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On the Brief

TABLE OF CONTENTS

	<u>PAGE</u>
Middlesex County Board of Supervisors'	
July 5, 1983 Minutes, Extracts.....	1
July 18, 1983 Letter from James H.	
Ward, Jr. to Randolph Reed.....	9
July 19, 1983 Letter from Randolph	
Reed to Lunsford T. Nuckols, Jr.....	10
Amended Petition for a Writ of Mandamus.....	11
Demurrer and Motion to Separate Parties.....	27
March 26, 1984 Motion to Dismiss.....	30
March 26, 1984 Transcript of Hearing,	
Extracts.....	32
April 16, 1984 Motion to Dismiss and Affidavit.....	38
Order to Substitute T. Booker Moore	
for William Foster.....	42
Order to Nonsuit Marshall D. Beard and	
Nancy M. Beard.....	44
Order to Nonsuit Bernard L. Fletcher and	
Pansy L. Fletcher.....	46
Order to Nonsuit Count III of the Amended	
Complaint.....	48
June 6, 1984 Transcript of Hearing.....	50
July 23, 1984 Final Order and Decree.....	82
Assignments of Error.....	85

P. O. Box 428
Saluda, Virginia 23149



(804) 758-4330

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APR 17 1984

County of Middlesex

BOARD OF SUPERVISORS

TO WHOM IT MAY CONCERN:

We certify and authenticate, pursuant to section 8.01-390 of the Code of Virginia, as amended, that the attached documents being extracts of the minutes of the Middlesex County Board of Supervisors for [July 5, 1983 and the ordinance adopted at such meeting] attached hereto consisting of [7] pages are true copies of records of the Middlesex County Board of Supervisors found in the general files of said board.

Patricia N. Sparks, Secretary
Middlesex County Board of
Supervisors

Stephen Gadinis,
County Administrator
Middlesex County Board of
Supervisors

COMMONWEALTH OF VIRGINIA)

COUNTY OF MIDDLESEX

Sworn to and subscribed before me this 12th day of April, 1984.

Notary Public

My commission expires: 3-17-85

The following is a written account of the Middlesex County Board of Supervisors meeting, held on Tuesday, July 5, 1983. The topic of discussion centered on a proposed county airport hazard ordinance.

Mr. Handley: Mr. Ward has one item to discuss on the agenda.

Mr. Ward: This is in reference to the public hearing on Thursday night about the public ordinance for Hummel Field. There were some statements made about the discussion concerning the Commonwealth Attorney's office and the Attorney Generals office. My only report to that is from the inception, we have been working with John McCarthy, Assistant Attorney General, who has been dealing with this, and as I understand is very important in writing the Attorney Generals opinion.

I have talked with John McCarthy, and another gentlemen who deals with county ordinances-I do not have his name with me. As I stated that night, as I have stated the last month or two its nothing cut and dry about this type of ordinance. I can't guarantee that if it goes to court it will be approved, and I can't guarantee that it will be shot down either. It depends on the opinion that we are being dealt with according to Mr. McCarthy wasn't so much I don't think he wrote it very ambiguously but he didn't really respond because he felt like it was a case by case determination. I was wondering when I actually had discussions with Mr. McCarthy after the other night I thought maybe I had made a mistake so I can't say any thing about it and I couldn't do anything else so I called John and discussed with John my best recollections of what took place at the meeting, of course I told him that I had not had time to review the tapes and maybe there had been some things said that I could not remember or didn't get quite right because there was so much hollering and screaming. So I asked John was he willing to put something in writing. He was not only willing to put it in writing, he worked late on Friday and had his secretary work late on Friday and then hand delivered it to the main post office so it would be here today. In fact, Mr. McCarthy had told me that if not for the fact that he had planned a vacation sometime in the future, he would have been here today to discuss this. Again this is his opinion it is not a formal opinion from the Attorney Generals Office which was not requested by you anyway. This was a request to do something in writing from the Attorney Generals Office. That what we have got, and I would be glad to read it to you.

Dear Jimmy:

You have inquired whether a recently proposed ordinance regulating the height of structures within a certain radius of a county's airport would, when applied to an adjacent piece of residential property on which the erection of a windmill has been proposed (though no construction has commenced) constitute an unconstitutional taking of property without due process. You further informed me that in a recent meeting of the board of

supervisors held, inter alia, to consider the ordinance in question an attorney for the landowner, speaking on the landowner's behalf, publicly conceded that erection of the windmill was sought for the express purpose of forcing the county to make a decision on the airport's future location.

Mr. Ward: And as I told John and some of you today, I have not gone back and listen to the tapes. But to the best of my recollection, was that this board was forced to make a decision on the airport. Charlie (Revere) told me today that he thought somebody questioned our integrity not integrity but responsibility whether you were being irresponsible or not for not making a decision. I thought that's when it came up when he said you all had to do something, that you had to press the issue.

(Continuance of letter)

(Already, of course, I had been informed that the FAA had issued a hazard determination with respect to the proposed windmill.)

You also inquired as to whether the county has authority to enact such an ordinance. While legal scholars do differ on this questions, it is my opinion that the better view is that the counties do have authority to enact such an ordinance in the interests of the safety of their citizens. At you earlier request, the ordinance was reviewed by myself and a colleague and in its current, reviewed form was not found to be objectionable.

Mr. Ward: He reiterated there, the way I feel, what I said to you. This is his opinion (McCarthy). Everybody's got a different opinion, like Charlie (Revere) was talking about at the end of the meeting where he upheld the fact that they filed an application would it have an affect? Yes, that someone's opinion and Charlie (Revere) said everyone has an opinion. This was to support not so much, the advocacy of the ordinance, but what I had told you that my conversation had been with these people.

(Continuance of letter)

Returning to the factual situation you now present, it appears from the statement made by counsel for the landowner that erection of the windmill is proposed for a purpose of remote to the economically viable use of the property itself and, instead, is proposed for the express purpose of forcing a political decision. In not entirely dissimilar contexts cases have held that one who erects a structure in proximity to an airport for the spiteful purpose of interfering with airport operations lacks the proper standing to challenge an ordinance prohibiting, inter alia, such a structure. While I could not on the facts given me along conclude that spite was the motivation in this instance, the factual situation you present

still appears sufficiently akin to those in the cases referred to to dictate the same result. Accordingly, I am of the opinion that the landowner in question, having decided to erect the windmill for a purpose remote to any apparent concern for the economically viable use of his land, would lack standing to challenge the ordinance's application to the proposed windmill.

In general terms, whether application of a zoning ordinance to a particular structure constitutes a taking of property without due process involves a balancing test. The two factors to be weighted are the public's valid interests and the landowner's interests in the economically viable uses of his land. The public interests are in the health, safety, and welfare of its citizens. Inasmuch, as the FAA has formally determined that such a structure would constitute a hazard to aviation, the public's interest in safety must weigh heavily indeed. On the other hand, the landowner's concession through counsel in this instance would indicate that the economically viable uses of the land are not genuinely involved.

The mere fact that the ordinance limits in some degree the development of the land does not make its application unconstitutional where it does not restrict the best use of the land or destroy any of the more fundamental incidents of ownership.

As you have informed your board, there may, of course, arise other situations where you would determine that, absent just compensation, the ordinance could not bar the erection of certain structures whose erection is sought in accordance with the genuine desire to develop land for its highest and best use.

Trusting this is responsive to your inquiry, I am with best wishes,

Sincerely,

John McCarthy
Assistant Attorney General

Mr. Ward: He dictated that and sent it to the trial. It does not change anything that I told you previously about the ordinance itself one way or another. If I could say there was no questions with the ordinance, I would. Just like this gentlemen said the other night, that positively if it couldn't be done he wouldn't be done anyway. As far as the ordinance is concerned, this is the opinion of Mr. McCarthy's letter. It is not a formal opinion of the Attorney General's Office. You know what happened on land use, when Judge Holiday and somebody was talking about the Attorney General's opinion, Judge Holiday said "he is a lawyer." They researched the case while giving opinions, so.

Mr. Handley: It is my understanding, Dale, correct me if I am wrong, we had the public hearing at the June 30 meeting. The motion was that we could take this matter up when we received correspondence from the Assistant Attorney General. So with that we could bring this up and discuss it today.

Mr. Burton: Right.

Mr. Handley: Is it the feeling of the board to bring this up for discussion today to further discuss the proposed airport hazard ordinance.

Mr. Jessie: Does the board have to pass the ordinance?

Mr. Handley: We can, if you so desire.

Mr. Jessie: I say lets discuss it and get this hazard ordinance out of the way, so another hazard won't come up.

Mr. Revere: The original intent was that, and I think that time as we discussed the other night was a factor. The fact that I think we have a hearing next Friday, do you not?

Mr. Crittenden: No, this Friday.

Mr. Revere: I think maybe Fred made the motion...

Mr. Crittenden: My motion at that meeting was that we should have something in writing from the Attorney General's Office, and this is what Mr. Ward has gotten done. I think that answers the questions that I surfaced, and motion was passed at that time.

Mr. Handley: It cleared up some questions.

Mr. Crittenden: This is exactly right.

Mr. Ward: There were some questions that had not been resolved and will not be resolved until after... Not only that, but I would like to review the tapes and speak to Mr. McCarthy about things we never had a chance to see about.

Mr. Revere: That doesn't have any effect on the ordinance itself.

Mr. Handley: All we are addressing right now is the ordinance. Whatever happened at that meeting we are not addressing at this time. That's up to Jimmy.

Mr. Crittenden: I know Jimmy told us this, but at the time Jimmy didn't have information at the time, but I was concerned about the fact, particularly after listening to the gentlemen

who spoke representing the people in the airport area, that maybe from their indication we shouldn't do it. But now we have this in writing, it is certainly wide open, as I see it.

Mr. Ward: I think the only thing this has resolved is the issue that will be or could be signed by the board.

Mr. Crittenden: Yes.

Mr. Ward: And it appears, based on a certain set or circumstances we could go either way.

Mr. Crittenden: The same thing could come up...

Mr. Revere: And actually I think that was talking about responsibility that we were not acting responsively to something that had already been decided as far as what this gentlemen concerns were. But thats why we have courts and...

Mr. Ward: According to what Mr. McCarthy said he did remember that. He thought was not done ambiguously so much, but done in a context that it had to be decided on the facts of the issue. Thats what he stated right here he could see situations where this may not be found to be...okay. And the only other determination we are ever going to find out is not from Mr. Bailes's opinion as to what something is, but when the judge makes a decision.

Mr. Handley: Thats something we have no control over. We have to do what we think is the best interest for all citizens of the county.

Mr. Revere: It all boils down to whats in the best interest of the public safety in this particular interest.

Mr. Ward: Do you all have on record what you thought was necessary to keep the airport as safe as possible.

Mr. Handley: We had quite a lengthy discussion last Thursday on this do you wish to continue this discussion or do you wish to make a motion on this matter now. I think we have just about answered all the questions on this matter now.

Mr. Jessie: I make a motion to pass the ordinance now.

Mr. Revere: Second.

Mr. Handley: All in favor raise your right hand. Unanimous.

AN ORDINANCE TO REGULATE THE CONSTRUCTION, ERECTION OR INSTALLATION OF HAZARDOUS STRUCTURES IN THE VICINITY OF HUMMEL FIELD, PURSUANT TO SECTIONS 15.1-504, 15.1-505, and 15.1-510 OF THE CODE OF VIRGINIA OF 1950, AS AMENDED.

BE IT ORDAINED by the Board of Supervisors of Middlesex County, Virginia as follows:

Section 1 Short Title. This ordinance shall be known and may be cited as the Middlesex County Airport Hazard Ordinance.

Section 2 Policy and Purpose. It is hereby found that an obstruction has the potential for endangering the lives and property of users of Hummel Field, and the lives and property of occupants of land in its vicinity; that an obstruction may affect existing and future use and operation of Hummel Field; and that an obstruction may reduce the size of areas available for landing, take-off, and maneuvering of aircraft, thus tending to destroy or impair the utility of Hummel Field and the public investment therein. Accordingly, it is declared:

1. That the creation or establishment of a hazardous structure has the potential of being a public nuisance and may injure the region served by Hummel Field;
2. That it is necessary in the interest of public health, public safety, and general welfare that the creation or establishment of hazardous structures be prevented; and
3. That the prevention of those obstructions should be accomplished by the exercise of the police power; and the immediate operation of the provisions of this ordinance is necessary for the protection and preservation of public health, public safety, and general welfare.

Section 3 Definitions. As used in this ordinance, unless the context requires otherwise, the following words and terms shall have the meanings indicated:

HUMMEL FIELD: The airport located at Topping in Saluda Magisterial District, Middlesex County, Virginia, owned and operated by the County of Middlesex, Virginia.

STRUCTURE: An object, including a mobile object, constructed, erected, or installed by man, including, without limitations, buildings, towers, windmills, cranes, and smoke stacks.

HAZARDOUS STRUCTURE: Any structure which by virtue of its height, design, or location is determined by the Federal Aviation Administration to constitute an obstruction to air navigation under Federal Aviation Regulations, Part 77.

NONCONFORMING USE: Any pre-existing structure which is inconsistent with the provisions of this ordinance.

Section 4 Regulation Against Hazardous Structures. Except as otherwise provided in this ordinance, no hazardous structure shall be constructed, erected, installed, or permitted within an eight-tenths (0.8) of a mile radius of Hummel Field, measured from the center point of the runway.

Section 5 Nonconforming Uses. This ordinance shall not be construed to require the removal, lowering, or other altering of any structure in existence as of the effective date of this ordinance.

Section 6 Enforcement. In addition to, and not in limitation of, the Board of Supervisors of Middlesex County may institute any action or proceedings which it deems appropriate to enjoin, prevent, or restrain any construction, erection, or any installation of a hazardous structure in violation of this ordinance.

Section 7 Penalties. Any violation of this ordinance shall constitute a misdemeanor and be punishable by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than twelve (12) months, or both. Each day of violation continuing to exist shall constitute a separate offense.

Section 8 Severability. If any court of competent jurisdiction shall adjudge any provision of this ordinance to be invalid, such judgement shall not affect any other provision of this ordinance not included in the judgement. If any court of competent jurisdiction shall adjudge invalid the application of any provision of this ordinance to a particular structure, such judgement shall not affect the application of the provision to any other structure not specifically included in the judgement.

Section 9 Effective Date. This ordinance shall be in full force and effect from and after its adoption by the Middlesex County Board of Supervisors.



COMMONWEALTH of VIRGINIA

JAMES H. WARD, JR.
COMMONWEALTH'S ATTORNEY
COUNTY OF MIDDLESEX
POST OFFICE BOX 356
SALUDA, VIRGINIA 23149
(804) 758-3391

July 18, 1983

Mr. Randolph Reed
Building Inspector
Middlesex County
Saluda, Va. 23149

RE: Appeal Case 83-4, Mr. & Mrs. L. T. Nuckols, Jr.
v. Middlesex County Board of Building Appeals

Dear Randy:

Even though the State Building Code Technical Board has reversed the decision made by our local Board of Appeals and yourself as to the above captioned, I do not feel you should issue a building permit for the following reasons:

1. As instructed by the Board of Supervisors of this County, I am to consider appealing the decision in the local Circuit Court as well as any other possible legal remedies;

2. To grant such a permit would be in violation of the recently enacted ordinance to regulate the construction, erection, or installation of hazardous structures in the vicinity of Hummel Airport.

If you have any questions relative to this matter, please do not hesitate to contact me.

With best regards,

James H. Ward, Jr.

JHWjr:cr



County of Middlesex

BUILDING OFFICIAL
P.O. Box 423
Saluda, Virginia 23149
(804) 758-4305

July 19, 1983

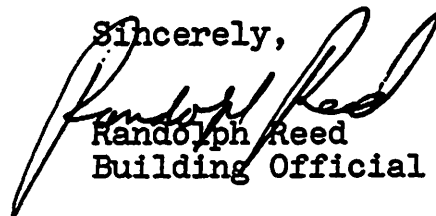
Mr. L. T. Nuckols
Topping, Virginia 23169

Dear Mr. Nuckols:

In reference to your request for a permit to construct a windmill on your property at Topping near the Airport.

I have been instructed by the Commonwealth's Attorney that the structure would be in violation of the County's Hazardous Structure Ordinance, therefore I must deny the permit.

Sincerely,



Randolph Reed
Building Official

RR/mt

NOV 16 1983
V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR.
and
ELIZABETH S. NUCKOLS
P. O. Box 101 A
Topping, Virginia 23169

MARSHALL D. BEARD
and
NANCY M. BEARD
P. O. Box 112
Topping, Virginia 23169

and

BERNARD L. FLETCHER
and
PANSY M. FLETCHER
Box 87
Topping, Virginia 23169

Complainants

v.

In Chancery No. 2276

WILLIAM FOSTER, Successor to
RANDOLPH REED
Acting Building Official
Middlesex County
Saluda, Virginia

and

BOARD OF SUPERVISORS
OF MIDDLESEX COUNTY, to wit:
A. CARLSON HANDLEY, JR.
DAVIDSON J. GILL
FRED S. CRITTENDEN
CHARLES R. REVERE
FRANK JESSIE

Defendants

AMENDED PETITION FOR A WRIT OF MANDAMUS
[OR IN THE ALTERNATIVE FOR DAMAGES RESULTING
FROM THE IMPROPER TAKING OF PETITIONERS' PROPERTY]

TO THE HONORABLE JUDGES OF SAID COURT:

JURISDICTION

This is an action for mandamus to compel performance of a

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MIDDLESEX CO., VA
FILED
11-14-83
Donna B. Lawley

ministerial act by a public official, to wit the issuance of a building permit. Jurisdiction for this action is conferred on the court by Section 17-123, and Section 8.01-184, et seq., Code of Virginia, 1950 as amended. Complainants are without any adequate remedy at law. Complainants are similarly aggrieved by the action of defendants, and thus joinder is proper. In the event that mandamus is denied, complainants seek damages for the resulting taking and/or damaging of their property.

PARTIES

1. (a) Lunsford T. Nuckols, Jr. and Elizabeth S. Nuckols, husband and wife, (hereinafter Nuckols) are the owners of that certain parcel of real estate located in Pinetop Magisterial District, Middlesex County, Virginia, near Topping, Virginia, lying on Meacham's Creek, containing 24.67 acres, more or less, which was acquired by deed duly recorded in the Clerk's office of said county on May 13, 1971. For further description, reference is made to said deed.

(b) Marshall D. Beard and Nancy M. Beard, husband and wife (hereinafter Beard) are the owners of that certain parcel of real estate located in Pinetop Magisterial District, Middlesex County, Virginia, near Locklies, Virginia containing 16.75 acres, more or less, which was acquired by deed duly recorded in the Clerk's office of said county on May 22, 1972. For further description, reference is made to said deed.

(c) Bernard L. Fletcher and Pansy M. Fletcher, husband and wife (hereinafter Fletcher), are the owners of that certain parcel of real estate located in Pinetop Magisterial District, Middlesex County, Virginia, near Topping, Virginia, containing 8.00 acres, more or less, which was acquired by deed duly recorded in the clerk's office of said county on August 1, 1967. For further description, reference is made to said deed.

2. At all times material herein, Randolph Reed, (hereinafter Reed) was the duly appointed, qualified and acting Building Official in the County of Middlesex, Virginia, representing the Local Building Department as that term is defined in Section 36-97(10) of the Code of Virginia, 1950, as amended [Uniform Statewide Building Code] (hereafter Building Code). Reed resigned as the Building Official on September 30, 1983. His current successor in office is William Foster, Acting Building Official.

3. Board of Supervisors of Middlesex County (hereinafter Board) is the duly elected governing body of Middlesex County, Virginia. The members are A. Carl Handley, Jr., Davidson J. Gill, Fred S. Crittenden, Charles R. Revere and Frank Jessie.

EXHIBITS

All exhibits referred to herein are attached to the original petition filed August 11, 1983, and are incorporated herein by reference.

COUNT I

(COMPLAINANTS' VESTED RIGHTS)

4. Pursuant to the Building Code the Building Official (formerly Reed, now Foster) is authorized and charged with the duty and task of issuing building permits upon application for such permit properly made and presented to him in his official capacity. Such permit is "properly made" when it is

1. typed or printed on the form provided to applicants by the Building Official.

2. accompanied by a set of building or structure plans that indicate that the proposed building or structure conforms to the Building Officials and Code Administrators [BOCA] Code.

3. accompanied with a check for the application fee (or other credit arrangements are made with the Building Official for payment of the fee).

5. (a) On or about February 4, 1983, Nuckols submitted to Reed an application for a permit to erect a new structure on their property, to wit, a tower to support a wind generated turbine (windmill). Said application was made on the form furnished by Reed, and was "properly made." The application was accompanied by a working plan, and specifications as required, all of which indicated that the proposed structure complied with the BOCA Code. A copy of Nuckols' application is attached hereto and marked Exhibit 1(a).

(b) On or about February 22, 1983, Beard submitted

to Reed an application for a permit to erect a new structure on their property, to wit, a tower to support a wind generated turbine (windmill). Said application was made on the form furnished by Reed, and was "properly made." The application was accompanied by a working plan, and specifications as required, all of which indicated that the proposed structure complied with the BOCA Code. A copy of Beard's application is attached hereto and marked Exhibit 1(b).

(c) On or about February 22, 1983, Fletcher submitted to Reed an application for a permit to erect a new structure on their property, to wit, a tower to support a wind generated turbine (windmill). Said application was made on the form furnished by Reed, and was "properly made." The application was accompanied by a working plan, and specifications as required, all of which indicated that the proposed structure complied with the BOCA Code. A copy of Fletcher's application is attached hereto and marked Exhibit 1(c).

6. (a) On April 13, 1983, Reed DENIED Nuckols' application. A copy of Reed's letter of denial is attached as Exhibit 2(a).

(b) On June 16, 1983 Reed DENIED Beard's application. A copy of Reed's letter of denial is attached as Exhibit 2(b).

(c) On June 23, 1983 Reed DENIED Fletcher's application. A copy of Reed's letter of denial is attached as Exhibit 2(c).

7. Reed's reason for the denials was not based on any deficiency in the plans or specifications. At the time the

applications were filed there were no zoning or other public or private restrictions that would be violated by the erection of such structures (windmills) as described by said applications and plans. At the time said applications were filed, there were no violations or contemplated violations of any Building Code requirements or of any other ordinances or lawful requirements of said County in connection with the erection and maintenance of such structures.

8. Nuckols appealed the denial to the Local Building Code Board of Appeals on March 28, 1983, as prescribed by §118.7 of the Building Code. See letter and memorandum in support of appeal with exhibits attached as Exhibit 3(a) and 3(b). (Because of Reed's inactions and letter dated February 22, 1983, a copy of which is attached as Exhibit 3(c), Nuckols' notice of appeal was filed before Reed's letter of denial (Exhibit 2(a)) was received.)

9. On April 13, 1983, the Local Building Appeals Board conducted a hearing on Nuckols appeal and denied the appeal. See minutes of Middlesex County Appeals Board attached as Exhibit 4.

10. On April 14, 1983 Nuckols appealed the decision of the Middlesex County Board of Building Appeals to the State Building Code Technical Review Board (hereinafter State Board). See letter dated April 14, 1983 attached as Exhibit 5. The review by the State Board represented the final administrative procedure in such matters.

11. The State Board initially scheduled a hearing on

Nuckols' appeal for May 20, 1983. See letter dated May 3, 1983 attached as Exhibit 6(a). On May 17, 1983, at the request of the Commonwealth Attorney of Middlesex County, counsel for Reed, the hearing was continued. See letter attached as Exhibit 6(b). The hearing on the appeal was rescheduled for July 8, 1983. See letter attached as Exhibit 6(c).

12. Sometime before the July 8 hearing, to wit, June 16, 1983 and July 5, 1983 respectively, Beard and Fletcher contacted Reed by letter and notified Reed that they intended to appeal the denial of their application for a permit. See Exhibits 7(a) and 7(b). On June 21, 1983, Reed responded to Beard by referring Beard to the Nuckols appeal and requested that Beard defer his appeal to the local Board since there was an appeal pending before the State Board identical to Beard's application, and stated that he (Reed) would "abide by their decision." See letter dated June 21, 1983 attached as Exhibit 7(c). It is submitted that Reed would have responded in a similar fashion to Fletcher if time permitted.

13. Nuckols' appeal was heard by the State Board on July 8, 1983 and the decision of the Middlesex County Board of Building Code Appeal was REVERSED, effective July 8, 1983. See Opinion dated July 13, 1983, attached as Exhibit 8. This decision has the effect of a directive to the Building Official to issue the permit.

14. On July 18, 1983 Complainants Nuckols, Beard and

Fletcher requested Reed to issue the permits for which they had previously applied. Reed refused to do so. See letters dated July 19 and 20, 1983 attached as Exhibits 9(a) 9(b) and 9(c).

15. Reed's stated basis for refusing to issue the permits is that the Commonwealth Attorney notified him that, in his opinion, a new County Ordinance enacted on the eve of the hearing before the State Board (July 5) precluded such action. See letter from Ward to Reed dated July 18, 1983 attached as Exhibit 10(a) and copy of Ordinance attached as Exhibit 10(b). However, complainants' applications were filed approximately five months before the instant ordinance was enacted, and they had performed all required tasks, and complied with all the legislative requirements for the procurement of such permits. But for the improper refusal of the Building Official to issue the permits, the structures would have been erected prior to the enactment of the ordinance. The ordinance itself recognizes that pre-existing structures are exempt from its authority. Section five of the ordinance states:

This ordinance shall not be construed to require the removal, lowering, or other altering of any structure in existence as of the effective date of this ordinance.

15(a). Nuckols, Beard, and Fletcher have made demands upon the Board of Supervisors of Middlesex County to not enact the questioned ordinance because it was invalid and otherwise made demands to obtain their permits to construct buildings

on their land, as well as other demands for compensation as required by Va. Code §15.1-554.

16. Complainants submitted their applications for building permits with bona fide site plans and have diligently pursued their remedies in good faith, incurring substantial expenses in preparing plans for their respective structures, including but not limited to architectural and engineering fees, contractors' expenses for on site work as well as stand-by fees, and legal and other expenses. In addition, complainants have incurred substantial legal expenses in pursuing and exhausting their administrative remedies through the various appeals described herein.

17. Because of the above described actions, complainants have acquired vested rights to the building permits described in the applications properly filed, notwithstanding the subsequently enacted ordinance. That is, for purposes of construing section five of the ordinance, complainants are in the position of having the structures in question legally "in existence." Any delay in carrying out the intention of complainants to erect said structure will cause further expense.

18. Complainants are without a plain and adequate remedy in the ordinary course of law to secure the issuance of such permits, and cannot lawfully proceed to erect said structures without such permits; the Building Official (now Foster) refuses and withholds the issuance of such permits in violation of his legal duty as hereinbefore set forth, and to the great injury and damage to complainants.

WHEREFORE, complainants pray that this court take jurisdiction under the Declaratory Judgment Section of the Code of Virginia and under its inherent equity powers; that it determine the rights of the complainants and determine that complainants have a vested right to their respective building permits and issue a writ of mandamus to defendant Foster, Reed's successor in office, or his successor, to issue or cause issuance to complainants of their respective building permits, and if a writ to show cause is issued, that then, on final hearing, an order be made that such building permits be issued and complainants further pray that they be awarded their attorneys' fees, court costs, and such other and further relief as to the court may seem just and proper.

COUNT II

[INVALIDITY OF ORDINANCE ENACTED JULY 5, 1983]

In the event that complainants vested rights are not recognized then, pleading in the alternative, complainants allege that the ordinance is invalid and in support, represent as follows:

A.

19. The allegations of paragraphs 1 through 16 are incorporated herein by reference as if stated fully.

20. The ordinance in question (Exhibit 10(b)) was originally proposed and noticed for a public hearing at the regular meeting of the Board on June 30, 1983. At that hearing

the validity of the ordinance was questioned by several persons in attendance, including one of the attorneys for complainants herein. As a result, the Board lay on the table ("tabled") generally any further consideration of the proposed ordinance, and directed the Commonwealth Attorney to secure an opinion from the Attorney General of Virginia on the validity of the proposed ordinance. No date was set for further consideration of the ordinance. In fact, the Commonwealth Attorney publicly stated that he did not see any way he could get an opinion from the Attorney General before July 8, 1983, the date set for the Appeal before the State Board.

21. On July 1, 1983 the Commonwealth Attorney contacted one of the Assistant Attorney Generals, ex parte, and requested a letter from him on the validity of the proposed ordinance.

22. On July 5, 1983, without further notice to the public, the Board enacted the ordinance which is attached as Exhibit 10(b). The action of the Board in passing the ordinance should be declared null and void and the ordinance invalid for failure to reasonably provide fair and adequate notice to the public. The concerned citizens relied on the statements and information publicly stated at the June 30, 1983 meeting such that they were taken by complete surprise when the Board considered this ordinance at its meeting on July 5. The Board considered and voted on the ordinance at its meeting on July 5, providing absolutely no notice to the public of its intentions

to vote on the proposed ordinance, in order to thwart the interests of the public including complainants herein.

B.

23. Virginia follows the "Dillon Rule," which requires that no county or municipality may enact any legislation unless there is specific statutory authority for same.

24. The ordinance states on its face that the authority for its enactment is Section 15.1-504, 15.1-505 and 15.1-510, Code of Virginia, 1950, as amended (Code). Section 15.1-504 is a general grant of power to counties prescribing the procedure to be followed in the adoption of ordinances, and Section 15.1-505 establishes the penalty for the violation of any such ordinance. Section 15.1-510 is a grant by the Virginia General Assembly to any county in Virginia to the right to exercise certain police powers.

25. Notwithstanding the attempt by the Board to label the ordinance an exercise of its police powers, the ordinance is a zoning ordinance. As such, it must be enacted in compliance with Sections 15.1-486 et seq. of the Code.

26. The Board failed to comply with the procedural requirements of the Code in enacting the ordinance. Furthermore, the ordinance is an attempt to spot zone or zone a specific section of the county, in violation of statutory and constitutional constraints.

27. The action of the Board of Supervisors in zoning said properties was arbitrary and capricious and thus null and void;

it had no relationship to the health, safety, and welfare of the county; the sole reason for enacting a zoning law was to prevent the issuance of building permits to complainants for a windmill.

28. The defendants, in denying complainants' applications are improperly relying on an invalid ordinance. As a zoning ordinance, it was enacted improperly and is thus illegal; as an exercise of police power, it is arbitrary and capricious and likewise illegal.

29. Complainants are without a plain and adequate remedy in the ordinary course of law to secure the issuance of such permits, and cannot lawfully proceed to erect said structures without such permits; the Building Official (now Foster) refuses and withholds the issuance of such permits in violation of his legal duty as hereinbefore set forth, and to the great injury and damage to complainants.

WHEREFORE, pleading in the alternative, complainants pray that this court take jurisdiction under the Declaratory Judgment Section of the Code of Virginia and under the inherent equity powers; that it determine the rights of the complainants and that it determine that the ordinance passed on July 5, 1983 was arbitrary and capricious, in violation of the proper procedures for zoning legislation and lacking in due process notification to the public and therefore null and void ab initio, and that it further determine that said action insofar as it attempted to deprive complainants of their vested rights

was null and void and contrary to the Constitution of Virginia and of the United States of America, and that it issue such writs, orders or injunctions as may be necessary to carry out its findings and specifically that it direct the issuance of building permits to complainants in accordance with law; and that they be awarded their attorneys' fees, court costs, and such other relief as to the court may seem just and proper.

COUNT III

Pleading in the alternative, complainants allege

30. The allegations of paragraphs 1-29 are incorporated herein by reference as if stated fully

31. In the event that this court (a) upholds the validity of the ordinance (Exhibit 10(b) and (b) denies that complainants have a vested right to their respective building permits, complainants' property will have effectively been taken and or damaged by Middlesex County. Any such taking or damaging when done for "the public use" must provide the property owners affected with just compensation. Art. 1, Sec. 11, Virginia Constitution.

32. The stated purpose of the ordinance is for the use and benefit of the public.

33. The Board has not provided complainants with any compensation for the taking or damaging of their property for public use.

WHEREFORE, complainants pray that this court declare that

the Board has taken or damaged their respective properties and schedule a hearing to determine the amount of damages to be awarded along with their attorneys' fees and costs and such other and further relief as to the court seems just.

LUNSFORD T. NUCKOLS

ELIZABETH S. NUCKOLS

MARSHALL D. BEARD

NANCY M. BEARD

BERNARD L. FLETCHER

PANSY L. FLETCHER

William B. Cummings, Esquire
 112 South Pitt Street
 Post Office Box 1177
 Alexandria, Virginia 22313
 (703) 836-7997

and

Conrad B. Maddox, Jr., Esquire
 309 Marston Lane
 Richmond, Virginia 23221
 (804) 353-5176

Counsel for Complainants

STATE OF VIRGINIA
CITY/COUNTY OF _____

Subscribed and sworn to before me this date by LUNSFORD T. NUCKOLS, JR. and ELIZABETH S. NUCKOLS.

Date: _____

Notary Public

My commission expires: _____

STATE OF VIRGINIA
CITY/COUNTY OF _____

Subscribed and sworn to before me this date by MARSHALL D. BEARD and NANCY M. BEARD.

Date: _____

Notary Public

My commission expires: _____

STATE OF VIRGINIA
CITY/COUNTY OF _____

Subscribed and sworn to before me this date by BERNAND L. FLETCHER and PANSY M. FLETCHER.

Date: _____

Notary Public

My commission expires: _____

Certificate of Service

I hereby certify that a true copy of the foregoing amended petition was hand delivered/mailed first class postage prepaid, this _____ day of November, 1983 to James H. Ward, Jr., Esquire, Post Office Box 356, Saluda, Virginia 23149, Counsel for defendants.

RECEIVED
DEC 07 1983

VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR. et al

Plaintiffs,

v.

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Build-
ing Official
Middlesex County
Saluda, Virginia

and

BOARD OF SUPERVISORS OF
MIDDLESEX COUNTY, to-wit:
A. CARL HANDLEY, JR.
DAVIDSON J. GILL
FRED S. CRITTENDEN
CHARLES R. REVERE
FRANK JESSIE

Defendants

DEMURRER

AND

MOTION TO SEPARATE PARTIES

CHANCERY # 2276

DEMURRER

Come now, Defendants, WILLIAM FOSTER, Successor to RANDOLPH REED, Acting Building Official of Middlesex County, Virginia, and THE BOARD OF SUPERVISORS OF MIDDLESEX COUNTY, to-wit: A. CARL HANDLEY, JR., DAVIDSON J. GILL, FRED S. CRITTENDEN, CHARLES R. REVERE and FRANK JESSIE, by counsel, and demur to the petition filed herein and say that it is not sufficient in law and ought not to be prosecuted on the following grounds:

(1) The petition appears to seek recovery against both Defendants by requesting a Declaratory Judgment and Mandamus, both of which are Equitable remedies and further the petition seeks damages founded upon an alleged taking of Plaintiff's property, a purely Legal remedy, all of which constitutes a misjoinder of causes of action which bar Plaintiffs from recovery in this action.

(2) There is a misjoinder of Defendants based on the following:

A. The Declaratory Judgment Act and Mandamus are solely directed against the Building Official to which the Board of Supervisors is not a party; and,

B. The damage cause of action is solely directed against the Board of Supervisors to which the Building Official is not a party; and,

Thus, the Defendants named in the petition are separate legal entities among whom the relationship necessary to permit joinder is lacking.

(3) There is a misjoinder of Plaintiffs, based on the following:

A. Each application and the actions taken thereon would of necessity be based on different facts and circumstances; and,

B. The pleadings fail to show that the Plaintiffs Fletchers have exhausted their administrative remedies; and,

C. The laws of Virginia, neither make provisions for nor sanction class action suits; and,

Thus the Plaintiffs named in the petitioners suit are separate legal entities among whom the relationship necessary to permit joinder is lacking.

(4) The pleadings are vague, argumentative, misleading and contain counsel's conclusions and emphasis and are as such improper.

(5) Even assuming, arguendo the facts alleged in the pleadings to be true, the action of the Defendant, the Board of Supervisors does not constitute a taking which is compensable as the promulgation of the ordinance in question is a valid exercise of police powers.

(6) Virginia Law poses no burden on the Defendant, the Board of Supervisors to give notice of a meeting to take subsequent action on a matter formerly discussed at a duly advertised public meeting, especially as the meeting at which said action was taken was a regularly called monthly meeting.

MOTION TO SEPARATE PARTIES

Come now, Defendants, WILLIAM FOSTER, Successor to RANDOLPH REED, Acting Building Official of Middlesex County, Virginia, and the BOARD OF SUPERVISORS OF MIDDLESEX COUNTY, to-wit: A. CARL HANDLEY, JR., DAVIDSON J. GILL, FRED S. CRITTENDEN, CHARLES R. REVERE and FRANK JESSIE, by counsel, and moves this court to Order that the claims of each Plaintiff herein be separately tried for the following reasons:

(1) Each application and the actions taken thereon would of necessity be based on different facts and circumstances; and,

(2) The pleadings fail to show that the Plaintiff's Fletchers have exhausted their administrative remedies; and,

(3) The laws of Virginia, neither make provisions for nor sanction class action suits.

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Building Official
Middlesex County,
BOARD OF SUPERVISORS OF MIDDLESEX COUNTY,
to-wit: A. CARL HANDLEY, JR., DAVIDSON
J. GILL, FRED S. CRITTENDEN, CHARLES S.
REVERE, FRANK JESSIE

By: 

Of Counsel for William Foster, Successor
to Randolph Reed, Acting Building Of-
ficial, Middlesex County, Board of Sup-
ervisors of Middlesex County, to-wit:
A. Carl Handley, Jr., Davidson J. Gill,
Fred S. Crittenden, Charles S. Revere,
Frank Jessie

James H. Ward, Jr.
Commonwealth's Attorney
Middlesex County, Virginia
P.O. Box 356
Saluda, Virginia 23149

CERTIFICATE

It is certified that the original of the above DEMURRER and MOTION TO
SEPARATE PARTIES was mailed to William B. Cummings, Esq., 112 South Pitt Street,
P.O. Box 1177, Alexandria, Virginia, 22313 and to Conard B. Mattox, Jr., Esq.,
309 Marston Lane, Richmond, Virginia 23221, Counsel for Plaintiffs on this
5th day of December, 1983.


James H. Ward, Jr.

James H. Ward, Jr.
Commonwealth's Attorney
Middlesex County
P.O. Box 356
Saluda, Va. 23149

VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR. et al,

Complainants

v.

IN CHANCERY #2276

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Building
Official, Middlesex County,
Saluda, Virginia, et al,

Defendants

MOTION TO DISMISS

Come now, defendants, William Foster, Successor to Randolph Reed, Acting Building Official of Middlesex County, Saluda, Virginia, and the Board of Supervisors of Middlesex County, by counsel, and move this Court to dismiss the above styled action. As grounds for such motion, the defendants state as follows:

1. The complainants admit in paragraph 15(a) of Count 1, of their petition that they have made demands upon the defendant Board of Supervisors as required by Virginia Code Section 15.1-554.
2. The defendant Board of Supervisors disallowed all claims of complainants on July 5, 1983.
3. The complainants have failed to perfect an appeal to such action of the defendant Board of Supervisors disallowing such claims within the proper time period and in the proper manner as set forth in Virginia Code Section 15.1-522.
4. Virginia Code Section 15.1-553 provides that a determination by Board of Supervisors of any county disallowing a claim "shall be final and conclusive and a perpetual bar to any

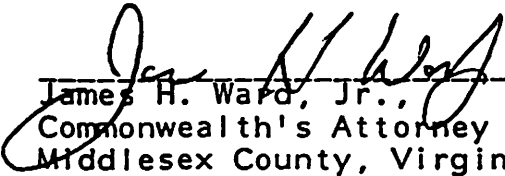
action in any court founded on such claim," unless an appeal is taken pursuant to Virginia Code Section 15.1-552 or unless the Board of Supervisors consent to the institution of an action by the claimant against the County, which consent has never been given.

WHEREFORE, the defendants pray that this action be dismissed with prejudice.

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Building
Official, Middlesex County,
Saluda, Virginia et al

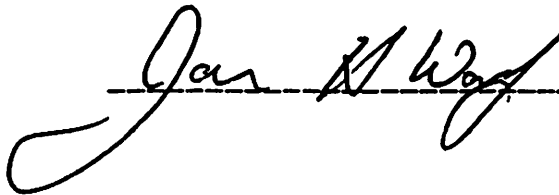
By: _____

Of Counsel


James H. Ward, Jr.,
Commonwealth's Attorney
Middlesex County, Virginia
P. O. Box 356
Saluda, Virginia 23149

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand delivered to all counsel of record on this 28th day of March, 1984.



1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

3 -----
4 LUNSFORD T. NUCKOLS, JR., et al,

5 Complainants,

6 vs.

7 WILLIAM FOSTER, Successor to RANDOLPH
8 REED, Acting Building Official of
9 Middlesex County, Saluda, Virginia,

10 IN CHANCERY
11 NO. 2276

12 -and-

13 BOARD OF SUPERVISORS OF MIDDLESEX
14 COUNTY, VIRGINIA,

15 Defendants.

16 Middlesex County Courthouse
17 Saluda, Virginia

18 Monday, March 26, 1984

19 The above-entitled cause came on to be heard,
20 before the HONORABLE JOHN E. DeHARDIT, Judge in and for the
21 Circuit Court of Middlesex County, in the Courthouse,
22 Saluda, Virginia, beginning at two o'clock p.m.

23 APPEARANCES:

On behalf of the Complainants:

WILLIAM B. CUMMINGS, ESQUIRE

On behalf of the Defendants:

JAMES H. WARD, JR., ESQUIRE
Commonwealth Attorney

Also Present: James C. Breeden, Esquire

1 a motion to dismiss, I certainly think that all counsel should
2 be here. I don't know why he is not here.

3 Was he advised of this hearing?

4 MR. WARD: He was here the last time, Your Honor.

5 MR. CUMMINGS: He was here last time, Your Honor,
6 and I was advised -- it's been a month or so since I last
7 spoke with him, but he was advised of this hearing. He
8 was copied by me of the date and so forth, Your Honor.

9 THE COURT: Do you know why he is not present?

10 MR. CUMMINGS: Because as I mentioned before, Your
11 Honor, my client was consulting with both of us and engaging
12 two counsel, if you will, in his case. He instructed us
13 that in matters where it was not absolutely necessary to
14 have both counsel present in the judgment of the counsel,
15 that we not double up on the appearance. And Mr. Maddox
16 and I understood this was my motion; that it was mine to
17 respond to. And I have done the research and was prepared
18 to argue it today. So he was -- to have been here would
19 have been just a cost expense to my client and not something
20 which the counsel thought was appropriate.

21 THE COURT: Gentlemen, I do feel like 15.1-553
22 has some merit in it. I will be truthful; I do think it
23 has some merit in it. But I am not sure if the Court has

1 question about that.

2 They own the -- the piece of property which they
3 own, Your Honor, is more than valuable enough to assess
4 that.

5 The second question Your Honor raised, though,
6 and I will just address it briefly because it is of concern
7 to the Court, there are studies that have been made, Your
8 Honor, of that area, in terms of the prevailing winds and
9 that sort of thing. And it is a prime area, the place
10 where the windmills have been sited is a prime area because
11 of the body of water that is adjacent to the property, for
12 the wind effect. This is the -- the principal wind in this
13 area comes right across --

14 THE COURT: Most of the windmills that have been
15 constructed in the last four or five years in this area,
16 though there are few that have been, have not been real
17 satisfactory.

18 Is this a different type of windmill that they
19 plan to use?

20 MR. CUMMINGS: Well, I have seen the design for
21 it, Your Honor, and seen the literature in support of it.

22 THE COURT: Do we have an expert that would come
23 in --

1 MR. CUMMINGS: Yes, sir.

2 THE COURT: I mean this is not frivolous; that's
3 what I want to get at. You know, there is so much talk
4 about frivolous lawsuits and now if this is a frivolous
5 suit, I don't want to have it take place in Middlesex. I
6 want to know definitely whether this is a valid claim.--

7 MR. CUMMINGS: To the contrary.

8 THE COURT: -- to use, that these windmills can
9 provide -- take care of enough energy for a home, a
10 furnace, a stove, a refrigerator, a washer, a drier and
11 those type of things.

12 MR. CUMMINGS: The estimates that have been given,
13 Your Honor, and I have seen the estimates, Your Honor, is
14 that the windmill, in its proposed location and the type of
15 windmill that's proposed -- I can't, unfortunately -- I
16 don't have the technical literature in front of me, but I
17 can tell you I have seen it -- indicate that this windmill
18 would not only suffice to produce energy more than sufficient
19 to cover the home needs of this house, but also provide a
20 surplus. As the Court well knows, VEPCO is required by
21 statute to accept back and pay for surplus electricity
22 generated by home generators.

23 THE COURT: Assuming that you are correct, can't

1 these windmills be put on -- somewhere on this property other
2 than where you have suggested putting them?

3 MR. CUMMINGS: Again, Your Honor, I -- my clients
4 have had engineering studies and wind studies done and they
5 are advised that this is the prime location. That's been
6 my understanding and I have seen the reports to that
7 effect.

8 THE COURT: Well, couldn't you move them several
9 hundred feet to a different place on the same property and
10 still have the same effect?

11 MR. CUMMINGS: Because of the wind tunnel effect,
12 Your Honor, and the trees -- this is a very wooded area --
13 on either side of the house, with obstructions every bit as
14 high or higher than this proposed windmill structure, I
15 might add -- it is my understanding, Your Honor, within a
16 few feet of the proposed location, there is not much
17 latitude. There is a few feet latitude, obviously, but
18 beyond that, Your Honor, in terms of getting out of that area,
19 I'm told --

20 THE COURT: What is the cost of these windmills?

21 MR. CUMMINGS: I think between \$10 and \$15,000,
22 Your Honor, most of which will be deducted as an energy
23 credit. I think 1984 or 1985 are probably the last two years

1 Honor and his burden, I think, to present that, since it is
2 his motion.

3 THE COURT: Well, that's what I need.

4 MR. WARD: Well, Your Honor, the bill of complaint
5 is contrary to what Mr. Cummings is telling us. He has
6 stated in his bill of complaint that they made other demands
7 for compensation.

8 MR. CUMMINGS: What we told them at the time, Your
9 Honor, as Mr. Ward well knows because he was there, was that
10 if they pass an ordinance that takes our property, that,
11 say, does not allow us the right to build on our property,
12 if they pass such an ordinance, then they would be taking
13 our property.

14 But it was a conditional suggestion, Your Honor,
15 conditional terms -- we're making a claim, don't pass this
16 ordinance. It is not a valid ordinance. We gave them a
17 memorandum to that effect.

18 Without further notice to us, Your Honor, they
19 ruled a week -- three days later, after the Fourth of July
20 holiday, they reconvened and passed the ordinance.

21 So that a couple of days later, the State Technical
22 Review Board said that you should have given the building
23 permit originally. And only then, Your Honor, did we file

VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

APR 17 1983

LUNSFORD T. NUCKOLS, JR., et al.,

Complainants

v.

IN CHANCERY #2276

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Building
Official, Middlesex County
Saluda, Virginia, et al.,

Defendants.

MOTION TO DISMISS

Come now, defendants, William Foster, Successor to Randolph Reed, Acting Building Official of Middlesex County, Saluda, Virginia, and the Board of Supervisors of Middlesex County, by counsel, and move this Court to dismiss the above styled action. As grounds for such motion, the defendants state as follows:

1. The complainants admit in paragraph 15(a) of Count 1, of their petition that they have made demands upon the defendant Board of Supervisors as required by Virginia Code Section 15.1-554.

2. The defendant Board of Supervisors disallowed all claims of complainants on July 5, 1983.

3. The complainants' amended petition for writ of mandamus reflects under paragraph 15(a) that the aforesaid demands were made and furthermore, reflects and admits in paragraphs 22, 28, and 33 among others, that the Board had not allowed or conceded to their demands. Furthermore, at a special meeting of the Middlesex County Board of Supervisors held on February 16, 1983 the Board in considering the options stated that it "would be the best course of

action" to wait for a decision from the Federal Aviation Administration and then seek an injunction to prohibit construction of the windmill, if a building permit is issued. The Board at that time specifically considered the application of Mr. L. T. Nuckols and its options including among other things condemnation. Nevertheless it set forth its cause of action as stated above. See certified copy of an abstract of such minutes attached hereto.

At the July 5, 1983 hearing of the Board of Supervisors of Middlesex County (a certified copy of the appropriate abstract of minutes being attached hereto as an exhibit) the letter of John McCarthy, Assistant Attorney General for the State of Virginia was read in its entirety. That letter reflects that the ordinance would be under the police power rather than under the eminent domain power and further reflects that "...the land owner's concession through counsel in this instance would indicate that the economically viable uses of the land are not generally involved." At that meeting as the abstract of minutes indicates, upon motion duly made and seconded, the ordinance was unanimously adopted.

Notwithstanding the above, the Board of Supervisors, at a meeting on September 12, 1983, a certified copy of the abstract of such minutes being attached hereto as an exhibit, the Board unanimously voted to keep the airport at its present location.

Reference is made to an affidavit attached hereto from a member of the Board of Supervisors of Middlesex County, Virginia confirming that all demands made by the claimants were denied and disallowed by the Board.

4. The complainants have failed to perfect an appeal to such action of the defendant Board of Supervisors disallowing such claims within the proper time period and the proper manner as set forth in Virginia Code Section 15.1-552.

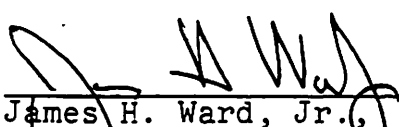
5. Virginia Code Section 15.1-553 provides that a determination by Board of Supervisors of any county disallowing a claim "shall be final and conclusive and a perpetual bar to any action in any court founded on such claim," unless an appeal is taken pursuant to Virginia Code Section 15.1-552 or unless the Board of Supervisors consent to the institution of an action by the claimant against the County, which consent has never been given.

WHEREFORE, the defendants pray that this action be dismissed with prejudice.

WILLIAM FOSTER, Successor to
RANDOLPH REED, Acting Building
Official, Middlesex County,
Saluda, Virginia et al

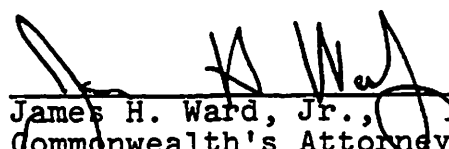
By: 

Of Counsel


James H. Ward, Jr.,
Commonwealth's Attorney
Middlesex County, Virginia
P. O. Box 356
Saluda, Virginia 23149

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion to dismiss, accompanying exhibits and Brief in Support of the Motion to Dismiss was mailed postage prepaid to all counsel of record on this 16th day of April, 1984.


James H. Ward, Jr.,
Commonwealth's Attorney

STATE OF VIRGINIA,
COUNTY OF MIDDLESEX, to-wit:

The undersigned member of the Board of Supervisors for Middlesex County, Virginia being duly sworn deposes and says:

1. That he was a member of the Board of Supervisors of Middlesex County, Virginia on the dates in 1983 when all actions were taken by the Board concerning the demands and claims of Lunsford T. Nuckols, Jr. and Elizabeth S. Nuckols, Marshall D. Beard and Bernard L. Fletcher and Pansy M. Fletcher relating to: not passing the ordinance entitled "An Ordinance to Regulate the Construction, Erection or Installation of Hazardous Structures in the Vicinity of Hummel Field, pursuant to Section 15.1-504, 15.1-505, and 15.1-510, of the Code of Virginia of 1959, as amended;" the issuance to them of permits to construct windmills on their property adjacent to the airport; and the treatment of the property as condemned if the permits were not issued and ordinance passed.

2. All demands and claims by the complainants as reflected above have been denied by the Board of Supervisors.

A. Carl Handley Jr.
Subscribed and sworn to before me in my County Taforesaid, in the State of Virginia this 16th day of April, 1984.

My commission expires:

January 31, 1986

Susan Lyn Newhouse
Notary Public

(DAILY2/A.)

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR., <u>et al.</u> ,)	
)	
Complainants,)	
)	
v.)	In Chancery No. 2276
)	
WILLIAM FOSTER, SUCCESSOR TO)	
RANDOLPH REED,)	
ACTING BUILDING OFFICIAL)	
MIDDLESEX COUNTY)	
SALUDA, VIRGINIA, <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

This cause came on to be heard on the pleadings filed herein and upon the joint motion of the parties to substitute T. Booker Moore in place of William Foster as a defendant, and it

APPEARING to the Court that William Foster was named as a defendant in his official capacity as Acting Building Official of Middlesex County and has since been replaced by T. Booker Moore as the Building Official and that the motion to substitute should be granted.

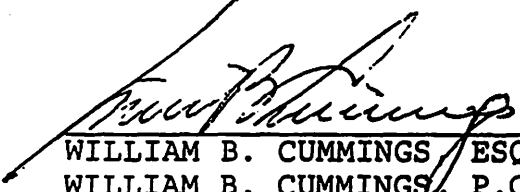
UPON CONSIDERATION WHEREOF, it is

ADJUDGED and ORDERED that T. Booker Moore, Building Official of Middlesex County, shall be substituted as party defendant for William Foster, Acting Building Inspector of Middlesex County, and the Clerk shall make the appropriate notation on the file.

Entered this _____ day of _____, 1984.

Judge

WE ASK FOR THIS:


WILLIAM B. CUMMINGS, ESQUIRE
WILLIAM B. CUMMINGS, P.C.
112 South Pitt Street
Post Office Box 1177
Alexandria, Virginia 22313
(703) 836-7997
Co-Counsel for Petitioners

CONARD B. MATTOX, JR., ESQUIRE
309 Marston Lane
Richmond, Virginia 23221
(804) 353-5176
Co-Counsel for Petitioners

SEEN AND AGREED:

JAMES H. WARD, JR., ESQUIRE
COMMONWEALTH'S ATTORNEY
Middlesex County
Post Office Box 356
Saluda, Virginia 23149
Counsel for Defendants

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR., et al.,)

Complainants,)

v.)

In Chancery No. 2276

WILLIAM FOSTER, SUCCESSOR TO)

RANDOLPH REED,)

ACTING BUILDING OFFICIAL)

MIDDLESEX COUNTY)

SALUDA, VIRGINIA, et al.,)

Defendants.)

ORDER

THIS CAUSE came on to be heard on the pleadings filed herein and upon the motion of petitioners, MARSHALL D. BEARD and NANCY M. BEARD, by counsel, to non-suit this proceeding as to them only, and it

APPEARING to the Court that the petitioners have a statutory right to non-suit as to themselves, and that the motion should be granted,

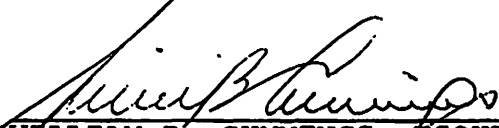
UPON CONSIDERATION WHEREOF, it is

ADJUDGED and ORDERED that the motion of MARSHALL D. BEARD and NANCY M. BEARD to non-suit this action is granted, and the case shall stand dismissed without prejudice as to them only, and the Clerk shall remove the names of MARSHALL D. BEARD and NANCY M. BEARD as parties to the action.

ENTERED this _____ day of _____, 1984.

Judge

WE ASK FOR THIS:


WILLIAM B. CUMMINGS, ESQUIRE
WILLIAM B. CUMMINGS, P.C.
112 South Pitt Street
Alexandria, Virginia 22313
(703) 836-7997
Co-Counsel for Petitioners

CONRAD B. MATTOX, JR. ESQUIRE
309 Marston Lane
Richmond, Virginia 23221
(804) 353-5176
Co-Counsel for Petitioners

SEEN:

JAMES H. WARD, JR., ESQUIRE
Commonwealth's Attorney
Middlesex County
Post Office Box 356
Saluda, Virginia 23149

Order
Lunsford T. Nuckols, Jr., et al.
v.
William Foster, Successor to
Randolph Reed,
Acting Building Official
Middlesex County
Saluda, Virginia, et al.
In Chancery No. 2276

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR., <u>et al.</u> ,)	
)	
Complainants,)	
)	
v.)	In Chancery No. 2276
)	
WILLIAM FOSTER, SUCCESSOR TO)	
RANDOLPH REED,)	
ACTING BUILDING OFFICIAL)	
MIDDLESEX COUNTY)	
SALUDA, VIRGINIA, <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

THIS CAUSE came on to be heard on the pleadings filed herein and upon the motion of petitioners, BERNARD L. FLETCHER and PANSY L. FLETCHER, by counsel, to non-suit this proceeding as to them only, and it

APPEARING to the Court that the petitioners have a statutory right to non-suit as to themselves, and that the motion should be granted,

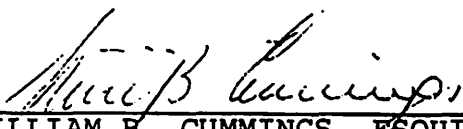
UPON CONSIDERATION WHEREOF, it is

ADJUDGED and ORDERED that the motion of BERNARD L. FLETCHER and PANSY L. FLETCHER to non-suit this action is granted, and the case shall stand dismissed without prejudice as to them only, and the Clerk shall remove the names of BERNARD L. FLETCHER and PANSY L. FLETCHER as parties to the action.

ENTERED this ____ day of _____, 1984.

Judge

WE ASK FOR THIS:


WILLIAM B. CUMMINGS, ESQUIRE
WILLIAM B. CUMMINGS, P.C.
112 South Pitt Street
Post Office Box 1177
Alexandria, Virginia 22313
(703) 836-7997
Co-Counsel for Petitioners

CONARD B. MATTOX, JR., ESQUIRE
309 Marston Lane
Richmond, Virginia 23221
(804) 353-5176
Co-Counsel for Petitioners

SEEN:

JAMES H. WARD, JR., ESQUIRE
Commonwealth's Attorney
Middlesex County
Post Office Box 356
Saluda, Virginia 23149

Order
Lunsford T. Nuckols, Jr., et al.
v.
William Foster, Successor to
Randolph Reed,
Acting Building Official
Middlesex County
Saluda, Virginia, et al.
In Chancery No. 2276

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR., et al.,)
Complainants,)
v.)
WILLIAM FOSTER, SUCCESSOR TO)
RANDOLPH REED,)
ACTING BUILDING OFFICIAL)
MIDDLESEX COUNTY)
SALUDA, VIRGINIA, et al.,)
Defendants.)

In Chancery No. 2276

ORDER

This cause came on to be heard on the pleadings filed herein and upon the motion of the Petitioners, by counsel, to non-suit Count III of the amended petition, and it

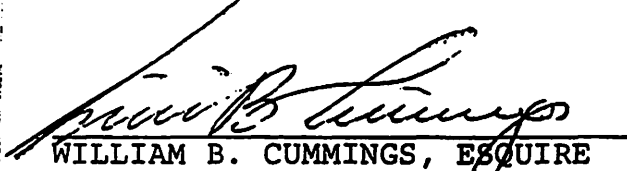
APPEARING to the Court that the petitioners have an absolute right to non-suit Count III and that the motion should be granted.


UPON CONSIDERATION WHEREOF, it is ADJUDGED and ORDERED that the motion to non-suit Count III of the amended petition be and the same hereby is granted and Count III is dismissed, without prejudice.

Entered this 6th day of June, 1984.


5/ John E. DeHart
Judge

WE ASK FOR THIS:


WILLIAM B. CUMMINGS, ESQUIRE
WILLIAM B. CUMMINGS, P.C.
112 South Pitt Street
Post Office Box 1177
Alexandria, Virginia 22313
(703) 836-7997
Co-Counsel for Petitioners


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309 Marston Lane
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(804) 353-5176
Co-Counsel for Petitioners

SEEN:


JAMES H. WARD, JR., ESQUIRE
COMMONWEALTH'S ATTORNEY
Middlesex County
Post Office Box 356
Saluda, Virginia 23149
Counsel for Defendants

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V I R G I N I A :

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

- - - - -X

LUNSFORD T. NUCKOLS, JR.,
et al.,

Complainants,

vs

IN CHANCERY NO. 2276

WILLIAM FOSTER, Successor
to RANDOLPH REED, Acting
Building Official of
Middlesex County, Saluda,
Virginia

and

BOARD OF SUPERVISORS OF
MIDDLESEX COUNTY, VIRGINIA,

Defendants.

- - - - -X

Middlesex County Courthouse
Saluda, Virginia

Wednesday, June 6, 1984

The above-entitled matter came on to be heard
before THE HONORABLE JOHN E. DeHARDIT, Judge, in and for
the Circuit Court of Middlesex County, Virginia, beginning
at 11:04 o'clock a.m.

1 APPEARANCES:

2 On Behalf of the Complainants:

3 WILLIAM B. CUMMINGS, ESQUIRE
4 CONRAD B. MATTOX, JR., ESQUIRE

5 On Behalf of the Defendants:

6 JAMES H. WARD, JR., ESQUIRE
7 Commonwealth's Attorney
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P R O C E E D I N G S

(Whereupon the Court Reporter was duly sworn
by the Clerk.)

THE COURT: Gentlemen, do you wish to be
limited as to time of argument?

MR. WARD: I don't think so. I think I can limit
my argument.

MR. CUMMINGS: I don't think so.

THE COURT: Don't wish to be limited either
side. Are there any witnesses to be sworn?

MR. WARD: No, sir.

MR. CUMMINGS: Not for today.

THE COURT: You may proceed.

MR. WARD: Judge, before we start, I believe
we have some matters we need to take care of. The
plaintiff's attorneys have forwarded petitions for nonsuiting
Fletcher's -- Defendants Fletcher and Beard.

MR. CUMMINGS: Plaintiffs.

MR. WARD: Excuse me, plaintiffs Fletcher
and Beard and also an order looks like to substitute Mr.
Booker Moore who is a new acting Building Official in
place of William Foster who was the Building Official; and
also they have a motion to nonsuit Count III of the

1 particular amended Bill of Complaint that they first
2 filed.

3 We have no objection because those are
4 following right in line with some of our points on the
5 merits. We would ask that the defendants Beard -- excuse
6 me, plaintiffs Beard and Fletcher be dismissed with
7 prejudice as opposed to without prejudice.

8 THE COURT: The argument on that, gentlemen?

9 MR. CUMMINGS: Your Honor please, the statute
10 clearly provides for allowance of a nonsuit without
11 prejudice if it comes at such time prior to the defendants
12 filing an answer.

13 The defendants in this case have only filed
14 a demurrer and a motion to dismiss neither of which is a
15 plea to the merits of both. So, under the statute, Your
16 Honor, I cite the statute 8.230 or something, the nonsuits
17 are to be taken without prejudice by statute; and I would
18 ask that they be allowed to be taken without prejudice.
19 I don't know if they plan to refile or not. As I've heard
20 judges say, "We'll take up the prejudice at such time as
21 they file the suit in the future" as opposed to doing it
22 now. I think that's appropriate time to see what argument
23 might be raised at that time.

1 THE COURT: Thank you, Mr. Cummings. Mr. Ward?

2 MR. WARD: I have nothing further.

3 THE COURT: The Court will grant on a limited
4 basis. Thank you, Mr. Ward.

5 MR. CUMMINGS: May I submit those orders, Your
6 Honor.

7 MR. WARD: Let me sign them.

8 (The bailiff handed some documents to the
9 Court for its examination.)

10 THE COURT: All right. Mr. Ward.

11 MR. WARD: Yes, Your Honor. May it please
12 the Court, we're here on this today on the motion to
13 dismiss that the County has filed. We filed it according
14 to the noncompliance with certain code sections be it
15 15.2-552, 553 and 554 Code of Virginia.

16 As the Court will note, when suing the County,
17 there are specific guidelines which you must follow that's
18 not always required in other circumstances. Now, 15.1-554
19 states that "no action shall be maintained by any person
20 against a county upon a claim or demand unless such person
21 shall have first presented the claim to the Board of
22 Supervisors." Any claim or demand.

23 The language is sufficiently understandable and

1 the cases are replete that is -- means any claim either
2 equitable or legal in nature. This is a rule. This is
3 a norm. There are exceptions. The erroneous tax suits
4 there's specific statutes for that which give you guidelines
5 on how to file those suits. There are certain equitable
6 situations where there have been diversion of funds by
7 the Board of Supervisors.

8 Now, these are all cases which have been cited
9 by both parties here today; but we still take the position
10 that this is the norm; any claim or demand.

11 The actions which we have are mandamus and
12 declaratory judgment, and there's no provisions in the
13 statutes that states -- that really preclude or exclude
14 the necessity for compliance with these statutes.

15 Now, mandamus and declaratory judgments are
16 not just used against the County, they're used against
17 individuals, agents of administrative agencies or what not;
18 though there is no language that states if you're going to
19 use these particular code provisions you do not have to
20 comply with the elements. You must make the demands.

21 Evidently plaintiff's attorneys feel that as
22 a necessity for making demands because in their amended
23 bill 15A states, Nuckols, Beard and Fletcher have made

1 demands upon the Board of Supervisors, Middlesex County to
2 not enact the questioned ordinance because it was invalid, and
3 otherwise made demand to obtain their permits to construct
4 buildings on their land as well as other demands for
5 compensation as required by 15.1-554.

6 So, evidently, they feel that these Code sections
7 apply.

8 Now, let's go on to 15.1-553. That states,
9 when this latter was claimed, when it's filed, what one
10 must do if it has been denied.

11 Now, we believe that there is sufficient
12 evidence in the pleadings that state that these have been
13 denied. Back in February 16 of 1983, we have minutes from
14 that meeting which state when they first were brought up
15 about these building permits that the Board of Supervisors
16 went on record to oppose it; to do what was necessary to
17 prevent these windmills from being built.

18 On July 5, 1983, the Board of Supervisors
19 enacted an ordinance which precluded the building of these
20 type of structures. If there was any question as to the
21 intent or -- of the Board of Supervisors, again on
22 September 12, 1983 just prior to the election, there was
23 a special meeting called to discuss the issue of the

1 airport. This was something that the Board of Supervisors
2 wanted to make known to the electorate because it was
3 a peripheral issue in the election, and they again went on
4 record to leave the airport where it was.

5 Mr. Handley, the Chairman of the Board of
6 Supervisors has signed an affidavit, an affidavit was
7 attached to our motion to dismiss stating that all of the
8 claims and demands of the petitioners have been denied;
9 and we feel that there are certain provisions in the
10 amended Bill of Complaint by which the plaintiffs feel
11 that they've also been denied.

12 Under Section 28, it states, "The defendants
13 in denying the complainants' applications are improperly
14 denied on invalid points." We feel that there's no
15 question that the claims have been denied. We feel, thus,
16 we have to go to the most peripheral section which is
17 15.1-552, and that states, the time frame which one must
18 come in to appeal a decision or demand, a claim made to
19 the Board of Supervisors.

20 It appears that the plaintiffs have apparently
21 overlooked this provision. There's nothing alleged in
22 the pleadings that they've complied with it. In fact,
23 the record shows that they have not. They are to serve

1 notice on the Clerk of the Board of Supervisors, post a
2 bond with surity none of which has been done.

3 When the Board of Supervisors on July 5th, 1983
4 passed this ordinance, that's when the claims were denied.
5 That's when the statute of limitations began to run. The
6 six-month period would have run in January of 1984. The
7 bond has not been posted. Nothing has been done to date.

8 In the County, the case that we cited, Parker
9 versus Prince William County, many things were decided in
10 that case; but one of which was the necessity of following
11 this procedure. They stated in that instance that following
12 that procedure was jurisdictional and it was pertinent
13 and had to be done. It was procedural.

14 That was a situation where the County, I believe
15 for the land fill and sewage system close to a man's hotel,
16 and they sought compensation under a condemnation
17 proceedings; but the main thrust of that particular case
18 was even though the parties made note and notified the
19 Clerk of the Board of the Supervisors of his intention to
20 file suit, and although they filed and posted a \$50 check,
21 the Court ruled that this was not sufficient compliance
22 with the Code section. It states that it must be a bond
23 with surity. This was not done in that particular case,

1 and it was some nine and a half months after the claim
2 was made and for that reason the action was dismissed.

3 We feel that the actions that have been
4 brought by the petitioners fall within the perview of the
5 statutes, and that the failure to comply with them as is
6 set forth on the record is critical and for those reasons
7 the action should be dismissed with prejudice.

8 THE COURT: Thank you, Mr. Ward. Mr. Cummings
9 or Mr. Mattox.

10 MR. CUMMINGS: Your Honor please, Mr. Mattox
11 and I are co-counsel for the complainants and will probably
12 try and jointly address the Court on this issue if that's
13 satisfactory with the Court.

14 With regard to the matter Mr. Ward has addressed,
15 the Court, Your Honor, I trust the Court has received our
16 memorandum we filed about a month ago?

17 THE COURT: I've received it. I have it before
18 me, and I've read it; and I would deposit it with the
19 Clerk when the hearing is over.

20 MR. CUMMINGS: Thank you, Your Honor. With
21 the permission of the Court, I will address issues already
22 raised and if Your Honor wants to pass along, just say so
23 and I'll move it on to other issues; but I will be following

1 my brief and my argument if that's satisfactory.

2 THE COURT: Yes, sir. You and Mr. Mattox both
3 want to argue, is that right?

4 MR. CUMMINGS: Yes, sir, Your Honor.

5 THE COURT: Then both of you will argue. Then
6 Mr. Ward will close.

7 MR. CUMMINGS: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. CUMMINGS: The motion to dismiss, Your Honor,
10 which was filed here when we were before the Court back in
11 March supplemented by Mr. Ward's additional filing of a
12 new motion and brief in support thereof, essentially says
13 that the case should be dismissed because we failed to
14 comply with 15.1-552 failing to notify the Court -- the
15 County Board.

16 With regard to Count III of our Complaint,
17 Your Honor, the one seeking inverse condemnation or damages
18 for the taking, we have now nonsuited that action. To the
19 extent that 15.1-552 applies in this case, it would apply
20 only to Count III.

21 Now, we maintained throughout that Count III
22 was an alternative relief and should not have been viewed
23 as a primary focus of our complaint but rather than get off

1 on that tangent, we've now nonsuited Count III.

2 The primary relief sought by the plaintiffs
3 in this case and still sought now as the only relief sought
4 is for mandamus. Mandamus against a Building Official to
5 issue building permits. This is not an evidentiary case.
6 This is not a case involving testimony or witnesses. It's
7 a question of the law. Was he required to issue the permit
8 or not.

9 The amended complaint made reference -- made
10 mention of the fact that a claim had been presented to the
11 County. In fact, the County was told of our position, our
12 legal position, on the ordinance that was being proposed
13 and the consequences that would run there if the ordinance
14 was passed and the building permit was denied. That
15 is it was our contention that that would have the effect
16 of a taking, and that we suggest that they were stepping
17 into an area where they might have some economic
18 consequences to the County for having damaged the property.

19 So, to that extent, the County was notified
20 and put on notice of what our contention was of a potential
21 claim. And, so, Count III in our complaint said for
22 alternative relief we're asking the Court that if the
23 building permit is not allowed, that would have a diminution

1 of the value of the property, restriction on the use of the
2 property and therefore, damages would flow; but only if the
3 Court ruled that mandamus would not issue. It was only
4 alternative relief.

5 As we state in our memorandum, Your Honor, in
6 opposition to the County's motion to dismiss, and Building
7 Official's motion to dismiss, this statute clearly does not
8 apply in a situation where the relief sought is mandamus
9 because you can't go --

10 THE COURT: What's the difference at that
11 point? What's the difference? Why do you distinguish
12 between the mandamus? I read this, but can you elaborate
13 more on that.

14 MR. CUMMINGS: Pretty much the language, Your
15 Honor please, I'll go to one of the cases that we cited
16 that was the case of Dominion Chevrolet --

17 THE COURT: Yes.

18 MR. CUMMINGS: -- versus County of Henrico,
19 1976 case. There there was a situation involving tax
20 issue, Your Honor, and the Court said the section 15.1-552
21 does not specifically provide for the correction of an
22 erroneous tax assessment. It relates only to a claim or
23 demand talking about monetary demands. It goes on to say

1 the reason why this is done; why you don't follow that
2 procedure because to follow that procedure, to follow that
3 logic would be to dismiss the other statute, the tax
4 assessment statute, and that statute would be without
5 value because such claims could only reach the Court from
6 an appeal from the Board of Supervisors which is not the
7 intention of the legislature.

8 THE COURT: Is this an indirect thing that you
9 couldn't do directly? Is that what you're trying to say?

10 MR. CUMMINGS: No, Your Honor. When you --
11 In this situation, Your Honor, where the Building Official
12 has refused to issue a permit and cites a reason therefor
13 which we claim to be an invalid reason, then the purpose
14 of the mandamus is to have an expeditious hearing to see
15 if that permit should have or should not have been denied;
16 and as the Supreme Court said in the Dominion Chevrolet
17 case, the object of the statute is to furnish an
18 expeditious and inexpensive remedy against taxes which
19 have been assessed or collected, and the object would
20 be frustrated if you followed the logic of requiring the
21 claim to go against the County and then be appealed through
22 the Circuit Court by virtue of that route.

23 The same with mandamus. This Court has

1 inherent powers as well as statutory power to issue mandamus.
2 Mandamus is most frequently issued against a public official
3 in this case a County public official; and to have to go
4 back to his supervisors, if you will, and file the appeal
5 and go through a six-month delay process, there, if you
6 will, we'd never get mandamus in time. We'd be constantly
7 going through the administrative remedy for mandamus.

8 We followed the administrative procedures for
9 the building permit. When the appeal -- When the permit
10 was denied initially, we followed administrative procedures
11 act, went to the building appeals board here locally, and
12 when they denied our appeal, went to the State Technical
13 Review Board in Richmond, followed the statutory provision
14 to the letter. They approved our case. They reversed the
15 decision of the Building Official.

16 Then, he still refused to issue it. So, we came
17 to the Court for the mandamus to issue the permits. A question
18 of law: Was he right or was he wrong when he issued -- when
19 he denied the issuance of the permit. All the cases cited
20 by the Board of Supervisors as I point out in our brief,
21 every one of them, Your Honor, deals with a monetary
22 claim against the County. That's the kind of claim they're
23

1 talking about.

2 In the Prince William case --

3 THE COURT: Is this indirectly a monetary
4 claim now?

5 MR. CUMMINGS: No, sir. Absolutely not. Mr.
6 and Mrs. Nuckols, Your Honor, have sought a permit to
7 build a wind generating turbine. They have asked for that.
8 They filed -- they complied with all the statutory
9 requirements. They followed them to the letter. They
10 followed the administrative review procedures when it was
11 denied to the letter. We maintain they're entitled to
12 it.

13 There are two grounds upon which they're
14 entitled to it we maintain. -- We maintain that taking
15 as the Court must do when reviewing a claim against the
16 statute, first try and find a way that the relief can be
17 granted to the complainant and still keep the statute
18 intact. That's the Court's first test in reviewing the
19 situation. We maintain in Count I that if the Court is
20 to view this case --

21 THE COURT: Suppose you hadn't nonsuited
22 Count III based on your argument now?

23 MR. CUMMINGS: Based upon my argument now, Your

1 Honor, I think Count III standing in alternative relief,
2 the Court could still maintain this case because Count III
3 Your Honor, is --

4 THE COURT: You were asking for monetary
5 damages there, were you not? Compensatory damage, property
6 taken or right taken?

7 MR. CUMMINGS: Yes, sir. Again, because it was
8 not the primary relief sought, Your Honor, because we
9 maintain this Court would still grant the relief we have
10 requested, that relief being the issuance of the building
11 permit.

12 Now, if this Court after hearing this case on
13 its merits denies our request, we then would have the
14 option, if we sought, to file a claim against the County;
15 and we would have to go through those procedures at that
16 time.

17 Now, at the present time, Your Honor, this
18 Court's only question before this Court is issuance of a
19 mandamus; ability to issue for one of two reasons: One,
20 because the statute on its face is illegal, and therefore,
21 we're grandfathered and we have the right because of the
22 grandfather language in the statute; or two, the Court
23 finds --

1 THE COURT: Why did you bring Count III?

2 MR. CUMMINGS: It's in the form of alternative
3 relief, Your Honor. It was a method --

4 THE COURT: It could have been something that
5 if that's what you wanted the Court could have gone along.
6 Was it possible the Court could have gone along with that?
7 You stated that now you come along some later time they go
8 along with that claim. So, you were asking for monetary
9 damages in this particular suit, were you not?

10 MR. CUMMINGS: Only in the form of alternative
11 relief, Your Honor.

12 THE COURT: I mean what's alternative? Not
13 your asking for, old common law; pleading last minute number
14 of things in the alternative; but you're still asking for
15 what you're asking for.

16 MR. CUMMINGS: That's correct, Your Honor. I
17 think as to Count III perhaps technically perhaps we
18 should have complied with the statute. The matter is now
19 moot as I said because we nonsuited Count III and should at
20 such time we reach the merits on Counts I and II, Your
21 Honor, we'll then deal with the issue of filing a claim
22 against --

23 THE COURT: Then I go back are you trying to do

1 something indirectly that you couldn't do directly because
2 you had Count III there?

3 MR. CUMMINGS: As Mr. Ward said, Your Honor,
4 perhaps it was an oversight on counsel's part of the
5 necessity of filing that particular aspect. That's not
6 what my clients want. Mr. Mattox and my client both want
7 to have the permit issued, Your Honor, as requested.
8 they've gone through a lot of trouble to get the permit
9 issued, Your Honor. They went through the County Building
10 Official. They've got all the plans. They have
11 engineers study the plans. All the plans meet all the
12 requirement specifications that are required under the
13 Building Code, Your Honor; and having been denied that,
14 they went through the administrative review of that and
15 the State Technical Appeal Board says you're entitled to
16 the permit. The reason given for its denial are erroneous.
17 You're entitled to the permit.

18 You then turn around and say we're not going
19 to issue it for a second and different reason, and that
20 reason being we now have a statute which says bars you.

21 This Court has to then interpret that statute
22 to see whether or not they have grandfather rights under
23 that statute or, two, if the statute is improper and was

1 illegally enacted in which case the State Technical
2 Review Board's position would then become the law. These
3 people would be entitled to their permit, and that's all
4 we're seeking at this time, Your Honor.

5 Mr. Mattox may wish to expand on that.

6 THE COURT: Thank you, Mr. Cummings. Mr.
7 Mattox, Court will now give you time.

8 MR. MATTOX: Your Honor, might be better if Mr.
9 Ward would be permitted --

10 MR. WARD: Your Honor, I'll wait until both of
11 them have finished.

12 THE COURT: Yes, sir.

13 MR. MATTOX: Your Honor, there's not but one
14 question before the Court today as the statutes of the
15 pleadings are at this moment, one question and that is
16 whether Mr. Ward's argument goes to the power of this
17 Court under these facts to issue a mandamus or declaratory
18 judgment. That's all.

19 THE COURT: But you're saying that later you're
20 going to ask for monetary damages.

21 MR. MATTOX: No, sir. I'm not saying that at
22 all, Your Honor.

23 THE COURT: I gathered that.

1 MR. MATTOX: No, sir. There is not one thing
2 in the pleadings today that requires any prerequisite act
3 on behalf of the plaintiffs in this case that they have
4 not done. There is no requirement of notice to anyone
5 about a declaratory judgment proceedings or an injunction
6 as the case may be.

7 So, all this other stuff whether the permit
8 was issued right or wrong or indifferent, at this moment
9 is not before the Court. What's before the Court today is
10 whether Mr. Ward's argument goes to the Court's right to
11 issue or consider an injunction. That's all. And, the
12 other things that was talked about the last hearing and some
13 of the things mentioned here today that is not before this
14 hearing right now.

15 So, I just think all the Court's got to do is
16 decide whether 15.1-550 whatever it is, two, whether or
17 not that requirement is a prerequisite to filing -- for
18 any citizen to file a petition for this Court for mandamus.
19 That's all.

20 THE COURT: Thank you, Mr. Mattox. Mr. Ward,
21 you may answer both of these gentlemen.

22 MR. WARD: Your Honor, as far as the expeditious
23 hearing, if they followed these proceedings: posted a bond,

1 we could have been here a long time ago. We wouldn't be
2 here. All they had to do was give a letter to the Board
3 of Supervisors, tell them that they are dissatisfied. They
4 intend to sue. They post a bond. They sue under the Code
5 section we'd have been here two, six, eight months ago.

6 The reason for the delay is not our fault.
7 They didn't comply with the law.

8 Now, the plaintiffs' attorney has set forth
9 in his argument the Dominion case. As I stated previously,
10 we feel that the law is any claims or demands except for
11 those which have been carved out as exception by the
12 Supreme Court or by the General Assembly; and before they
13 get to that portion in their argument, states that 15.1-554
14 deals with damages generally including the composition,
15 responsibilities, powers of the Board of Supervisors of
16 a County.

17 The statute relates to general claims, demands
18 against the County arising out of transactions, disputes
19 and matters incident to the operation of the County by the
20 Board. This section does not specifically provide for the
21 correction of erroneous assessment. It does not. There's
22 a specific code section, I said that in my argument; and
23 they have stated that only cases that we've cited today

1 deal with monetary or contract terms. The only cases they
2 see that they cited, Your Honor, had one common thread,
3 every one of them deals with a diversion of funds in some
4 nature on the inability of the Board of Supervisors to pay
5 certain funds. That's what they're basing their
6 equitable jurisdiction on.

7 We feel that's not proper. We also feel that
8 this is an indirect manner in which to claim money
9 and compensation for the County. We plead it. Judge, I
10 feel like, and I don't mean to make light of it, I feel
11 like Don Quixote fighting windmills. I've been fighting
12 Hummel airport for the last seven years. Every Board of
13 Supervisors meetings. This is not the first suit we've
14 had. We had a suit in Richmond brought by the same
15 individuals. It was dismissed because one of the parties
16 never authorized it. It was mysteriously dismissed.

17 We're here today on another suit. Two of the
18 parties have also dropped out. We're here with the same
19 individual.

20 It's our belief that they did contend and
21 presume and wanted money from the Board of Supervisors.
22 As authority for that I have in my hand a copy of an extract
23 of a Board of Supervisors minutes of June 30 in which Mr. Cummings

1 really addressed the issue at that time, and it states,
2 "....That's a lot of exercise to go through only to force
3 you to the issue of whether or not you're going to condemn
4 Mr. Nuckols's property and other property or lose the
5 airport. That's what I'm saying to you. You've made him
6 go through a lot of steps, gone through a lot of -- there's
7 a blank -- to address what Mr. Ward says is really the
8 chief issue and that is what are you going to do with the
9 airport? Are you going to keep it there or are you going
10 to condemn the property?"

11 I know there have been statements made about
12 the use of these windmills. They're going to be for
13 saving electricity, but we feel that the truth is that
14 they have been forcing the County to either shut the airport
15 down or condemn their property; and we would submit this
16 right now as evidence, Your Honor.

17 MR. MATTOX: Your Honor, I have to interpose
18 one view --

19 THE COURT: Well, now, Mr. Mattox --

20 MR. MATTOX: Mr. Ward, Your Honor --

21 THE COURT: I set some rules of argument here.
22 I stated that Mr. Ward would open and you gentlemen would
23 reply each. Any objection to his making a statement, Mr.

1 Ward?

2 MR. WARD: No, sir.

3 THE COURT: All right, sir.

4 MR. MATTOX: Mr. Ward went completely beyond
5 at pleadings in this case at this moment. There's not
6 one word in these pleadings about Hummel Airport, Your
7 Honor. Not any place. And what Mr. Ward has to say about
8 Hummel Airport is completely out of character.

9 MR. WARD: I feel these people have brought up
10 today they're dealing with Hummel Airport. These people have
11 brought up today the condemnation. That wasn't brought up
12 previously. That's the only reason I submitted this
13 extract of the minutes to prove that. It was that that
14 was in their mind, and that was in the mind of their
15 attorney on June 30th when he made the statement; and we
16 do feel that that's an indirect manner in which he's
17 trying to obtain --

18 MR. MATTOX: No evidence of that, Your Honor.
19 No evidence before this Court of that.

20 MR. WARD: Judge, that's -- I'm just going
21 by what's in his --

22 THE COURT: Sir, I didn't hear.

23 MR. WARD: I'm just basing my argument on the

1 minutes here and what they stated previously.

2 MR. CUMMINGS: Your Honor please, you may
3 recall we were here on March, whatever day it was in
4 March, Your Honor asked Mr. Ward whatever exhibits he
5 wanted to put into the record, Your Honor, should be
6 submitted with his motion, his brief; and he submitted
7 several things with that motion, with that brief; and I
8 would object as Mr. Mattox did to the inclusion of this.
9 First of all it's an extract taken out of context. Second
10 of all it's not at all in compliance with Your Honor's
11 instruction. Whatever he wanted to put in to put in there.

12 THE COURT: Do you object to that being put in?

13 MR. CUMMINGS: We have no way to respond. I do
14 object to it being put in.

15 THE COURT: The Court will sustain the
16 objection. Carry it back to Mr. Ward, please.

17 Gentlemen, I'll be very brief. One sentence
18 with my ruling in this matter.

19 In my opinion in this matter the law of the
20 Commonwealth of Virginia demands that I sustain the motion
21 brought forward here on behalf of the Board of Supervisors.
22 Mr. Ward, the Court will require you to prepare the order
23

1 in this matter, submit it to those gentlemen for their
2 signature.

3 MR. WARD: I'll be more than happy.

4 THE COURT: Court thanks you gentlemen.
5 Particularly I thank you for the briefs you gentlemen
6 have submitted. I know you put a lot of work in this.
7 The Court wants to thank you. It's been a great help.
8 Thank you all the officers consideration in the hearing
9 today and in the past.

10 MR. CUMMINGS: Your Honor, in light of the
11 briefs that were submitted and the extensive argument, I
12 wonder if the Court would be able to elaborate on the
13 reasons so that we have that part of the record as to what
14 issues the Court felt rationale so that in the event we
15 might want to consider some further action because it is
16 a matter I think, Your Honor, where clearly we think very
17 strongly distressing.

18 What the Court is saying in effect that the
19 power of this Court to issue an injunction set forth --

20 MR. WARD: Judge, I would have to object to
21 this. If he wants to elaborate --

22 THE COURT: Yes, sir.

23 MR. WARD: But he's arguing his case.

1 MR. CUMMINGS: I'm just asking. I think the
2 matter --

3 MR. WARD: He can as for elaboration without
4 rearguing his case.

5 THE COURT: Well, gentlemen, I feel like that
6 is the law of the State of Virginia, the statute law and
7 the caselaw. How this case has been brought about I
8 believe. The title I have before me, I have Title 15.1 before
9 me. I have the caselaw before me that you gentlemen have
10 submitted in the briefs. I've read both of them. I've
11 gone through them, and I feel like because of the pleadings
12 brought forward -- I say the pleadings, and I would say
13 I didn't want to say that, but I will say it, I think
14 because of the way the pleadings have been brought forward
15 and also that the law of the Commonwealth of Virginia
16 that I have to sustain the motion.

17 MR. CUMMINGS: Only reason I ask Your Honor I
18 don't mean to reargue the case --

19 THE COURT: Yes, sir.

20 MR. CUMMINGS: But because 8.01-191 which is
21 the statute which gives the Court authority of mandamus --

22 THE COURT: Mr. Cummings, you must know --

23 MR. CUMMINGS: -- would appear to be in conflict

1 with 15.1-552 because there's no restrictive language about
2 the -- in 8.01 about the Court's power to issue a
3 mandamus. As Mr. Mattox and I said, that's all the Court
4 has to consider today, and I just wanted the Court --
5 I understand the Court's saying that you feel 15.1-552
6 overrides 8.01.

7 THE COURT: I feel that way. I feel this way
8 also I think you're asking for monetary damages. I think
9 in your pleadings, you've asked for it and so forth, and
10 maybe I wasn't at the hearing, but your statement is here;
11 but before the Board of Supervisors you say the land may be
12 condemned and so forth. I didn't -- I mean you did
13 ask me for my reasons.

14 MR. CUMMINGS: Count III, Your Honor, is out of
15 the case now. That's why we took Count III out to avoid
16 that possibility the Court might still think that.

17 THE COURT: Didn't I ask you what you were
18 trying to do directly, indirectly?

19 MR. CUMMINGS: I'm saying absolutely not, Your
20 Honor. I think on the matter of law, Your Honor, there was
21 a basic irregularity in the refusal to issue the permits.

22 MR. WARD: Judge, he's arguing his case, and
23 I would object to --

1 MR. CUMMINGS: That's why we brought this
2 mandamus action.

3 MR. WARD: I don't care why he brought it.

4 THE COURT: I've ruled and I feel like, in my
5 humble opinion, I may be wrong, but I feel like I've ruled
6 correctly.

7 MR. CUMMINGS: I'm not arguing with Your
8 Honor's -- with the fact Your Honor has that sentiment.
9 I'm just trying to clarify the record the reasons for it.

10 THE COURT: Yes, sir.

11 MR. CUMMINGS: And I appreciate Your Honor
12 taking the few minutes to elaborate on that because it is
13 an issue. If Your Honor feels that 8.01 is superceded by,
14 overridden by 15.1-552, that's the issue I think only the
15 Supreme Court can resolve because there's no language in
16 8.01 about mandamus which says you have to go through any
17 extra drill or through any extra steps going back to the
18 County.

19 THE COURT: I will answer it this way, we're
20 all bound by rules of Court. I think if you look for
21 rules of Supreme Court, so many of them are based on time
22 elements. We go to the District Court, to Juvenile Court
23 what you have to do in a 10 day period to appeal your case.

1 When you appeal from the Circuit Court, the Supreme Court
2 of Virginia, you have to do something. The statutes are --
3 most of them are based on a time element, and we do not
4 comply with those time elements, we're lost; and we've got
5 to work on some system and the laws or we're lost; and
6 we'd be in chaos, and I --

7 MR. CUMMINGS: If that's Your Honor's feeling,
8 there's absolutely nothing in the mandamus statute which
9 has any precatory effort has to be taken by a party
10 aggrieved --

11 THE COURT: All right, gentlemen. I've ruled
12 on the matter, and I feel like I've done properly; and, of
13 course, you have the right of appeal to the Supreme Court.

14 At this time, the Court would order that the
15 transcript be made a part of the record. That would save
16 you time coming back another time.

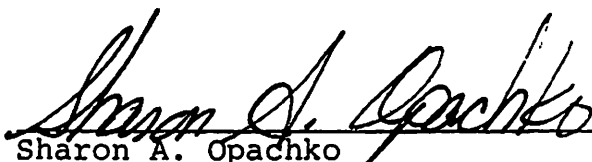
17 MR. CUMMINGS: Thank you, Your Honor.

18 (Whereupon at approximately 11:39 o'clock a.m.,
19 the hearing in the above-matter was concluded.)
20
21
22
23

1 CERTIFICATE OF REPORTER

2 I, Sharon A. Opachko, the stenographic reporter
3 who was duly sworn to well and truly report the foregoing
4 proceedings, do hereby certify that they are true and
5 correct to the best of my knowledge and ability; and that
6 I have no interest in said proceedings, financial or
7 otherwise, nor through relationship with any of the parties
8 in interest of their counsel.

9 IN WITNESS WHEREOF, I have hereunto set my hand
10 this 11th day of June, 1984.

11 
12 Sharon A. Opachko
13 Registered Professional Reporter
14
15
16
17
18
19
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21
22
23

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LUNSFORD T. NUCKOLS, JR., et al.,)	
)	
Complainants,)	
)	
v.)	IN CHANCERY NO. 2276
)	
T. BOOKER MOORE, Successor to)	
WILLIAM FOSTER, Building Official)	
of Middlesex County, Saluda,)	
Virginia)	
)	
and)	
)	
BOARD OF SUPERVISORS OF)	
MIDDLESEX COUNTY, VIRGINIA,)	
)	
Defendants.)	

DECREE

This cause came on to be heard on June 6, 1984 on the pleadings heretofore filed, upon the bill of complaint and amended bill of complaint filed by the complainants, upon the demurrer filed by the defendants, upon the motion to dismiss filed by the defendants, upon the order substituting T. Booker Moore for William Foster as a party defendant, upon the order non-suiting complainants, Marshall D. and Nancy M. Beard and Bernard L. and Pansy M. Fletcher, upon the order non-suiting Count III of the amended complaint, upon the complainants' memorandum of law in opposition to defendants' motion to dismiss, and upon argument of counsel, and it

APPEARING TO THE COURT that sections 15.1-550 through 15.1-554 of the Virginia Code requiring that certain procedural steps

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be followed before bringing a suit against a county must be complied with before a Court of Equity can entertain an application for the issuance of a writ of mandamus under Sections 8.01-644 through 8.01-653 of the Virginia Code or an application for declaratory judgment under Sections 8.01-184 through 8.01-191 of the Virginia Code, and it further

APPEARING TO THE COURT that the complainants, in Count I of their amended bill of complaint, are seeking a writ of mandamus, pursuant to Sections 8.01-644 through 8.01-653 of the Virginia Code, to order the Middlesex County Building Official to issue them a building permit, and that the complainants in Count II of their amended bill of complaint are seeking a declaratory judgment pursuant to Sections 8.01-184 through 8.01-191 of the Virginia Code, but that the complainants have not complied with the procedural requirements of Sections 15.1-550, et seq., of the Virginia Code, and that the motion to dismiss should accordingly be granted,

UPON CONSIDERATION WHEREOF, it is

ADJUDGED, ORDERED and DECREED that the amended bill of complaint shall be and the same hereby is dismissed, and it is further

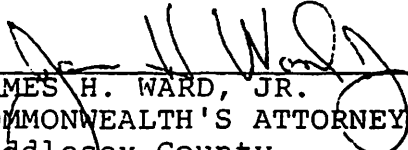
ORDERED that the transcript of this proceeding shall be made a part of the record, and it is further

ORDERED that the Clerk shall forthwith send a certified copy of this decree to each counsel of record.

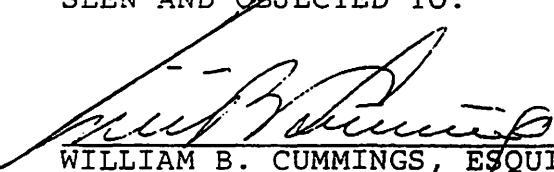
ENTERED this 13th day of July, 1984.

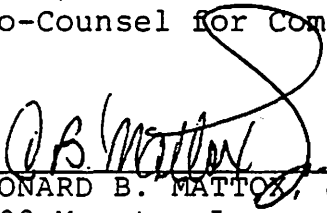
John E. DeHardit
John E. DeHardit, Judge

~~I ASK FOR THIS.~~ SEEN.


JAMES H. WARD, JR.
COMMONWEALTH'S ATTORNEY
Middlesex County
Counsel for Defendants

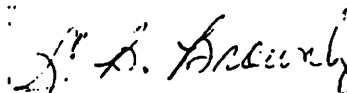
SEEN AND OBJECTED TO:


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Decree
In Chancery No. 2276

- 3 -



Assignments of Error

1. The lower court erred in ruling that the procedural requirements established for the presentation of claims or demands against a county as set out in §§15.1-550 et seq., of the Code of Virginia, regulate the filing of a petition for a declaratory judgment to declare a county ordinance either inapplicable under a "grandfather clause" or null and void ab initio.
2. The lower court erred in ruling that the procedural requirements established for the presentation of claims or demands against a county as set out in §§15.1-550 et seq., of the Code of Virginia, regulate the filing of a petition for a writ of mandamus to order a county official to fulfill his official duty.