not tell them without any application that they will  
19 give them what they want, they are seeking a reconsideration  
20 of this ruling.

21           THE COURT: What I would tell you is I think  
22 that I was right the first time, but just in case I was not,  
23 I want you to set out for me in memoranda form exactly what





1 the process is that the City sees that would remedy these  
2 six areas, and point in there to me where it is in the  
3 regulation, the specific regulations that you believe apply  
4 to each one, and I will take it under consideration before  
5 I give you an answer yes or no.

6 MS. ALDEN: I will be happy to do that, Your  
7 Honor. And I would point out that we have already indicated  
8 all of those processes to the plaintiffs.

9 THE COURT: Put it down so that I can see it.  
10 If you will give it to me by the end of next week.

11 MS. ALDEN: I will.

12 MS. HOSTETLER: Thank you very much, Your Honor.  
13 (Whereupon, at approximately 10:50 o'clock a.m., the  
14 hearing in this matter was concluded.)  
15  
16  
17  
18  
19  
20  
21  
22  
23



CERTIFICATE OF COURT REPORTER

I, ANITA B. GLOVER, a Certified Verbatim Reporter,  
do hereby certify that I took the notes of the foregoing  
hearing by Stenomask and reduced the same to typewriting;  
that the foregoing is a true record of said hearing to the  
best of my knowledge and ability; that I am neither related  
to nor employed by any attorney or counsel employed by the  
parties thereto; nor financially or otherwise interested  
in the action.

*Anita B. Glover*

ANITA B. GLOVER, CVR-CM  
Court Reporter



V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JACK E. RINKER and  
DAVID E. FELDMAN, Trustees,

and

JUDICIAL DRIVE ASSOCIATES,

Complainants,

v.

THE CITY OF FAIRFAX, et al.,

Defendants.

CHANCERY NO. 97940

1987 JAN 29 PM 4:45  
PATRICK E. GARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

DEFENDANTS' RESPONSE TO COMPLAINANTS' MOTION TO RECONSIDER

COME NOW the Defendants, by counsel, and submit the following information in response to Complainants' Motion to Reconsider and the Court's request for further information.

The subject property is currently zoned C-1(P), i.e., C-1 Office Commercial District with proffered conditions. If the property owners desire to modify the land use or development regulations currently applicable to the subject property, the following administrative procedures are available:

1. If the Complainants seek to amend or delete some or all of the proffered conditions which currently apply to the development and use of the subject property, the proper procedure would be to file an application for proffer amendment in the Office of the Zoning Administrator for the City of Fairfax. Such an application would follow the same process as a rezoning

application which is set forth in Sections 26-5 and -6 of the Code of the City of Fairfax. Copies of these provisions are attached to this Response as Exhibit "A".

The last proffer that currently applies to the subject property is one that is routinely requested by the staff of the Department of Community Development and Planning to clarify that the owners of property who proffer conditions in conjunction with a rezoning application will not subsequently seek a variance from the proffered conditions from the Board of Zoning Appeals. This proffer is not intended to prevent a subsequent application for proffer amendments and has never been interpreted in such a way by the City Council or City staff.

2. If the Complainants seek to modify, with respect to the subject property, any of the bulk or lot area requirements which are generally applicable to properties located in the C-1 Office Commercial District, they may file an application for a special exception in the Office of the Zoning Administrator. In a proper case, the City Council can modify the development regulations pertaining to minimum lot area and lot width, maximum building height, minimum front, side and rear yards, minimum open space, and maximum floor area ratio. The submission requirements for a special exception application and the factors that must be considered by City Council are set forth in Section 26-169(f) of the Code of the City of Fairfax. Copies of these provisions are attached to this Response as Exhibit "B".

WHEREFORE, having fully responded, the Defendants move the Court to deny Complainants' Motion to Reconsider.


CITY OF FAIRFAX  
By Counsel

VERNER, LIIPFERT, BERNHARD,  
McPHERSON AND HAND, CHARTERED  
8280 Greensboro Drive, Sixth Floor  
McLean, Virginia 22102  
(703)749-6000  
Counsel for the Defendants

By:   
for Leslie M. Alden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of January, 1987, a true and accurate copy of the foregoing Defendants' Response to Complainants' Motion to Reconsider was hand-delivered, to Sally Ann Hostetler, Esq., Odin, Feldman & Pittleman, P.C., 10505 Judicial Drive, Fairfax, Virginia 22030, counsel for the Complainants.

  
for Leslie M. Alden

Improvements permitted in front yards, as well as other improvements specifically permitted by this chapter may be located in a rear yard.

**Yard, side:** A yard extending from the front yard to the rear yard between the principal building and the side lot line, measured perpendicular to the building at the closest point to the side lot line.

Improvements permitted in front yards, as well as other improvements specifically permitted by this chapter may be permitted in a side yard.

Words used in the present tense include the future. Words in singular number include the plural number and words in the plural number include the singular number. The word "shall" is mandatory. The word "structure" includes the word "building." Unless otherwise specified, all distances shall be measured horizontally and at right angles to the line in relation to which distance is specified. The word "used" shall be deemed to include designed or intended to be used. (12-7-60, § 2; 2-5-65; 9-7-65; 1-4-66; 11-7-67; 12-5-67; 4-21-70; 11-3-70; 8-17-71; 10-71; 8-1-72; 10-10-72; 11-6-72; 4-8-75; Ord. No. 1975-26; Ord. No. 1979-1, § 1; Ord. No. 1980-5, § 1, 3-11-80; Ord. No. 1980-13, § 1, 7-15-80; Ord. No. 1981-5, § 1, 5-12-81; Ord. No. 1981-10, §§ 1, 2, 7-14-81; Ord. No. 1981-11, §§ 1, 2, 7-14-81; Ord. No. 1981-14, 9-15-81; Ord. No. 1982-16, § 1, 6-1-82; Ord. No. 1982-20, § 1, 6-22-82; Ord. No. 1983-13, §§ 1-4, 2-22-83; Ord. No. 1984-1, § 1, 1-10-84; Ord. No. 1985-24, 8-27-85; Ord. No. 1985-27, 10-8-85; Ord. No. 1986-4, 3-11-86; Ord. No. 1986-5, 3-11-86; Ord. No. 1986-40, 8-26-86)

#### **Sec. 26-5. Procedures for zoning change.**

(a) Application for a change of zoning (amendment to the zoning map) shall be made by the owner, contract owner or optionee of the property on forms prescribed by the zoning administrator, accompanied by a plat bearing a certification date within six (6) months of the date of filing such applications prepared by a certified surveyor, together with a list under oath, sworn to by the applicant, his attorney or agent of the owners, their agent or occupant required by this subsection and subsection (d) hereof, and the fee and costs required under section 26-3. All applications shall be referred to the planning commission and heard by it in a legally advertised public hearing. The proposed rezoning shall be advertised by publication once a week for two (2) successive weeks in a newspaper published in or having general circulation in the city. The term "two (2) successive weeks" shall mean that such notice shall be published at least twice in such newspaper with not less than six (6) days elapsing between the first and second publication. Such notice shall specify the time and place of the hearing at which persons affected may appear and present their views, not less than six (6) days nor more than twenty-one (21) days after the second advertisement shall appear in such newspaper. At least ten (10) days prior to the date of any public hearing before the planning commission on any proposed change in zoning, the property shall be posted by the city and the planning commission shall cause written notice to be sent by registered or certified mail to the owners, their agent or the occupant of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. Written notice as provided in this section shall also be sent by registered or certified mail to the owners, their agent or the occupant, of all abutting property and property

Supp. No. 21

immediately across the street or road from the property affected when such abutting or immediately across the street or road property lies in the county. In the event any hearing is continued at applicant's request or consent, the written notice shall be remailed at the cost of the applicant.

(b) Any application for a change in zoning, including but not limited to an amendment to or variance from the zoning map, shall include as a part of the application a statement on a form approved by the city manager providing complete disclosure of the legal and equitable ownership in any real estate to be affected by the requested change in zoning. In the case of corporate ownership of real estate, the disclosure shall include the names of stockholders, officers and directors and in any case the names and addresses of all the real parties in interest; provided, however, that the requirement of listing the names of stockholders, officers and directors shall not apply to a corporation whose stock is traded on a national or local stock exchange and having more than five hundred (500) shareholders.

The disclosure to be made pursuant to the above paragraph shall be sworn to under oath before a notary public or other official before whom oaths may be taken, and the form approved by the city manager shall so provide.

(c) Any comprehensive plan, or amendment thereto, or other amendment to this chapter shall originate or be referred to the planning commission and heard by it in a legally advertised public hearing. The proposed plan, or amendment thereto, or other amendment to this chapter shall be advertised by publication once a week for two successive weeks in a newspaper published in or having general circulation in the city. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than six days nor more than twenty-one days after the second advertisement shall appear in such newspaper.

(d) After the public hearing before the planning commission, the planning commission shall submit its recommendation to the city council, but no application for a change of zoning, comprehensive plan, or amendment thereto, or other amendment to this chapter shall be acted upon by the city council until advertised by publication once a week for two successive weeks in a newspaper published in or having general circulation in the city. Such notice shall specify the time and place of a public hearing before the city council at which persons affected may appear and present their views, not less than six nor more than twenty-one days after the second advertisement shall appear in such newspaper. At least ten days prior to the date of any public hearing before the city council on any proposed change in zoning, the property shall be posted by the city and the city council shall cause written notice to be sent by registered or certified mail to the owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. Written notice as provided in this section shall also be sent by registered or certified mail to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected when such abutting or immediately across the street or road property lies in the county. In the event any hearing is continued at the applicant's request or consent, the written notice shall be remailed at the cost of the applicant.

(e) Upon the denial of any application filed pursuant to subsection (a) above for a change in zoning, no further application shall be filed pursuant to subsection (a) above within twelve months for change in zoning of any or all of the same property involved in the denied application to the same zoning category applied for in the denied application. The term "zoning category" as used in this section shall mean residential, commercial, apartment or industrial. The applicant may withdraw any application filed pursuant to subsection (a) above at any time before the matter is called on the agenda of the city council for the advertised public hearing. Thereafter, such application may be withdrawn only upon the affirmative vote of a majority of the city council present and voting. The city council may initiate action on a proposed change in zoning by referring said proposal to the planning commission for a legally advertised public hearing whether or not an application for change in zoning of any or all



of the same property to the same zoning category has been denied within the preceding twelve months. (12-7-60, § 3; 2-5-64; 11-12-74; Ord. No. 1977-11.)

*For state law basis of this section, see Code of Va., § 15.1-431.*

**Sec. 26-6. Procedure for acceptance of proffers.**

(a) If an applicant for a change of zoning intends to proffer reasonable conditions as provided herein either the proffers or a statement of intent to submit proffers shall accompany the rezoning application. Failure to submit either shall constitute a binding declaration by the applicant that no proffers will be submitted.

Within sixty days from the date a statement of intent to submit proffers is filed, the applicant may request a conference with the planning director to discuss the nature, scope, effect and/or desirability of such proffers or any other matter relative to the application which is deemed pertinent by the applicant or the planning director. The planning director shall submit a written report of any such conference to the city manager.

(b) No rezoning application which is accompanied by a statement of intent to submit proffers shall be placed on a planning commission agenda until proffers are submitted in writing or a statement is submitted indicating that no proffers will be filed. All proffers filed by someone other than the record owner shall include a written statement signed by the record owner indicating his endorsement of the application. The applicant shall submit all proffers in writing to the planning director not less than twenty-one days prior to the first public hearing of such application before the planning commission. The planning director shall file such proffers with the zoning administrator, and the same shall be attached to and expressly made a part of the application for a change of zoning.

(c) At or before the first public hearing before the planning commission, the planning director shall recommend to the planning commission such proffers in addition to those submitted by the applicant which he deems to be reasonable and proper for the general purpose of promoting the health, safety or general welfare of the public.

(d) The planning commission may also recommend to the city council additional proffers which it deems to be reasonable and proper for the general purpose of promoting the health, safety or general welfare of the public.

(e) Not less than seventeen days prior to the first public hearing before the city council on the application in question, the applicant may submit additional proffers in writing to the planning director; provided, that such additional proffers are among those previously recommended by the planning di-

rector or the planning commission. No new material proffers, other than those recommended by the planning director or the planning commission, shall be submitted by the applicant. The planning director shall file such additional proffers in the same manner as aforesaid.

(f) The city council may refer to the city attorney for review of any proffer or proffers submitted by an applicant prior to adoption thereof by the city council.

(g) In the event that the applicant desires to submit additional proffers or to amend previously submitted proffers otherwise than as provided hereinabove, the application shall be referred to the planning commission for additional public hearings and recommendations, and thereafter the application shall be considered as provided herein. Costs of additional advertising and expenses of remailing additional notice shall be borne by the applicant.

(h) In the event that the city council adopts any such proffers as a part of the enactment of an amendment to the zoning map, the zoning administrator shall indicate the existence of such conditions when correcting the zoning map by affixing the suffix "(p)" to the zoning district designated for the subject property in any such amendment to the zoning map (e.g., C-1(p); RT-6(p); M-1(p)). (Ord. No. 1976-28, 11-9-76; Ord. No. 1979-8, §§ 1, 2; Ord. No. 1980-15, 9-16-80.)

#### Sec. 26-7. Violations; penalties.

Any person violating any provision of this chapter or any provisions of proffers pursuant thereto shall upon conviction be fined not less than ten dollars nor more than one thousand dollars for each offense. Each day such violation continues shall constitute a separate offense. (12-7-60, § 8.)

*For state law basis of this section, see Code of Va., § 15.1-491(e).*

### Article II. District Development Standards and Regulations Generally.

#### Division 1. Generally.

#### Sec. 26-8. Conformity with chapter; enumeration and purpose of districts.

(a) No structure shall hereafter be erected, no existing structure shall be moved, altered, added to or enlarged, nor shall any land or structure be used for any purpose not specifically permitted by this chapter in the district in which the structure or land is located.

**Sec. 26-168. Bulk and lot area requirements.****(a) Lot area requirements:**

- (1) Minimum lot area: Twenty thousand (20,000) square feet.
- (2) Minimum lot width: One hundred (100) feet.

Any nonconforming lot legally established in this zoning district prior to the adoption of lot area requirements may be developed or redeveloped, notwithstanding its nonconforming status.

**(b) Maximum building height:** Five (5) stories above grade, but not more than sixty (60) feet.

**(c) Minimum yard requirements:**

- (1) **Front:** The minimum angle of bulk plane shall be thirty (30) degrees and the front yard shall not be less than twenty-five (25) feet; except that on a street which has a right-of-way of less than fifty (50) feet, the angle of bulk plane and front yard shall be measured from a line established twenty-five (25) feet from the established center line of the road.
- (2) **Side:** No yard required; except:
  - a. Where a side yard is provided, such yard shall be a minimum of ten (10) feet;
  - b. Where contiguous to residentially zoned property, the minimum angle of bulk plane shall be forty-five (45) degrees, and the side yard shall not be less than twenty-five (25) feet.
- (3) **Rear:** No requirement; except, where contiguous to residentially zoned property, the minimum angle of bulk plane shall be forty-five (45) degrees, and the rear yard shall not be less than twenty-five (25) feet.

**(d) Open space requirements:** A minimum of thirty (30) per cent of the gross area of the lot shall be landscaped open space.

**(e) Floor area ratio:**

- (1) The maximum floor area ratio on any lot shall be 0.50.
- (2) If there is a parking structure on the lot, the total of the gross floor area of buildings on the lot and the above grade horizontal surface areas of the parking structure shall not exceed seventy (70) per cent of the lot area. The above grade horizontal surface areas of the parking structure shall be determined from the perimeter of the exterior walls of the structure without deduction for hallways, stairs, ramps, elevators, the thickness of walls, closets, mechanical rooms, columns or similar features. For the purposes of this paragraph, the lot area shall be determined in accordance with the provisions of the definition of "floor area ratio" in section 26-4.

(f) *Special exceptions:* City council may, by special exception, modify the requirements of this section in accordance with the following provisions:

- (1) Special exceptions shall be granted only in accordance with the procedures and limitations established for special use permits in section 26-103.
- (2) Special exceptions shall be granted only if the applicant has clearly demonstrated that, because of the topography of the land, design of the building, location of the building on the lot, perimeter screening, nature of the uses for which the building is designed, and/or other factors, the requested modification of the requirements of this section:
  - a. Will not result in a development which is disproportionate to surrounding land uses in size, bulk, or scale;
  - b. Will not adversely affect any nearby residential areas;
  - c. Will not overburden the community facilities existing or available or result in the obstruction of light and air, danger and congestion in transportation, or increased danger from fire, flood, or other hazards;
  - d. Will not be contrary to the objectives specified in the comprehensive plan.
- (3) Each application for a special exception shall be accomplished by a conceptual development plan, prepared at a scale of not less than one inch equals fifty (50) feet and, unless waived by the zoning administrator, containing the following information:
  - a. Locations and dimensions of lot lines and rights-of-way;
  - b. Locations and dimensions of all structures, driveways, curb cuts, parking and loading spaces and aisles, and median strip openings adjacent to the site;
  - c. Locations, types, and sizes of all on-site landscaping, screening and buffering;
  - d. Sketch architectural elevations of each facade indicating the height of the structures, architectural style, and building materials.
- (4) Requests for the modification of the requirements of this section may be granted in whole, granted in modified form, or denied by the council after considering the requisites listed above. (Ord. No. 1986-5, 3-11-86)

#### **Sec. 26-169. Improvements.**

All uses permitted by right or with a special use permit in this district are subject to the installation of curbs, gutters, storm drainage structures, sidewalks, entrances and exits, and approval thereof by the director of public works. (Ord. No. 1986-5, 3-11-86)

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY, VIRGINIA  
JUL 13 3 25 PM '86

JACK E. RINKER and  
DAVID E. FELDMAN, Trustees,  
and  
JUDICIAL DRIVE ASSOCIATES,  
a Virginia General Partnership,  
Complainants,

vs.

In Chancery No. 97940

THE CITY OF FAIRFAX,  
CITY COUNCIL OF FAIRFAX,  
VIRGINIA, et al.,

Defendants.

COMPLAINANTS' MEMORANDUM IN SUPPORT OF MOTION  
TO RECONSIDER GRANTING OF DEMURRER BASED UPON FAILURE  
TO EXHAUST ADMINISTRATIVE REMEDIES

In Defendants' written response to Complainants' Motion to Reconsider, they fail to cite an administrative remedy that would relieve complainants from the illegal, unconstitutional and involuntary conditions imposed upon Complainants by Ordinance 1986-24, adopted by City Council on May 27, 1986. Instead, Defendants refer this Court to two provisions which they contend will give the Complainants the relief they seek from this Court. However, neither of those provisions are administrative remedies nor do they provide the promised relief. Accordingly, the doctrine of exhaustion of administrative remedies, the premise upon which the Demurrer was sustained, is not applicable to this case

and Complainants should be allowed to seek redress in this Court.

First, Defendants tell the Court that Complainants can file an application for proffer amendment pursuant to City Code Section 26-5 ("Procedure for Zoning Change") and Section 26-6 ("Procedure for Acceptance of Proffers"). Thus, the Defendants are telling Complainants to seek an amendment to the existing unconstitutional ordinance through the zoning change process. However, zoning is a legislative function, not an administrative procedure. Laird vs. City of Danville, 225 Va. 256 (1983); Hurt vs. Caldwell, 222 Va. 91 (1981).

Thus, the Defendants' proposed administrative remedy is, in truth, a legislative act not within the purview of the doctrine that a litigant must exhaust its administrative remedies before seeking relief from this Court. The exhaustion doctrine is to prevent courts from anticipating "circumstances which may never materialize in order to decide a constitutional issue". Gayton Triangle vs. Henrico County, 216 Va. 764, 767 (1976). However, there is no requirement, nor could there be, that a litigant complaining of an illegal, constitutional act must first seek to have that law amended before seeking redress in the courts. It is only where the law itself provides an administrative remedy that could afford the petitioner the exact relief he seeks in court that the doctrine applies. Id.

Moreover, even if the procedure advocated by Defendants to relieve the Complainants of all six improperly imposed conditions were considered an administrative function, such relief is inadequate. In Board of Supervisors vs. Rowe, 216 Va. 517 (1975), the Supreme Court of Virginia held that when the relief sought constitutes a

challenge to the constitutionality of a zoning ordinance in its entirety and only a procedure providing total exemption from that ordinance would vindicate the rights asserted, the administrative procedure would be contrary to the intended spirit and purpose of the challenged ordinance, and therefore, the courts would not require the litigant to resort to the useless administrative act. Here, as in Rowe, the Defendants' suggested procedure is for the Complainants to seek an amendment to the Zoning Ordinance which would eliminate all the specific conditions of the Ordinance. Complainants have pled (and on demurrer it must be taken as true) that the Defendants imposed these conditions on Complainants involuntarily and in violation of the law. Under Rowe, an amendment providing a total exemption of these conditions, which Complainants seek in this Court, is contrary to the spirit of the challenged ordinance and thus the case is right for judicial review without resort to further process.

In addition, land for road right-of-ways are generally obtained either by voluntary dedication or condemnation. Apparently, the Defendants' position is that such a request may be imposed without consent or payment of fair market value, and if the aggrieved landowner is unhappy, then he must, at his own expense, seek an amendment to the law which imposed this illegal condition. Such cannot be, and is not, the law.

Defendants' second proposed available and adequate administrative remedy is also neither adequate nor administrative. Defendants

assert that those illegal conditions which deal with bulk and lot area requirements can be remedied by special exception permit pursuant to Fairfax City Code Section 26-169(f). However, the granting and denying of special exceptions is not an administrative act, but a legislative act. Fairfax County vs. Southland Corp., 224 Va. 517, 522 (1982). Here again, the Defendants mislead the Court in referring to the legislative act as an administrative remedy. Moreover, such a procedure could not, in fact, provide Complainants with the relief they seek inasmuch as only Condition 4 could be corrected by this process. See Gayton Triangle Land, a Company, supra. (Landowner need not apply for variance if challenged restrictions or obligations could not be remedied by variance.)

Thus, in response to the Court's precise question of what administrative process could Complainants resort to obtain the relief requested in the Petition for Declaratory Judgment, not a single administrative remedy has been set forth. Moreover, the process that has been set forth cannot provide these Complainants with the relief they seek from conditions that were imposed upon them improperly and in violation of the law and constitution of this state. Defendants have not cited a single provision of the Fairfax City Zoning Code or a single case which should prohibit these Complainants from seeking relief in this Court. Accordingly, Complainants respectfully request this Court to reconsider its earlier ruling and deny Defendants' Demurrer based upon failure to



exhaust administrative remedies.

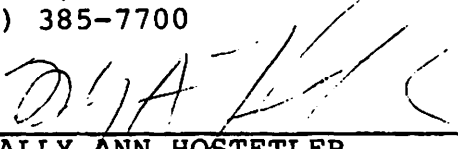
Respectfully submitted,

JACK E. RINKER, Trustee  
DAVID E. FELDMAN, Trustee  
JUDICIAL DRIVE ASSOCIATES

By Counsel

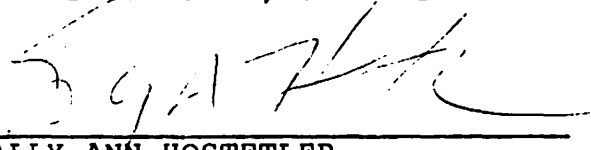
ODIN, FELDMAN & PITTLEMAN, P.C.  
10505 Judicial Drive, Suite 300  
Post Office Box 367  
Fairfax, VA 22030  
(703) 385-7700

By:

  
SALLY ANN HOSTETLER  
Counsel for Complainants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Complainants' Memorandum in Support of Motion to Reconsider Granting of Demurrer Based Upon Failure to Exhaust Administrative Remedies by first class mail, postage prepaid, to Leslie M. Alden, Esquire, of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, 8280 Greensboro Drive, Sixth Floor, McLean, VA 22102, Counsel for Defendants, on this 3rd day of February, 1987.

  
SALLY ANN HOSTETLER

*Ham*  
V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JACK E. RINKER and	)	
DAVID E. FELDMAN, Trustees,	)	
and	)	
JUDICIAL DRIVE ASSOCIATES,	)	
	)	
Complainants,	)	
	)	
v.	)	CHANCERY NO. 97940
	)	
THE CITY OF FAIRFAX, <u>et al.</u> ,	)	
	)	
Defendants.	)	

ORDER

THIS MATTER came to be heard on the 17th day of October, 1986, on Defendants' First Demurrer alleging Complainants' failure to exhaust administrative remedies and on Defendants' Second Demurrer alleging legislative immunity, and after argument of counsel and consideration of the pleadings, exhibits and applicable law; and

IT APPEARING TO THE COURT that the Defendants' first Demurrer should be granted, and therefore consideration of the Second Demurrer is unnecessary; it is therefore

ORDERED that the Defendants' First Demurrer alleging that the Complainants improperly failed to exhaust administrative remedies is sustained as to all Defendants.

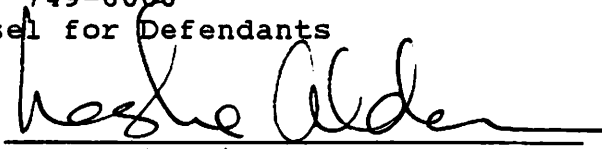
ENTERED this 10<sup>th</sup> day of Feb., 1988.

*Johanna L. Fitzpatrick*  
Johanna L. Fitzpatrick, Judge

I ASK FOR THIS:

VERNER, LIIPFERT, BERNHARD,  
McPHERSON AND HAND, CHARTERED  
8280 Greensboro Drive, Sixth Floor  
McLean, Virginia 22102  
(703) 749-6000  
Counsel for Defendants

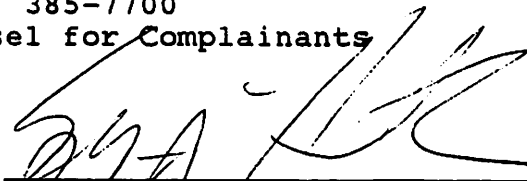
By:

  
Leslie M. Alden

SEEN: *Objected to:*

ODIN, FELDMAN & PITTLEMAN, P.C.  
10505 Judicial Drive  
Post Office Box 367  
Fairfax, Virginia 22030  
(703) 385-7700  
Counsel for Complainants

By:

  
Sally Ann Hostetler

C  
/   
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V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JACK E. RINKER and )  
DAVID E. FELDMAN, Trustees, )  
and )  
JUDICIAL DRIVE ASSOCIATES, )

Complainants, )

v. )

CHANCERY NO. 97940

THE CITY OF FAIRFAX, et al., )

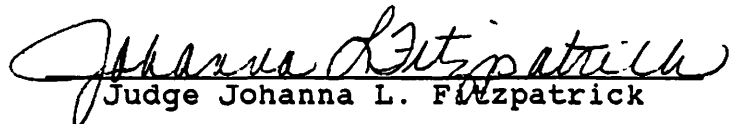
Defendants. )

ORDER

THIS MATTER came on to be heard upon the Motion to Reconsider Granting of Demurrer Based upon Failure to Exhaust Administrative Remedies filed by the Complainants in this case, and after hearing argument of counsel and consideration of the pleadings, it appearing to the Court that the Motion should be denied; it is therefore

ORDERED that the Motion to Reconsider Granting of Demurrer Based upon Failure to Exhaust Administrative Remedies is hereby denied.

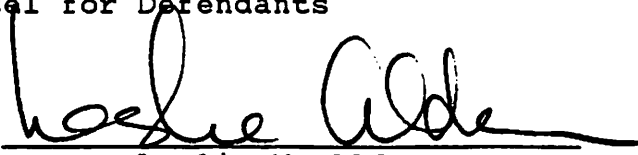
ENTERED this 2<sup>nd</sup> day of March, 1987.

  
Judge Johanna L. Fitzpatrick

I ASK FOR THIS:

VERNER, LIIPFERT, BERNHARD,  
McPHERSON AND HAND, CHARTERED  
8280 Greensboro Drive, Sixth Floor  
McLean, Virginia 22102  
Counsel for Defendants


By:

  
Leslie M. Alden

SEEN: *And objected to*

ODIN, FELDMAN & PITTLELMAN, P.C.  
10505 Judicial Drive, Suite 300  
Post Office Box 367  
Fairfax, Virginia 22030  
(703) 385-7700  
Counsel for Complainants

By:

  
Sally Ann Hostetler

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JACK E. RINKER, et al.,

Complainants,

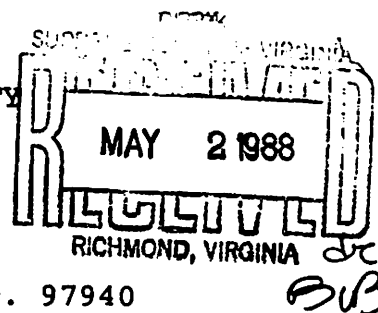
v.

THE CITY OF FAIRFAX, et al.,

Defendants.

\*  
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\*  
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\*  
\*

CHANCERY NO. 97940



FINAL ORDER

THIS MATTER came to be heard upon the Demurrer of all the Defendants to dismiss the Bill of Complaint for Declaratory Judgment and Injunctive Relief for failure of Complainants to exhaust their administrative remedies, and upon the Demurrer of the Defendant City Council and the individual named Defendants on the basis of immunity; and after argument of counsel, consideration of the Fairfax City Ordinances, and review of the pleadings;

IT APPEARING TO THE COURT that the Defendants' Demurrer for failure of the Complainants to exhaust their administrative remedies should be granted; and that this Court need not consider the second Demurrer, and

It FURTHER APPEARING TO THE COURT that the Final Order previously entered needs to be clarified, it is therefore

ORDERED, ADJUDGED and DECREED that the Demurrer for failure to exhaust administrative remedies is granted as to all Defendants and this case is dismissed.

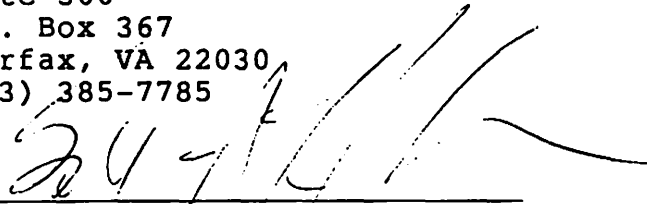
ENTERED this 18<sup>th</sup> day of April, 1988.

AND THIS CAUSE IS FINAL.

*Johanna L. Fitzpatrick*  
Johanna L. Fitzpatrick, Judge

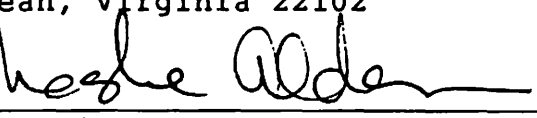
SEEN AND OBJECTED TO EXCEPT AS  
TO FORM:

Odin, Feldman & Pittleman, P.C.  
10505 Judicial Drive  
Suite 300  
P.O. Box 367  
Fairfax, VA 22030  
(703) 385-7785

By:   
Sally Ann Hostetler  
Counsel for Complainants

WE ASK FOR THIS:

VERNER, LIIPFERT, BERNARD,  
McPHERSON and HAND, CHARTERED  
8280 Greensboro Drive, Sixth Floor  
McLean, Virginia 22102

By:   
Leslie M. Alden  
Counsel for Defendants

1273M

A COPY TESTE:  
WARREN E. BARRY, CLERK

By:   
Deputy Clerk

**AN ORDINANCE TO AMEND AND REORDAIN THE ZONING ORDINANCE OF THE CITY OF FAIRFAX BY AMENDING THE ZONING MAP TO RECLASSIFY FROM C1-L (LIMITED OFFICE DISTRICT) TO C-1 (COMMERCIAL DISTRICT) WITH PROFFERS, PROPERTY IDENTIFIED AS CITY OF FAIRFAX TAX MAP 57-4-((2))-33.**

WHEREAS, Jack E. Rinker, Trustee & David E. Feldman, Trustee have submitted application No. Z-707-86-2 requesting a preliminary site plan for the property identified above; and specifically described as follows:

Beginning at a point lying in a southerly line of Judicial Drive, said point being a corner with the land of Ronald W. Tydings and Kerron W. Bryan, Trustees and also being the northwesterly corner of the land herein described; then from the point of beginning and running with said southerly line of Judicial Drive S 69°25'20" E 186.47 feet to a point; thence S 28°14'40" W, and the same course continued with a line of the land of Musolino and Feldman, a total distance of 265.48 feet to a point lying in a line of the land of Robert A. Cox; thence said line of the land of Robert A. Cox N 66°38'21" W 151.23 feet to a corner with Section One, Ardmore and the land of aforesaid Ronald W. Tydings and Kerron W. Bryan, Trustees N 20°34'40" E 255.76 feet to the point and place of beginning, containing 1.0066 acres of land.

WHEREAS, the City Council has carefully considered the application, the recommendation of the Planning Commission and staff, and the testimony received at public hearing; and

WHEREAS, the City Council has determined that the proposed rezoning is proper and in accordance with the pertinent considerations set forth in the Codes of Virginia and of the City of Fairfax;

NOW, THEREFORE, BE IT ORDAINED that the above described property be rezoned from C1-L (limited commercial district) to C-1 (commercial district) subject to the following reasonable conditions proffered by the property owners:

1. The exterior of the office building and parking deck shall be brick and masonry.
2. All uses shall be restricted to those permitted by right in the C1-L District.
3. The height of the parking lot lighting fixtures shall not exceed fifteen (15) feet, with light directed downward and inward to the site.
4. At the time of development, a ten (10) foot wide dedication and construction of curb, gutter, sidewalk and road widening shall be provided across the full frontage of Judicial Drive.
5. The height of the building shall not exceed 48 feet.
6. The Owners and/or their successors agree not to apply to the Board of Zoning Appeals or other public authorities for waivers or variances from the provisions of these proffers.

The Zoning Administrator of the City is hereby directed to modify the Zoning Map to show the changes in the zoning of these premises, including the existence of the conditions, and the Clerk of this Council is directed to transmit duly certified copies of this ordinance to the applicant, Zoning Administrator and to the Planning Commission of this City as soon as possible.



This ordinance shall take effect immediately upon its passage by the City Council of the City of Fairfax, Virginia.

Planning Commission Hearing:

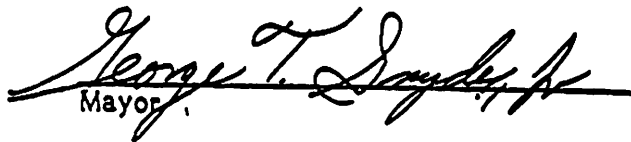
March 10, 1986

City Council Hearing

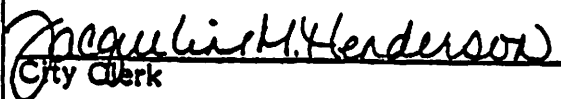
May 27, 1986

Adopted by City Council:

May 27, 1986

  
Mayor

ATTEST:

  
City Clerk

**Article XIX. Board of Zoning Appeals**

- § 26-219. Established; appointment of members.
- § 26-220. Powers and duties.
- § 26-221. Applications for variances.
- § 26-222. Appeals to board.
- § 26-223. Procedure on appeal.
- § 26-224. Certiorari to review decision of board.
- § 26-225. Authority of city council to grant certain variances.

**ARTICLE I. IN GENERAL****Sec. 26-1. Division of city into districts; zoning maps incorporated into chapter.**

The city is hereby divided into districts as shown on the official zoning map filed in the office of the city manager. The zoning map and schedule and all the explanatory matter thereon are hereby made a part of this chapter. (12-7-60, § 1)

**Sec. 26-2. Enforcement of chapter.**

This chapter shall be enforced by a zoning administrator appointed by the city manager. No land or structure shall be changed in use and no structure shall be erected, altered, added to or enlarged, or moved, until the zoning administrator shall have certified that the plans and intended use of the structure and the location thereof are in conformity with this chapter. The zoning administrator shall not approve any application when under this chapter prior approval of the planning commission, board of zoning appeals, board of architectural review or health officer is required, until the approval of such planning commission, board of zoning appeals, board of architectural review or health officer is obtained. (12-7-60, § 3; 4-6-65)

**Sec. 26-3. Fees required.**

The applicant for each occupancy permit or rezoning application shall submit to the zoning administrator a fee in accordance with the schedule of fees adopted by city council. (12-7-60, § 3; 11-12-74; Ord. No. 1986-26, 6-10-86)

**Sec. 26-4. Definitions.**

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section:

rector or the planning commission. No new material proffers, other than those recommended by the planning director or the planning commission, shall be submitted by the applicant. The planning director shall file such additional proffers in the same manner as aforesaid.

(f) The city council may refer to the city attorney for review of any proffer or proffers submitted by an applicant prior to adoption thereof by the city council.

(g) In the event that the applicant desires to submit additional proffers or to amend previously submitted proffers otherwise than as provided hereinabove, the application shall be referred to the planning commission for additional public hearings and recommendations, and thereafter the application shall be considered as provided herein. Costs of additional advertising and expenses of remailing additional notice shall be borne by the applicant.

(h) In the event that the city council adopts any such proffers as a part of the enactment of an amendment to the zoning map, the zoning administrator shall indicate the existence of such conditions when correcting the zoning map by affixing the suffix "(p)" to the zoning district designated for the subject property in any such amendment to the zoning map (e.g., C-1(p); RT-6(p); M-1(p)). (Ord. No. 1976-28, 11-9-76; Ord. No. 1979-8, §§ 1, 2; Ord. No. 1980-15, 9-16-80.)

#### Sec. 26-7. Violations; penalties.

Any person violating any provision of this chapter or any provisions of proffers pursuant thereto shall upon conviction be fined not less than ten dollars nor more than one thousand dollars for each offense. Each day such violation continues shall constitute a separate offense. (12-7-60, § 8.)

*For state law basis of this section, see Code of Va., § 15.1-491(e).*

### Article II. District Development Standards and Regulations Generally.

#### Division 1. Generally.

#### Sec. 26-8. Conformity with chapter; enumeration and purpose of districts.

(a) No structure shall hereafter be erected, no existing structure shall be moved, altered, added to or enlarged, nor shall any land or structure be used for any purpose not specifically permitted by this chapter in the district in which the structure or land is located.

(b) There are hereby established the following districts in the city for the general purposes indicated below:

(1) R-1. This district is established to provide areas for single-family residences with a minimum lot size of twenty thousand square feet.

(2) R-2. This district is established to provide areas for single-family residences with a minimum lot size of twelve thousand five hundred square feet.

(3) R-3. This district is established to provide areas for single-family residences with a minimum lot size of nine thousand five hundred square feet.

(4) R-T. This district is established to provide for single-family development and, under certain conditions, the development of townhouses. Townhouse development should occur where development will be consistent with the master plan, and involves the reuse of land where older structures are removed or as a transitional use of vacant land where a substantial portion of the property has common boundary with an I, C or M district. It is intended that any townhouse development permitted should result in high

quality living units to promote the purposes set forth in section 15.1-489, Code of Virginia, as amended, offering optimum preservation of natural land form and foliage and the clustering of usable open space by the clustering of dwelling units. Clusters of dwelling units should be so arranged to achieve an intimate, internal relationship. Site plans shall be prepared in sufficient detail to permit judgment of compliance with the purpose of this chapter.

(5) RT-6 This district is intended to maintain the character of low-density residential areas by providing for the development of town-houses with adequate open space to serve the needs of its residents.

(6) M-1 This district is established to provide areas for multi-family residences of the garden or low rise type or for retirement homes.

(7) PD The planned development district has been designed to promote a mixture of commercial and residential uses on appropriate tracts of more than five acres within the city, and to encourage creativity and innovation in development. The district provides a wider range of options for land use mixes through the offer of design flexibility in return for a higher degree of review and regulatory authority over development by the city council in the insurance of essential standards of public health, safety, morals, and general welfare. The over-all objective is to encourage land uses within the city which are more beneficial to the city and to the developer than are permitted under other existing zoning districts; to encourage development which improves public health, convenience or welfare and to foster future development of the city to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational activities; that the needs of industry and business be recognized in future growth; that residential areas be provided with healthy surroundings for family life; and that the growth of the community be consonant with the efficient and economical use of public funds.

The more specific objectives include:

Beneficial use of land. The failure to develop land in a manner compatible with and beneficial to the community of which it is a part is both widespread and widely lamented. Contributing factors have included:

The exclusive zoning of large areas for one specific purpose or another, but prohibiting the possibility of mutually beneficial mixtures, thus forcing unnecessary demands for transportation between areas and the consequent costs on both the city and the developer.

Zoning and development practices which have divided rather than united the city and the developer in a common cause which is the betterment of the community at large.

This district has been designed to bring the city and the developer together to promote the planning and development of land uses in a manner which best serves the interests of both parties.

Coordinated provision for services. Unless the demand for services generated by a development can be met by existing facilities, considering all other sources of demand which can be foreseen, new facilities must be planned for, budgeted and constructed to meet the demand as it develops. Failure to do so creates serious and inexcusable problems for both the new users and the prior users of those services.

This district has been designed to make the development of land and the provision of services a coordinated venture on the part of both the city and the developer.

This district has been designed to encourage mixed developments which are self-supporting with regard to tax-supported services; to reduce the necessity for automobile traffic by encouraging people to live and work in the same area; to encourage innovative mixes of both residential and commercial development which invite both day and evening as well as work day and weekend usage by area residents and businessmen; and to insure that usable play areas and other open relief are provided within a development.

(8) CPD The commercial planned development district has been designed to promote a mixture of commercial and residential uses, with commercial predominating, on appropriate tracts of one acre or more within the city. The district provides a wider range of options for developers through the offer of mixed land use in return for greater review and regulatory authority by the city council to insure essential standards of public health, safety, morals, and general welfare. The overall objective is to recognize the need for offices and shops in future growth; to provide residential areas with compatible surroundings; and to guide community growth consonant with the efficient and economical use of private land and with careful attention to the impact of such growth on adjacent developments, both existing and planned, and on the city's existing and proposed public facilities.

The more specific objectives include:

Beneficial use of land. The failure to develop land in a manner compatible with and beneficial to the community of which it is a part is both widespread and widely lamented. Contributing factors have included:

The exclusive zoning of large areas for one specific purpose or another, but prohibiting the possibility of mutually beneficial mixtures, thus forcing unnecessary demands for transportation between areas and the consequent costs on both the city and the developer.

Zoning and development practices which have divided rather than united the city and the developer in a common cause which is the betterment of the community at large.

This district has been designed to bring the city and the developer together to promote the planning and development of land uses in a manner which best serves the interests of both parties.

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This district has been designed to encourage mixed developments which are self-supporting with regard to tax-supported services; to reduce the necessity for automobile traffic by encouraging people to live and work in the same area; to encourage innovative mixes of both residential and commercial development which invite both day and evening as well as work day and weekend usage by area residents and businessmen; and to ensure that usable play areas and other open relief are provided within a development.

- (9) *C1-L*. This district is established to provide limited office development with low intensity. The intent is to permit a transitional district between residential and commercial areas with office buildings which in height and character are compatible with residential development and which will not adversely affect any nearby residential community.
- (10) *C-1*. This district is established to provide areas for offices for business, governmental and professional uses.
- (11) *C-2*. This district is established to provide areas for general business establishments and related activity.
- (12) *C-3*. This district is established to provide areas for business establishments of curb service or drive-in nature and related activity.
- (13) *I-1*. This district is established to provide areas for light industrial uses.
- (14) *I-2*. This district is established to provide areas for general industrial uses. (12-7-60, § 3; 4-17-63; 4-6-65; Ord. No. 1979-1, § 2; Ord. No. 1981-15, § 1, 9-15-81)

#### **Sec. 26-9. Use of required open space for other structures.**

No open space or lot required by this chapter for a structure shall, during the life of that structure, be occupied by or counted as open space for another building or structure. (12-7-60, § 3)

#### **Sec. 26-10. Lot situated on district boundaries.**

Where a district boundary line divides a lot in single ownership of record at the time such line is adopted, the regulations for the less restrictive portion of such lot shall extend not more than

thirty days from the date of the final written decision which adversely affects the rights, duties or privileges of the person engaging in or proposing to engage in land disturbing activities. (Ord. No. 1975-30, 7-1-75.)

Sec. 26-102. Penalties, injunctions and other legal actions.

(a) A violation of this division shall be deemed a misdemeanor and upon conviction shall be subject to a fine not exceeding one thousand dollars for each violation.

(b) The director of public services may apply to the circuit court of the County of Fairfax for injunctive relief to enjoin a violation or a threatened violation of this division, without the necessity of showing that there does not exist an adequate remedy at law.

(c) The city attorney shall, upon request of the director of public services, take legal action to enforce the provisions of this division.

(d) Compliance with the provisions of this division shall be prima facie evidence in any legal or equitable proceeding for damages caused by erosion, siltation or sedimentation that all requirements of law have been met and the complaining party must show negligence in order to recover any damages. (Ord. No. 1975-30, 7-1-75.)

Division 13. Special Use Permits.

Sec. 26-103. R-1, R-2, R-3, RT, RT-6, M-1, PD and CPD districts.

Any special use permit required in the R-1, R-2, R-3, RT, RT-6, M-1, PD and CPD districts shall be issued only by the city council in accordance with the procedure hereinafter set out:

(a) An applicant for a special use permit under this section shall make application to and on forms provided for that purpose by the zoning administrator, and the application shall be accompanied by a fee of fifty dollars.

(b) Each such application within thirty days after filing shall be placed upon an agenda of a city council meeting and the city council shall schedule a public hearing upon the application, and shall cause to be advertised by publication once a week for two successive weeks in a newspaper published in or having general circulation in the city a notice of the time and place of the public hearing. This hearing shall be not less than six days nor more than twenty-one days after final publication of the notice. At least ten days prior to the date of any such public hearing the property shall be posted by the city and the applicant shall notify all adjacent and at least three additional neighboring property owners by certified mail.



- (c) The city council is hereby empowered to grant special use permits for the districts specified above when in the judgment of the city council such special use permit shall be in harmony with the general purpose and intent of this chapter and the official zoning map, such use will not be objectionable by reason of smoke, dust, odor, vibration or sight and will not tend to affect adversely the use of neighboring property or the welfare of persons living and working in the neighborhood of the proposed use.
- (d) The city council in considering any application for a special use permit for the districts specified above shall consider the following factors and standards: The size and shape of the lot on which the use is proposed, access to streets for both vehicular and pedestrian traffic, taking into consideration future increase of vehicular traffic, lighting, noise, traffic, sight, smoke, dust, odor, vibration and other factors which may affect the serenity of the neighborhood, the safety and movement of vehicular traffic upon adjacent streets, the safety of children living in the area, the location height and design of buildings, walls, fences and landscaping proposed and overall impact of the proposed use upon the development and use of adjacent land.
- (e) The city council shall have the power, except as otherwise provided, to impose conditions upon the issuance of any special use permit and to require bond acceptable to the bond committee of the city council of any applicant to insure compliance with such conditions. No occupancy permit shall be issued for any such use until all conditions of the special use permit have been complied with. In imposing such conditions, the city council shall be guided by the standards and considerations as set forth in (c) and (d) above.
- (f) No order of the city council permitting the erection, alteration or use of a building shall be valid for a period exceeding twelve (12) months, unless building permit(s) for the erection of each of such buildings is obtained, construction is begun within said period and construction proceeds to completion in accordance with said permit(s). In the event said order does not involve the construction of any building, the order of the city council permitting the use shall not be valid for a period exceeding six (6) months unless such use is established within six (6) months. (12-7-60, § 11; 12-17-74)

**State law reference—**Authority of city council to grant special use permits, Code of Va., § 15.1-491(c).

**Sec. 26-104. C1-L, C-1, C-2, C-3, I-1 and I-2 districts.**

(a) The board of zoning appeals is hereby empowered to grant special use permits for the C1-L, C-1, C-2, C-3, I-1 and I-2 districts except where the city council has expressly reserved for itself authority to grant special use permits. In considering an application for a special use permit, the permit issuing authority shall consider whether such special use permit is in harmony with the general purpose and intent of this chapter and the official zoning map.

(b) Applications for special use permits may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the zoning administrator in accordance with rules adopted by the board. The application and

accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board. No such special use permit shall be authorized except after notice and hearing as required by section 15.1-431 of the Code of Virginia, as amended. The zoning administrator shall also transmit a copy of the application to the planning commission which may send a recommendation to the board or appear as a party at the hearing.

(c) The board of zoning appeals in considering any application for a special use permit shall consider the following factors and standards: The size and shape of the lot on which the use is proposed, access to streets for both vehicular and pedestrian traffic, taking into consideration future increase of vehicular traffic, lighting, noise, traffic, sight, smoke, dust, odor, vibration and other factors which may affect the serenity of the neighborhood, the safety and movement of vehicular traffic upon adjacent streets, the safety of children living in the area, the location, height and design of buildings, walls, fences and landscaping proposed and overall impact of the proposed use upon the development and use of adjacent land.

(d) The board of zoning appeals shall have the power, except as otherwise provided, to impose conditions upon the issuance of any special use permit and to require bond acceptable to the bond committee of the city council of any applicant to insure compliance with such conditions. No occupancy permit shall be issued for any such use until all conditions of the special use permit have been complied with. In imposing such conditions, the board shall be guided by the standards and considerations as set forth in subsection (c) above.

(e) No order of the board permitting the erection, alteration or use of a building shall be valid for a period exceeding twelve (12) months, unless building permit(s) for the erection of each of such building is obtained, construction is begun within said period and construction proceeds to completion in accordance with said permit(s). In the event said order does not involve the construction of any building the order of the board permitting the use shall not be valid for a period exceeding six (6) months unless such use is established within six (6) months. (12-7-60, § 5; Ord. No. 1982-16, § 2, 6-1-82)

**State law reference**—Authority of board of zoning appeals to grant special use permits, Code of Va., §§ 15.1-495(f), 15.1-496.

**Sec. 26-157. Improvements.**

All uses permitted by right or with a special use permit in this district are subject to the installation of curbs, gutters, storm drainage structures, sidewalks, entrances and exits, and approval thereof by the director of public services. (12-7-60, § 11; 12-17-74.)

**Sec. 26-158. Variance.**

Where by reason of exceptional shape or area, exceptional topographic conditions, conditions created by a condemnation, or other extraordinary or exceptional situation or condition, wherein the application of any requirement of this chapter would result in peculiar and exceptional practical difficulty or hardship upon the developer or owner of such property, the planning commission may recommend and the city council shall have the power to grant a variance from any requirement of this chapter so as to relieve such difficulties or hardships, provided such relief can be granted without substantially impairing the intent and purpose of this chapter. The board of zoning appeals shall have no authority to vary the provisions of this chapter as they relate to the C-P-D district. (12-7-60, § 11; 12-17-74.)

**Article XI. C1-L Limited Office District.****Sec. 26-159. Permitted uses--By right.**

The following uses are permitted by right: Banks and offices for business and professional, including medical, legal, insurance, real estate, and similar offices. (12-7-60, § 11; 12-17-74.)

**Sec. 26-160. Same--With special use permit.**

The following uses may be permitted subject to securing a special use permit as provided in division 13 of article II:

(a) Banks with drive-in teller windows.

(b) Schools of general instruction and nursery schools complying with the provisions of division 9 of article II. (12-7-60, § 11; 12-17-74; Ord. No. 1976-15, 5-18-76.)

**Sec. 26-161. Uses prohibited.**

All uses not specifically permitted are prohibited. (12-7-60, § 11; 12-17-74.)

**Sec. 26-162. Building type.**

(a) All new buildings erected under the provisions of this article shall be built to resemble a series of townhouses, with any parking under the buildings being fully enclosed.

The front and rear facades of a townhouse style building shall be divided vertically so as to appear to be a series of no more than seven (7) individual townhouse units, each being no more than thirty (30) feet wide. The vertical sections of the front and rear facades shall be delineated by differing the building materials, colors, or roof lines, or any combination of these, and the front facade shall present a staggered appearance with no more than two (2) abutting vertical sections having the same front yard setback, the minimum variation being two (2) feet.

(b) Any single-family dwelling unit, legally constructed in a residential district and intended and used as a single-family residence, may thereafter be converted to office use, in the event that the property on which it is located shall have been rezoned to the C1-L district; provided, however, that any additions or modifications to the structure which are part of or subsequent to its conversion to commercial use shall not increase the gross floor area of the building by more than fifteen (15) per cent.

(c) Compliance with the provisions of this section shall be determined by the zoning administrator upon recommendation of the board of architectural review. (12-7-60, § 11; 12-17-74; Ord. No. 1981-15, § 2, 9-15-81; Ord. No. 1983-13, § 5, 2-22-83; Ord. No. 1984-17, 11-13-84)

**Sec. 26-163. Height, area, setback, lot width, floor area ratio, open space and maximum building size.****(a) *Maximum height:***

- (1) No wall of any structure shall be exposed more than three (3) stories, but in no event shall the height of any building measured from the top of the highest exposed external wall or from the top of any screening for rooftop mechanical equipment, whichever is higher, exceed thirty-five (35) feet. For the purpose of this section, the exceptions to height limitations contained in section 26-12(a) shall not apply.
- (2) No mechanical equipment shall be placed on the roof unless recessed below the roofline so that it is concealed and not visible from ground level or dwellings. Any mechanical equipment placed on the ground outside the building must be adequately screened to harmonize with the general appearance and character of the building; if the lot borders residential property, no mechanical equipment may be located within twenty-five (25) feet of adjacent residential property, and all such equipment must be screened for sound as well as aesthetics.

**(b) *Lot area:***

- (1) Minimum lot area: None.
- (2) Maximum lot area: Three (3) acres.

(3) Average lot area: None.

(c) *Building restriction line (brl):*

- (1) **Front:** Twenty-five-foot setback except that on a street which has a right-of-way of less than fifty (50) feet the "brl" shall be fifty (50) feet from the established center line.
- (2) **Corner lots:** The "brl" shall apply to all streets and the side setback shall be applied to the remaining property line(s).
- (3) **Between the street and the building restriction line,** no fence, wall, structure, automobile parking area, unloading area or other impervious area except permitted signs, sidewalks, driveways for ingress and egress shall be permitted nor shall any merchandise be displayed. Such building restriction areas shall be landscaped pursuant to a plan approved by the planning director.

(d) *Setbacks:*

- (1) **Side:** Twelve (12) feet; except where contiguous to residential property where twenty-five-foot setback required.
- (2) **Rear:** None; except where contiguous to residential property where twenty-five-foot setback required.

(e) *Lot width:* Minimum lot width at the building restriction line: None.

(f) *Floor area ratio:* Maximum 0.40.

(g) *Open space:* At least thirty (30) per cent of the lot area shall be landscaped open space.

(h) *Maximum building sizes:* No townhouse style building or converted single-family residential structure, together with any additions or modifications thereto, shall exceed seventeen thousand five hundred (17,500) square feet in gross floor area. (12-7-60, § 11; 12-17-74; Ord. No. 1979-20; Ord. No. 1981-15, § 3, 9-15-81; Ord. No. 1983-12, §§ 1, 2, 2-22-83; Ord. No. 1983-13, §§ 6, 7, 2-22-83; Ord. No. 1984-17, 11-13-84)

#### **Sec. 26-164. Improvements.**

All uses permitted by right or with a special use permit in this district are subject to the installation of curbs, gutters, storm drainage structures, sidewalks, entrances and exits, and approval thereof by the director of public services. (12-7-60, § 11; 12-17-74; Ord. No. 1979-20; Ord. No. 1981-15, § 3, 9-15-81)

**ARTICLE XII. C-1 OFFICE COMMERCIAL DISTRICT\*****Sec. 26-165. Purpose and intent.**

This district is established to provide areas for offices for business, government and professional uses, and uses accessory or complementary thereto. (Ord. No. 1986-5, 3-11-86)

**Sec. 26-166. Permitted uses—By right.**

- (a) Financial institutions without drive-in facilities.
- (b) Offices.
- (c) Churches, synagogues and other places of worship.
- (d) Funeral homes.
- (e) Hospitals.
- (f) Nursing home.
- (g) Medical and dental clinics.
- (h) Schools of special instruction, provided that the practice of the particular trade taught is a permitted use.
- (i) Municipal parking facilities.
- (j) Ancillary amusement machine uses provided that no more than two (2) such machines shall be permitted.
- (k) The following accessory uses, provided that they are located completely within an office building and the aggregate of all such uses does not occupy more than twenty (20) per cent of the gross floor area of the office building:
  - (1) Barbershop or beauty shop;
  - (2) Florist;
  - (3) Gift shop;
  - (4) Display and sales of scientific, electronic or medical equipment of a type not customarily retailed to the general public;
  - (5) Pharmacies or medical supply services;
  - (6) Optical stores and services;

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\*Editor's note—Ord. No. 1986-5, adopted March 11, 1986, deleted Art. XII in its entirety and enacted a new Art. XII in lieu thereof. Said former Art. XII, consisting of §§ 26-165—26-169, pertained to regulations for the C-1 Commercial District, and was derived from an ordinance of Dec. 7, 1960, § 11; an ordinance of Dec. 17, 1974; Ord. No. 1976-15, adopted May 18, 1976; Ord. No. 1976-17, adopted June 15, 1976; Ord. No. 1981-11, §§ 8—10, adopted July 14, 1981; Ord. No. 1982-16, §§ 3, 4, adopted June 1, 1982; and Ord. No. 1984-1, § 2, adopted Jan. 10, 1984.

Supp. No. 20, Rev.

- (7) Newsstands;
- (8) Photographic and photocopy services;
- (9) Restaurants, refreshment areas;
- (10) Health clubs. (Ord. No. 1986-5, 3-11-86)

**Sec. 26-167. Same—With special use permit.**

(a) The following uses are permitted with a special use permit issued by city council in accordance with the provisions of section 26-103:

- (1) Dancing area within a restaurant, provided that:
  - a. The dancing area, together with any entertainment area, does not exceed twenty-five (25) per cent of the gross floor area of the restaurant; and
  - b. The lot on which the restaurant is located is no closer than two hundred (200) feet from residentially zoned property measured from nearest property lines, unless waived by city council;
  - c. Dancing shall be restricted to a dancing area which shall be clearly demarcated and of a size proportionate to the seating capacity of the restaurant.
- (2) Entertainment area within a restaurant, provided that:
  - a. The entertainment area, together with any dancing area, does not exceed twenty-five (25) per cent of the gross floor area of the restaurant; and
  - b. The lot on which the entertainment area is located is no closer than two hundred (200) feet from residentially zoned property measured from nearest property lines, unless waived by city council.
- (3) Financial institutions with drive-in facilities.

(b) The following uses are permitted with a special use permit issued by the board of zoning appeals in accordance with the provisions of section 26-103:

- (1) Public utility facilities, excluding property yards.
- (2) Lodge halls, private clubs, public benefit associations.
- (3) Commercial tennis courts.
- (4) Television and radio stations without towers.
- (5) Nursery schools, schools of general instruction.
- (6) Ancillary amusement machine uses:
  - a. From three (3) to five (5) amusement machines may be permitted in any establishment with one thousand (1,000) or more square feet of floor area open to the public.
  - b. The floor area occupied by amusement machines shall be no more than five (5) per cent of the floor area open to the public. (Ord. No. 1986-5, 3-11-86)

(e) Costs shall not be allowed against the board, unless it shall appear to the court that it acted in bad faith or with malice in making the decision appealed from.

*For state law basis of this section, see Code of Va.,  
§ 15.1-497.*

**Sec. 26-225. Authority of city council to grant certain variances.**

The city council hereby reserves to itself the right to authorize any variance from the height limitation found in any zoning district. (12-7-60, § 5; 5-15-73.)



## ASSIGNMENTS OF ERROR

I. The Trial Court erred in ruling that an aggrieved land owner must attempt to correct, by legislative process, an ordinance which unconstitutionally restricts the use of his land, before that land owner may seek redress in the courts.

II. The Trial Court erred in ruling that an aggrieved land owner must attempt to correct, by incomplete legislative process, an ordinance which impermissibly imposes involuntary, confiscatory conditions on the uses of the land, including the taking of land for a right of way without just compensation, before that landowner may seek redress in the courts.