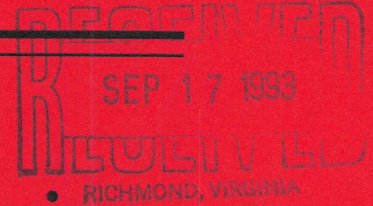


247VA479

CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 930682

**JANE W. GWINN, FAIRFAX COUNTY ZONING
ADMINISTRATOR,**

Appellant,

v.

ORVILLE N. COLLIER,

Appellee.

JOINT APPENDIX

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Fairfax County Attorney**

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Senior Assistant County Attorney
Virginia State Bar #18610
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Counsel for Appellee

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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

Complainant,

v.

IN CHANCERY NO. 120132

ORVILLE N. COLLIER

SERVE AT:

10109 Milstead Road
Great Falls, Virginia
22043

Respondent..

BILL OF COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW Complainant Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and requests this Honorable Court to grant her Bill of Complaint for Declaratory Judgment and Injunctive Relief and as grounds therefore states as follows:

1. The Board of Supervisors of Fairfax County, Virginia is the duly elected governing body of Fairfax County, Virginia, with the power to adopt ordinances to secure and promote the health, safety and general welfare of the County, and to enforce the same under Va. Code § 15.1-491(d) (Supp. 1990), § 15.1-499 (1989) and under Fairfax County Code § 1-1-12(c).

2. The Board of Supervisors has designated Complainant Jane W. Gwinn as the Fairfax County Zoning Administrator. Under the provisions of Va. Code § 15.1-491(d) (Supp. 1990), the Zoning Administrator has all necessary authority to administer and enforce the Fairfax County Zoning Ordinance (hereinafter "Zoning Ordinance"), including the ordering in writing of the remedying of any condition found to be in violation of the Zoning Ordinance, and the bringing of legal action in the form of injunctive relief to insure compliance with the ordinance.

3. Respondent Orville N. Collier (hereinafter "Collier") is the owner of record of real property located at 10109 Milstead Road (hereinafter "subject property") by virtue of a deed of bargain and sale recorded among the land records of Fairfax County in Deed Book 4600, at page 347. The property is also shown on the Fairfax County Property Identification Map as Tax Map No. 7-4((1))38. A true and accurate copy of the deed of bargain and sale referenced herein is attached hereto and incorporated by reference as Exhibit A.

4. The subject property contains approximately 2 acres and is zoned to the R-E District (Residential Estate District).

5. On April 30, 1981, Collier was issued Non-Residential Use Permit (Non-Rup) Certificate No. A-687-81 for the use of the subject property as a Major Vehicle Establishment. A copy of the aforementioned Non-Rup Certificate is attached hereto and incorporated by reference as Exhibit B.

6. Until March 28, 1983, Zoning Ordinance § 18-111 provided as follows:

No officer, board, agency or employee of the County shall issue, grant or approve any permit, license, certificate or other authorization for the erection of any building or for any use of land or building that would not be in full compliance with the provisions of this Ordinance. Any such permit, license, certificate or other authorization issued, granted or approved in violation of any of the provisions of this Ordinance shall be null and void and of no effect without the necessity of any proceedings for revocation or nullification thereof, and any work undertaken or use established pursuant to any such permit, license, certificate or authorization shall be unlawful. No action shall be taken by any officer, board, agency or employee of the County, including the BZA, purporting to validate any such violation.

A copy of the aforementioned Zoning Ordinance § 18-111 is attached hereto and incorporated by reference as Exhibit C-1. On March 28, 1983, Zoning Ordinance § 18-111 was renumbered as Zoning Ordinance § 18-114. A copy of Zoning Ordinance § 18-114 is attached hereto and incorporated by reference as Exhibit C-2.

7. Until December 1, 1985, Zoning Ordinance § 2-508 provided as follows:

It shall be unlawful for any person to place or store, or permit to be placed or stored on any property in the County a junk vehicle, unless such vehicle is kept in a fully enclosed structure. This provision, however, shall not preclude the diligent repair of a junk vehicle within a period not to exceed twenty-one (21) days; provided, however, that (a) such vehicle is owned by the resident of the dwelling unit at which it is parked; and (b) the same vehicle is not the subject of repair more than one time in any three (3) month period. . . .

A copy of Zoning Ordinance§ 2-508 in its entirety is attached hereto and incorporated by reference as Exhibit D.

8. Until December 1, 1985, Zoning Ordinance § 20-300 defined a junk vehicle as:

Any motor vehicle, trailer or semi-trailer that cannot be operated in its existing condition because the parts necessary for operation such as, but not limited to, tires, windshield, engine, drive train, driver's seat, steering wheel or column, gas or brake pedals are removed, destroyed, damaged or deteriorated.

A copy of the aforementioned Zoning Ordinance § 20-300 definition of "junk vehicle" is attached hereto and incorporated by reference as Exhibit E.

9. By letter dated March 2, 1983, the Zoning Administrator issued a notice of violation to Collier which revoked Collier's Non-Rup dated April 30, 1981, since it had been issued in error, and declared same to be null and void in accordance with Zoning Ordinance § 18-111. The notice of violation also informed Collier that the parking and/or storage of thirty-four (34) vehicles on the subject property is in violation of Zoning Ordinance § 2-508 and directed Collier to cease the repair of and remove from the subject property all vehicles which were not registered in Collier's name or the name of the full time resident of the subject property. Collier was also directed to repair, place in a fully enclosed structure, or remove from the subject property any of the junk vehicles listed in the March 2, 1983, letter which were not registered in Collier's name or the name of the full time

resident of the subject property within thirty (30) days of the receipt of the March 2, 1983, letter. A copy of the March 2, 1983, notice of violation is attached hereto and incorporated by reference as Exhibit F.

10. Collier received the March 2, 1983, notice of violation by certified mail on March 5, 1983. A copy of the returned receipt signed by O. N. Collier is attached hereto and incorporated by reference as Exhibit G.

11. Zoning Ordinance § 2-302(5) provides that "[n]o use shall be allowed in any district which is not permitted by the regulations for the district." A copy of Zoning Ordinance § 2-302(5) is attached hereto and incorporated by reference as Exhibit H.

12. Zoning Ordinance § 20-300 defines a vehicle major service establishment as follows:

Buildings and premises wherein major mechanical and body work, repair of transmissions and differentials, straightening of body parts, painting, welding or other similar work is performed on vehicles. Vehicle light service establishments may be permitted as an ancillary use, however, vehicle major service establishments shall not be deemed to include HEAVY EQUIPMENT AND SPECIALIZED VEHICLE SALE, RENTAL AND SERVICE ESTABLISHMENTS.

A copy of the aforementioned Zoning Ordinance § 20-300 definition of "vehicle major service establishment" is attached hereto and incorporated by reference as Exhibit I.

13. A vehicle major service establishment is not a permitted use in the R-E District. A copy of Zoning Ordinance § 3-E02, Permitted Uses, is attached hereto and incorporated by reference as Exhibit J.

14. Until March 27, 1990, Zoning Ordinance § 10-102(23) provided for storage as an accessory use as follows:

Storage, outside in R districts, to include a compost pile, provided such storage is located on the rear half of the lot, is screened from the view from the first story window of any neighboring dwelling, and the total area for such outside storage does not occupy more than 100 square feet. . . .

A copy of Zoning Ordinance § 10-102(23) is attached hereto and incorporated by reference as Exhibit K-1. On March 27, 1990, Zoning Ordinance § 10-102(23) was renumbered as Zoning Ordinance § 10-102(24). A copy of Zoning Ordinance § 10-102(24) is attached hereto and incorporated by reference as Exhibit K-2.

15. By letter dated October 29, 1985, Senior Zoning Inspector Mary F. Burton issued Collier another notice of violation for the continued use of the subject property as a major vehicle service establishment in the R-E District in violation of Zoning Ordinance § 2-302(5). Collier was directed to clear the violation within forty-five (45) days after receipt of the October 29, 1985, notice of violation by ceasing the repair of any vehicles and removing all vehicles from the subject property, with the exception of vehicles that are registered to the bona fide residents of the subject property.

The notice of violation also informed Collier that the keeping of junk vehicles behind a fenced area on the subject property was in violation of Zoning Ordinance § 2-508 and ordered Collier to repair or remove the junk vehicles from the

subject property within twenty-one (21) days of the receipt of the notice of violation or to place the junk vehicles in a fully enclosed structure. If this was not done within twenty-one days, Collier would have an additional nine (9) days in which to clear the violation.

In addition, the notice of violation informed Collier that the use of the subject property to store tires and miscellaneous vehicle parts is in violation of Zoning Ordinance § 10-102(23) and ordered Collier to comply with § 10-102(23) within thirty days by locating the outside storage to the rear half of the lot, screening it from view from the first story window of any neighboring dwelling and limiting it to a total area not exceeding 100 square feet. A copy of the October 29, 1985, notice of violation is attached hereto and incorporated by reference as Exhibit L.

16. Collier received the October 29, 1985, notice of violation by certified mail on November 1, 1985. A copy of the return receipt signed by O. N. Collier on November 1, 1985, is attached hereto and incorporated by reference as Exhibit M.

17. By letter dated March 13, 1986, Senior Zoning Inspector Mary F. Burton issued a notice of violation for the continued operation of a major vehicle service establishment (C&C Auto Repair) from the subject property in violation of Zoning Ordinance §2-302(5) and ordered Collier to clear the violation within ten (10) days after receipt of the notice of violation by ceasing the repair of vehicles and removing all vehicles from the subject property, with the exception of the

vehicles that are registered to the bona fide residents of the subject property. A copy of the March 13, 1986, notice of violation is attached hereto and incorporated by reference as Exhibit N.

18. Collier received the March 13, 1986, notice of violation by certified mail on March 15, 1986. A copy of the return receipt signed by P. Collier on March 15, 1986, is attached hereto and incorporated by reference as Exhibit O.

19. By letter dated September 15, 1986, Senior Zoning Inspector Mary F. Burton issued Collier an additional notice of violation for the continued operation of a vehicle major service establishment (C&C Auto Repair) from the subject property in violation of Zoning Ordinance § 2-302(5). A copy of the September 15, 1986, notice of violation is attached hereto and incorporated by reference as Exhibit P.

20. Collier received the September 15, 1986, notice of violation by certified mail on September 18, 1986. A copy of the return receipt signed by Ruth V. Watson on September 18, 1986, is attached hereto and incorporated by reference as Exhibit Q.

21. By letter dated August 14, 1989, Senior Zoning Inspector Tammy R. Brown issued Collier a notice of violation for the continued use of the subject property as a vehicle major service establishment (C&C Auto Repair) from the subject property and directed Collier to clear the violation within fifteen (15) days of receipt of the notice of violation by ceasing the repair of vehicles and removing all vehicles

from the subject property with the exception of the vehicles that are registered to the bona fide residents of the subject property. A copy of the August 14, 1989, notice of violation is attached hereto and incorporated by reference as Exhibit R.

22. Collier was served in person with the August 14, 1989, notice of violation by Deputy Sheriff J. E. Hollar on August 21, 1989, at 12:35 p.m. A copy of the return of service on the back of the first page of the August 14, 1989, notice of violation showing personal service on Mr. Orville N. Collier on August 21, 1989, is attached hereto and incorporated by reference as Exhibit S.

23. Va. Code § 15.1-496.1 (1989) and Zoning Ordinance §§ 18-301 and 18-303 provide, inter alia, that any person aggrieved by any decision of the Zoning Administrator or by an order, requirement, decision or determination of any other administrative officer made in the administration and enforcement of the Zoning Ordinance may appeal such decision, order, requirement or determination to the Board of Zoning Appeals (hereinafter "BZA") within 30 days of the decision, order requirement or determination. Copies of the above-referenced sections are attached hereto for the Court's convenience as Exhibits T-1 and T-2.

24. Collier never appealed the decisions and orders set forth in the March 2, 1983, October 29, 1985, March 13, 1986, September 15, 1986, and August 14, 1989, notices of violation to the BZA. The time for filing such appeals has expired.

25. By failing to appeal the March 2, 1983, October 29, 1985, March 13, 1986, September 15, 1986 and August 14, 1989, decisions and orders of the Zoning Administrator to the BZA, the decision that Collier's use of the subject property as a vehicle major service establishment is in violation of Zoning Ordinance § 2-302(5) and that the use of the subject property for storage is in violation of § 10-102(24) are "thing[s] certain and not subject to attack by the Defendant." Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988).

26. As is more particularly set forth in the affidavit of Senior Zoning Inspector Tammy R. Brown, which affidavit is attached hereto as Exhibit U and incorporated herein by reference, Collier continues to use the subject property as a vehicle major service establishment in violation of Zoning Ordinance § 2-302(5) and as a storage yard in Violation of Zoning Ordinance 10-102(24).

27. Collier persists in the flagrant violation of the Fairfax County Zoning Ordinance by continuing to illegally operate a vehicle major service establishment from the subject property.

28. Venue in this matter is proper under Va. Code § 8.01-261 (15)(c) (Supp. 1990).

29. The Complainant has no adequate remedy at law.

30. This Court has jurisdiction to award declaratory judgment in this matter pursuant to Va. Code § 8.01-184 (1984),

and further has jurisdiction to award injunctive relief in this matter pursuant to Va. Code §§ 8.01-620 (1984), 15.1-491(d) (Supp. 1990) and 15.1-499 (1989).

WHEREFORE, Complainant, by counsel, respectfully requests that this Honorable Court award her the following relief:

1. Declare Collier to be in continuing violation of Zoning Ordinance § 2-302(5) by the use of the subject property as a vehicle major service establishment.

2. Declare Collier to be in continuing violation of Zoning Ordinance 10-102(24) by the use of the subject property for storage which occupies more than 100 square feet.

3. Issue a mandatory injunction requiring Collier to cease the operation of a vehicle major service establishment from the subject property and remove all vehicles and items associated with the vehicle major service establishment and stored on the subject property in violation of Zoning Ordinance § 10-102(24) from the subject property with the exception of the vehicles that are registered to the bona fide residents of the subject property.

4. Issue a prohibitory injunction permanently enjoining the Respondents, their agents and employees, from using the subject property as a vehicle major service establishment as defined by Zoning Ordinance § 20-300 and from using the subject property for storage in violation of Zoning Ordinance § 10-102(24).

5. Grant Complainant such other relief as this Court may deem appropriate.

Respectfully submitted,

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR

By Jan L. Brodie
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By Jan L. Brodie
Jan L. Brodie
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 246-2421
Counsel for Complainant

19444

THIS DEED, made this 21 day of April, 1977, by and between ERNEST GENTRY and ROBERT MORRIS COLLIER, Executors under the Estate of Evelyn M. Collier, deceased, parties of the first part; and ORVILLE NATHAN COLLIER and PATRICIA A. COLLIER, his wife as tenants by the entirety, parties of the second part:

WITNESSETH, that for and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable considerations, the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant and convey, with GENERAL WARRANTY OF TITLE, unto the said parties of the second part, as tenants by the entirety, with the full common law right of survivorship and not as tenants in common, all of that certain lot or parcel of land, together with its improvements thereon, situate and being in Dranesville Magisterial District, Fairfax County, Virginia, and more particularly described, according to a survey of Joseph Berry Certified Land Surveyor, as follows:

BEGINNING at a pipe on the south side of a 12 foot outlet road and a corner to C. Good, the said pipe being N. 84° 00' W. 314.84 feet from the west side of the public road from Forestville to the River Bend Road at Dailey's Store; thence leaving the outlet road and running with the line of C. Good and the same course continued with the line of L. Good, S. 6° 09' W. 240.15 feet to a pipe, a corner to Denslow; thence with the line of Denslow N. 76° 36' W. 410.76 feet to a pipe; thence N. 6° 00' E. 187.25 feet to a pipe on the said side of the outlet road; thence with the side of the road, parallel to and 12 feet from the line of Watson, S. 84° 00' E. 407.97 feet to the beginning, and containing two acres.

This conveyance is subject however, to a Perpetual Easement to Clarence R. Good and Marjorie M. Good & their heirs and assigns, upon which to maintain and operate a gas transmission pipe line for domestic use under and across the above described property; this pipe line is now in place and this reservation of easement contemplates that it is at least sixteen (16) inches below grade; if said pipe line as now installed is not sixteen (16) inches below grade at this time, then the parties of the second part are to bear no responsibility for damage to said line by reason of their cultivation or grading the soil over said pipe line.

As part consideration for this conveyance, the parties of the first part hereby grant a Perpetual Easement of right of way to the said parties of the second part, their heirs and assigns upon which to construct, operate and maintain a domestic gas pipe line from the northwest corner of the land hereby conveyed, to the meter boxes on the Virginia Gas Corporation transmission line approximately 100 feet west of said corner; said pipe line is to be placed at least sixteen (16) inches below grade.

The said parties of the first part covenant that they have the right to convey the said land unto the said parties of the

*O. N. Collier
10105 P.O. 1st April 77
Area of 2.000*

4600 348

second part; that they have done no act to encumber the same; that the said parties of the second part shall have quiet possession of the said land, free from all encumbrances; and that the said parties of the first part will execute such further assurances of the said land, as may be requisite.

WITNESS the following signatures and seals:

Ernest Gentry (SEAL)
ERNEST GENTRY, Executor
Robert Morris Collier (SEAL)
ROBERT MORRIS COLLIER, Executor

STATE OF VIRGINIA,

COUNTY OF FAIRFAX, to-wit:

I, the undersigned Notary Public, in and for the county and state aforesaid, do hereby certify that ERNEST GENTRY and ROBERT MORRIS COLLIER, Executors under the Estate of Evelyn M. Collier, whose names are signed to the above writing, bearing date on the 21 day of April, 1977, have personally appeared before me in my county aforesaid and acknowledged the same before me.

GIVEN under my hand this 21 day of April, 1977.

MY commission expires: _____

Tax Paid
Sec 58-54 73.50
Sec 58-65.1 2450
Sec 58-54.1 4875.00
Consideration 4875.00

James Cecil Smith
NOTARY PUBLIC
Commission as James Cecil Smith

This instrument with certificate annexed,
admitted to record-Office of Circuit Court
Fairfax County, Va MAY 2 1977 at 11:37am
Teste: James E. Hargrave Clerk

COUNTY OF FAIRFAX
FAIRFAX, VIRGINIA
OFFICE OF ZONING ADMINISTRATION

NON-RESIDENTIAL USE PERMIT CERTIFICATE

No. A-687-81 Date 4-30 19 81

THIS CERTIFICATE SHALL BE CONSPICUOUSLY
POSTED AT ALL TIMES IN ANY ESTABLISHMENT.

Permission is hereby granted to C & C Auto Repair

to use the entire floor of the building located on

Lot na, Block na, Section na, Zone RE

Subdivision na

Premises 10109 Milstead Road for the

following purposes: Major vehicle Establishment, Non-

Conforming use, 120 sq.ft.

Philip G. Yates

Zoning Administrator
Tammy Brown

By: _____

In accordance with Section 18-701, this Certificate does not take the place of any license required by law, nor does it authorize the use of boilers, motors, machinery, or any signs. Any change in the use or occupancy of this building or land shall require a new Certificate. Any change in building, electrical, plumbing or mechanical may invalidate this permit.

CDZ - 4

Exhibit

B

mail, return receipt requested, and postmarked not less than fifteen (15) days before the hearing, to the last known address of the owner(s) as shown on the current real estate assessment books. Notice as required by this Paragraph shall include notice to owners of property abutting and immediately across the street which lies in an adjoining county or city.

5. Additional Notice: The hearing body may by resolution prescribe additional means and forms of notices in connection with any matter falling within its jurisdiction.

18-111

Permits Not To Be Issued for Structures Which Would Violate Ordinance

No officer, board, agency or employee of the County shall issue, grant or approve any permit, license, certificate or other authorization for the erection of any building or for any use of any land or building that would not be in full compliance with the provisions of this Ordinance. Any such permit, license, certificate or other authorization issued, granted or approved in violation of any of the provisions of this Ordinance shall be null and void and of no effect without the necessity of any proceedings for revocation or nullification thereof, and any work undertaken or use established pursuant to any such permit, license, certificate or authorization shall be unlawful. No action shall be taken by any officer, board, agency or employee of the County, including the BZA, purporting to validate any such violation.

sent by certified mail, return receipt requested, and postmarked not less than fifteen (15) days prior to the hearing. Notices sent by a staff agent of the hearing body may be sent by first class mail, provided that the staff agent makes affidavit that the mailing has been made and files the affidavit with the application.

5. Additional Notice: The hearing body may by resolution prescribe additional means and forms of notices in connection with any matter falling within its jurisdiction.

18-111**Amendment of Applications**

1. With the exception of an application for an amendment to the Zoning Map, which is regulated by the provisions of Sect. 207 below, any application may itself be amended if filed prior to forty (40) days before the first public hearing. Such request for amendment shall be made in writing to the Zoning Administrator.
2. Within forty (40) days of the first public hearing, an amendment to an application may be requested and, based on the nature and extent of the amendment, such request may be due cause to reschedule the public hearing. Such request for amendment shall be made in writing to the Zoning Administrator.

18-112**Withdrawal of Applications**

1. With the exception of an application for an amendment to the Zoning Map, which is regulated by the provisions of Sect. 208 below, an application may be withdrawn at any time by the applicant or his agent by giving notice in writing to the Zoning Administrator. No fee or part thereof shall be refunded for an application withdrawn by the applicant.
An application may also be administratively withdrawn by the Zoning Administrator if it is determined that the application was accepted in error. In such cases, there shall be a full refund of the fee paid for filing the application.
2. If an application is withdrawn, there shall be a limitation on rehearing as set forth in Sect. 108 above.

18-113**Dismissal of Applications**

If an applicant refuses or neglects to prosecute an application, the Zoning Administrator may, not less than fifteen (15) days after notice of intention to do so, declare an application dismissed. Notice sent by certified mail, return receipt requested, to the applicant at the last known address shall be deemed adequate compliance with this requirement. If an application is dismissed, there shall be no refund of the filing fee.

18-114**Permits Not To Be Issued for Structures Which Would Violate Ordinance**

No officer, board, agency or employee of the County shall issue, grant or approve any permit, license, certificate or other authorization for the erection of any building or for any use of any land or building that would not be in full compliance with the provisions of this Ordinance. Any such permit, license, certificate or other authorization issued, granted or approved in violation of any of the provisions of this Ordinance shall be null and void and of no effect without the necessity of any proceedings for revocation or nullification thereof, and any work undertaken or use established pursuant to any such permit, license, certificate or authorization shall be unlawful. No action shall be taken by any officer, board, agency or employee of the County, including the BZA, purporting to validate any such violation.

mobile home as the quarters of a caretaker, watchman or tenant farmer, and his family; provided that such use meets the following conditions:

- (1) Shall be located only in an R-A, R-P, R-C, R-E or R-1 District.
- (2) Shall be located not less than 200 feet from any public street, and not less than 100 feet from any abutting property line.
- (3) Shall be connected to public sewer or an approved septic field, public water or an approved well, and to electricity.
- (4) Shall be located on the property of the employer, and the mobile home shall be titled by the property owner.

D. In conjunction with the approval of a special permit or special exception for a church, private school of general or special education, child care center or nursery school, mobile homes may be allowed as temporary dwellings for faculty, staff or students. Such mobile homes shall be connected to public sewer or an approved septic field, public water or an approved well, and to electricity and shall be subject to the regulations of the zoning district in which located. In addition, the hearing body may impose such conditions and restrictions as it may deem necessary to assure that the use will be compatible with the use of adjacent properties. Such conditions and restrictions may include, but need not be limited to, location, landscaping and screening, and time limitations.

2. Except as qualified in Par. 1 above, it shall be unlawful for any property owner, tenant, lessee or administrator of any real estate in the County to rent, lease or allow any mobile home that is to be used as a dwelling or living quarters to be parked on the land under their supervision unless such land is a legal mobile home park licensed in accordance with the provisions of Chapter 32 of The Code and maintained in accordance with the provisions of this Ordinance.

2-508

Limitation on Junk Vehicles

It shall be unlawful for any person to place or store, or permit to be placed or stored on any property in the County a junk vehicle, unless such vehicle is kept in a fully enclosed structure. This provision, however, shall not preclude the diligent repair of a junk vehicle within a period not to exceed twenty-one (21) days; provided, however, that (a) such vehicle is owned by the resident of the dwelling unit at which it is parked; and (b) the same vehicle is not the subject of repair more than one time in any three (3) month period.

This provision shall not preclude the placement or storage of junk vehicles on any lot containing a heavy equipment and specialized vehicle sale, rental and service establishment, a junk yard, a motor vehicle storage and impoundment yard, a service station, a vehicle light service establishment, a vehicle major service establishment or a vehicle sale, rental and ancillary service establishment, provided such placement or storage is in accordance with the applicable provisions of this Ordinance for such uses.

2-509

Dwelling Units Displayed for Advertising Purposes

A dwelling unit displayed for advertising purposes in connection with a residential development may be located in any R district, provided such dwelling unit is located

ILLUMINATION: See definitions under GLARE.

IMPACT: See definitions under VIBRATION.

INDUSTRIAL PARK: A planned coordinated development of a tract of land with two (2) or more separate industrial buildings that contain a combined total of at least 50,000 square feet of gross floor area and are occupied by not less than five (5) different tenants. Such development is planned, designed, constructed and managed on an integrated and coordinated basis with special attention given to on-site vehicular circulation, parking, utility needs, building design and orientation and open space.

INOPERABLE VEHICLE: See VEHICLE, INOPERABLE.

INSTITUTION OF HIGHER LEARNING: For the purpose of this Ordinance, an institution of higher learning shall be deemed to include a proprietary school that is approved, licensed, and bonded by the Proprietary School Service Office of the State Department of Education.

JUNK VEHICLE: Any motor vehicle, trailer or semi-trailer that cannot be operated in its existing condition because the parts necessary for operation such as, but not limited to, tires, windshield, engine, drive train, driver's seat, steering wheel or column, gas or brake pedals are removed, destroyed, damaged or deteriorated.

JUNK YARD: The use of any space, whether inside or outside a building, for the storage, keeping or abandonment of junk, including scrap metals or other scrap materials, or for the dismantling, demolition or abandonment of automobiles or other vehicles or machinery or parts thereof; provided that this definition shall not apply to outside storage as permitted as an accessory use under the provisions of Sect. 10-102. A junk yard shall also be inclusive of an AUTOMOBILE GRAVEYARD as defined herein.

KENNEL: Any place or establishment in which dogs are kept in numbers greater than permitted by, or under conditions not conforming to, the provisions of Sect. 2-512; or any place or establishment in which dogs are kept, trained, boarded or handled for a fee.

LANDFILL: A land depository, excavation, or area operated in a controlled manner by a person for the dumping of debris or inert material; or a disposal site operated by means of compacting and covering solid waste at least once each day with an approved material. This term is intended to include both debris landfills and sanitary landfills as defined in Chapters 104 and 109 of The Code.

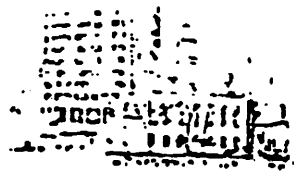
LANDSCAPE ARCHITECT: A professional who is registered with the State Department of Professional and Occupational Registration as a certified landscape architect.

LANDSCAPED OPEN SPACE: See OPEN SPACE, LANDSCAPED.

LANDSCAPING: The improvement of a lot with grass, shrubs, trees, other vegetation and/or ornamental objects. Landscaping may include pedestrian walks, flowerbeds, ornamental objects such as fountains, statues and other similar natural and artificial objects designed and arranged to produce an aesthetically pleasing effect.

LAND SURVEYOR: An individual who is registered with the State Department of Professional and Occupational Registration as a land surveyor.

Ldn: See DAY NIGHT AVERAGE SOUND LEVEL.



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

Office of Comprehensive Planning
Zoning Administration Division
10555 Main Street
Fairfax, Virginia 22030



691-4274

March 2, 1983

Certified Mail
Return Receipt Requested
Receipt No. P354 539 599

Orville N. Collier
10109 Millstead Road
Great Falls, Virginia 22066

RE: 10109 Millstead Road
Tax Map Ref.: 7-4 ((1)) 38
Zoning District: R-E

Dear Mr. Collier:

This letter is a result of a review of the documents pertinent to the use of the above referenced property for the repair of vehicles.

On April 30, 1981, this office issued a Non-Residential Use Permit (Non-Rup) for the use of your property as a Major Vehicle Establishment which was deemed at that time to be a nonconforming use trading as C and C Auto Repair. The issuance of that Non-Rup was based on notarized statements prepared in June and July of 1980 by four (4) residents of the Great Falls area. These statements attest to the use of your property for the repair of vehicles for the last fifteen (15) to twenty-five (25) years.

In order to be deemed a nonconforming use, it must be determined that the use was lawfully established. A review of the Fairfax County Zoning Ordinances in effect since 1941 reveals that a vehicle repair business was not a permitted use on your property and, thus, this use cannot be deemed nonconforming. The Non-Rup dated April 30, 1981, was issued in error and is hereby declared to be null and void in accordance with the provisions of Sect. 18-111 of the Zoning Ordinance, which states:

No officer, board, agency or employee of the County shall issue, grant or approve any permit, license, certificate or other authorization for the erection of any building or for any use of any land or building that would not be in full compliance with the provisions of this Ordinance. Any such permit, license, certificate or other authorization issued, granted or approved in violation of any of the provisions of this Ordinance shall be null and void and of no effect without the necessity of any proceedings for revocation or nullification thereof, and any work undertaken or use established pursuant

Exhibit

F

to any such permit, license, certificate or authorization shall be unlawful. No action shall be taken by any officer, board, agency or employee of the County, including the BZA, purporting to validate any such violation.

It is my understanding that recent zoning inspections have revealed that you have thirty-four (34) vehicles parked and/or stored on the referenced property. Five (5) of these vehicles have been determined to be junk vehicles as defined in Part 3 of Article 20 of the Zoning Ordinance and in violation of Sect. 2-508 of the Zoning Ordinance. The following is a list of the junk vehicles:

- Dodge, green, Virginia license VSJ-485
- V.W., square back, blue
- Dodge, convertible
- Ford Thunderbird, Washington, D.C. license 381-276
- Chrysler, station wagon

For your information and review, Part 3 of Article 20 of the Zoning Ordinance defines a junk vehicle as:

Any motor vehicle, trailer or semi-trailer that cannot be operated in its existing condition because the parts necessary for operation such as, but not limited to, tires, windshield, engine, drive train, driver's seat, steering wheel or column, gas or brake pedals are removed, destroyed, damaged or deteriorated.

Section 2-508 of the Zoning Ordinance states:

It shall be unlawful for any person to place or store, or permit to be placed or stored on any property in the County a junk vehicle, unless such vehicle is kept in a fully enclosed structure; provided, however, that this provision shall not apply to any lot containing a heavy equipment and specialized vehicle sale, rental and service establishment, junk yard, motor vehicle storage and impoundment yard, service station, vehicle light service establishment, vehicle major service

Orville N. Collier

March 2, 1983

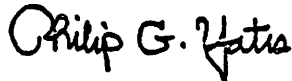
Page: 3

establishment or vehicle sale, rental and ancillary service establishment. And further provided that this provision shall not preclude the diligent repair of a vehicle within a period not to exceed thirty (30) days.

Based on the information contained in this letter you are hereby directed to cease the repair of and remove from your property all vehicles which are not registered in your name or the name of a full time resident of your property. You must also repair, place in a fully enclosed structure, or remove from your property any of the junk vehicles listed in this letter which are registered in your name or the name of a full time resident of your property. These actions must be accomplished within thirty (30) days of your receipt of this letter.

Should you have any questions concerning the matter discussed in this letter, please do not hesitate to contact me or Claude Kennedy, Chief, Zoning Enforcement Branch at 691-2215.

Sincerely yours,



Philip G. Yates
Zoning Administrator

PGY/CFK/kar

cc: Wallace C. Covington, Chief
Permit, Plan Review Branch

✓ Claude F. Kennedy, Chief
Zoning Enforcement Branch

PS Form 3811, Dec. 1980

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

<p>● SE DLN: Complete items 1, 2, 3, and 4. Add your address in the "RETURN TO" space on reverse.</p>	
<p>(CONSULT POSTMASTER FOR FEES)</p>	
<p>1. The following service is requested (check one).</p> <p><input type="checkbox"/> Show to whom and date delivered —6</p> <p><input checked="" type="checkbox"/> Show to whom, date, and address of delivery.. —6</p>	
<p>2. <input type="checkbox"/> RESTRICTED DELIVERY —6 (The restricted delivery fee is charged in addition to the return receipt fee.)</p>	
<p>TOTAL \$ _____</p>	
<p>3. ARTICLE ADDRESSED TO: Orville N. Collier 10109 Millstead Road Great Falls, VA 22066</p>	
<p>4. TYPE OF SERVICE:</p> <p><input type="checkbox"/> REGISTERED <input type="checkbox"/> INSURED</p> <p><input checked="" type="checkbox"/> CERTIFIED <input type="checkbox"/> COD</p> <p><input type="checkbox"/> EXPRESS MAIL</p>	<p>ARTICLE NUMBER <u>2</u></p> <p>P354 359 599</p>
<p>(Always obtain signature of addressee or agent)</p>	
<p>I have received the article described above.</p>	
<p>SIGNATURE <input type="checkbox"/> Addressee <input type="checkbox"/> Authorized agent</p> <p><i>P. N. Collier</i></p>	
<p>5. DATE OF DELIVERY</p> <p>3-5-83</p>	<p>POSTMARK</p>
<p>6. ADDRESSEE'S ADDRESS (Only if requested)</p> <p>16109 MILLSTEAD RD. GTFH/VA 22066</p>	
<p>7. UNABLE TO DELIVER? BECAUSE:</p>	<p>7a. EMPLOYEE'S INITIALS</p> <p><i>TH</i></p>

PART 3**2-300 INTERPRETATION OF DISTRICT REGULATIONS**

The Sections that follow present a brief statement of interpretation of the district regulations set forth in Articles 3-7.

2-301**Statements of Purpose and Intent**

The purpose and intent statement presented for each zoning district sets forth the underlying and primary purpose and intent of a given district; although it is not to be concluded that a district is created solely for the fulfillment of a singular stated purpose.

2-302**Permitted Uses**

1. It is the intent of this Ordinance to permit any use, not otherwise prohibited by law, to locate in a specified zoning district(s), either as a permitted use, a special permit use or a special exception use. In the event there is not a particular use listed in the Ordinance that corresponds with the use in question, then it shall be interpreted that the use in the Ordinance having the most similar characteristics as the use in question shall govern. Where uncertainties continue to exist, the question shall be directed to the Zoning Administrator in conformance with the provisions of Sect. 18-103.
2. Notwithstanding that a given use might be construed to qualify as a use permitted in a district, if such use has characteristics more similar to a particular use listed or defined elsewhere in the Ordinance, then it shall be interpreted that the latter listing or definition shall govern. Where uncertainties continue to exist, the question shall be directed to the Zoning Administrator in conformance with the provisions of Sect. 18-103.
3. The term 'permitted uses' represents only those uses which are permitted by right in a given district and does not apply to uses otherwise allowed by special permit or special exception.
4. No structure shall hereafter be built or moved, and no structure or land shall hereafter be used or occupied, except for a use that is permitted in the zoning district in which the structure or land is located.
5. No use shall be allowed in any district which is not permitted by the regulations for the district.
6. No accessory structure or use, as defined in Article 20, shall hereafter be built, moved, remodeled, established, altered or enlarged unless such accessory structure or use complies with the provisions of Part 1 of Article 10.
7. No accessory service use, as defined in Article 20, shall hereafter be established, altered or enlarged unless such accessory service use complies with the provisions of Part 2 of Article 10.
8. No home occupation shall hereafter be established, altered or enlarged unless such home occupation complies with the provisions of Part 3 of Article 10.
9. No sign shall hereafter be erected, built or displayed and no existing sign shall be moved, remodeled, altered or enlarged unless such sign complies, or will thereafter comply, with the provisions of Article 12.

USE: Any purpose for which a structure or a tract of land may be designed, arranged, intended, maintained, or occupied; also, any activity, occupation, business or operation carried on, or intended to be carried on, in or on a structure or on a tract of land.

USE, ACCESSORY: See ACCESSORY USE.

USE, PUBLIC: See PUBLIC USE.

VEHICLE LIGHT SERVICE ESTABLISHMENT: Buildings and premises wherein the primary use is the sale, servicing, repair and/or installation of motor vehicle accessories, such as the following: spark plugs, batteries, distributors and distributor parts, tires, brakes, brake fluid, mufflers, tail pipes, water hoses, fan belts, light bulbs, fuses, floor mats, windshield wipers, wiperblades, grease retainers, wheel bearings, and mirrors. Vehicle light service establishments may also include greasing, lubrication and radiator flushing, minor servicing and repair of carburetors, fuel pumps, oil pumps, water pumps and lines, electrical systems, and minor motor adjustments not involving removal of the head or crankcase or racing the motor. Uses permissible at a vehicle light service establishment shall not include major mechanical and body work, the repair of transmissions or differentials, straightening of body parts, painting, welding, or other work involving noise, glare, fumes, smoke, or other characteristics to an extent greater than normally found in service stations.

VEHICLE MAJOR SERVICE ESTABLISHMENT: Buildings and premises wherein major mechanical and body work, repair of transmissions and differentials, straightening of body parts, painting, welding or other similar work is performed on vehicles. Vehicle light service establishments may be permitted as an ancillary use, however, vehicle major service establishments shall not be deemed to include **HEAVY EQUIPMENT AND SPECIALIZED VEHICLE SALE, RENTAL AND SERVICE ESTABLISHMENTS.**

VEHICLE SALE, RENTAL AND ANCILLARY SERVICE ESTABLISHMENT: Any use of land whereon the primary occupation is the sale, rental and ancillary service of vehicles in operating condition such as automobiles, motorcycles, ambulances, taxicabs, vans and recreational vehicles. For the purpose of this Ordinance, vehicle sale, rental and ancillary service establishments shall not be deemed to include **HEAVY EQUIPMENT AND SPECIALIZED VEHICLE SALE, RENTAL AND SERVICE ESTABLISHMENTS;** however, specialized vehicles such as pick-up trucks may be sold, rented and serviced as an ancillary use.

VETERINARY HOSPITAL: A facility rendering surgical and medical treatment to animals. Crematory facilities shall not be allowed in a veterinary hospital.

VIBRATION: A reciprocating movement transmitted through the earth, both in horizontal and vertical planes.

The following terms are defined as they relate to the provisions of Part 8 of Article 14.

- **ACCELERATION:** The rate of change of particle velocity.
- **AMPLITUDE:** The maximum displacement of the earth from the normal rest position. Amplitude is usually reported as inches or mils.
- **DISPLACEMENT:** The amount of motion involved in earthborn vibration. It is referred to the normal rest position of the earth and is, therefore, one-half (½) of the total excursion for a steady state vibration. Displacement is usually reported in inches or decimal fractions of an inch.
- **FREQUENCY:** The number of times that a displacement completely repeats itself in one second of time. Frequency is designated in hertz (Hz).

PART E 3-E00 R-E RESIDENTIAL ESTATE DISTRICT**3-E01 Purpose and Intent**

The R-E District is established to promote agricultural uses and low density residential uses at a density not to exceed one (1) dwelling unit per two (2) acres; to allow other selected uses which are compatible with the open and rural character of the district; and otherwise to implement the stated purpose and intent of this Ordinance.

3-E02 Permitted Uses

1. Accessory uses and home occupations as permitted by Article 10.
2. Agriculture, as defined in Article 20.
3. Dwellings, single family detached.
4. Privately-owned dwellings for seasonal occupancy, not designed or used for permanent occupancy, such as summer homes and cottages, hunting and fishing lodges and cabins.
5. Public uses.

3-E03 Special Permit Uses

For specific Group uses, regulations and standards, refer to Article 8.

1. Group 2 - Interment Uses.
2. Group 3 - Institutional Uses.
3. Group 4 - Community Uses.
4. Group 5 - Commercial Recreation Uses, limited to:
 - A. Commercial swimming pools, tennis courts and similar courts
5. Group 6 - Outdoor Recreational Uses.
6. Group 7 - Older Structures.
7. Group 8 - Temporary Uses.
8. Group 9 - Uses Requiring Special Regulation, limited to:
 - A. Barbershops or beauty parlors as a home occupation
 - B. Home professional offices
 - C. Sawmilling of timber
 - D. Veterinary hospitals
 - E. Accessory dwelling units

3-E04 Special Exception Uses

For specific Category uses, regulations and standards, refer to Article 9.

Reprint 9/88

ARTICLE 10

ACCESSORY USES, ACCESSORY SERVICE USES AND HOME OCCUPATIONS

PART 1

10-100 ACCESSORY USES AND STRUCTURES

10-101

Authorization

Accessory uses and structures are permitted in any zoning district, unless qualified below, but only in connection with, incidental to, and on the same lot with a principal use or structure which is permitted within such district.

10-102

Permitted Accessory Uses

Accessory uses and structures shall include, but are not limited to, the following uses and structures; provided that such use or structure shall be in accordance with the definition of Accessory Use contained in Article 20.

1. Amusement machines, but only accessory to eating establishments, motels, hotels, bowling alleys, skating facilities, and establishments for billiards, ping pong, indoor archery, and other indoor games of skill, and retail sales establishments with greater than 5000 square feet of floor area open to the general public.
2. Antenna structures.
3. Barns and any other structures that are customarily incidental to an agricultural use, but only in the R-A through R-1 Districts on a tract of land not less than five (5) acres; provided, however, a stable or other structure for livestock or domestic fowl may be permitted on a lot of less than five (5) acres where such livestock or domestic fowl are kept in accordance with the provisions of Sect. 2-512 or Sect. 8-917. In no instance shall such structures be used for retail sales except as may be permitted for a plant nursery by the provisions of Part 5 of Article 9.
4. Carports.
5. Child's playhouse, not to exceed 100 square feet in gross floor area, and child's play equipment.
6. Doghouses, runs, pens, rabbit hutches, cages, and other similar structures for the housing of commonly accepted pets, but not including kennels as defined in Article 20.
7. Fallout shelters.
8. Garages, private.
9. Garage and yard sales, in R districts, shall be permitted not more than twice in any one calendar year and shall be limited to items not specifically purchased for resale.
10. Gardening.

11. Guest house or rooms for guests in an accessory structure, but only in the R-A through R-E Districts, and provided such house is without kitchen facilities and is used for the occasional housing of guests of the occupants of the principal structure, and not as rental units or for permanent occupancy as house-keeping units.
12. Inoperative motor vehicles, as defined in Chapter 110 of The Code, provided such vehicles are kept within a fully enclosed building or structure or are kept completely screened or shielded from public view in accordance with Chapter 110 of The Code.
13. Motor vehicle fuel storage tanks in the C and I districts and in R districts when accessory to a use other than a dwelling.
14. Parking and loading spaces, off-street, as regulated by Article 11.
15. Parking of one (1) commercial vehicle per dwelling unit in an R district subject to the following limitations:
 - A. No garbage truck, tractor and/or trailer of a tractor-trailer truck, dump truck, construction equipment, cement-mixer truck, wrecker with a gross weight of 12,000 pounds or more, or similar such vehicles or equipment shall be parked in any R district.
 - B. Any commercial vehicle parked in an R district shall be owned and/or operated only by the occupant of the dwelling unit at which it is parked.
16. Porches, gazebos, belvederes and similar structures.
17. Quarters of a caretaker, watchman or tenant farmer, and his family, but only in the R-A through R-E Districts on a parcel of twenty (20) acres or more.
18. Recreation, storage and service structures in a mobile home park.
19. Residence for a proprietor or storekeeper and his/her family located in the same building as his/her place of occupation.
20. Servants quarters, but only in the R-A through R-4 Districts on a lot of two (2) acres or more. Servants quarters located in a structure detached from the principal dwelling shall comply with the applicable zoning district bulk regulations for single family dwellings.
21. Signs, as permitted by Article 12.
22. Statues, arbors, trellises, clotheslines, barbeque stoves, flagpoles, fences, walls and hedges, gates and gateposts, and basketball standards to include rim, net and backboard.
23. Storage, outside, in R districts, to include a compost pile, provided such storage is located on the rear half of the lot, is screened from the view from the first story window of any neighboring dwelling, and the total area for such outside storage does not occupy more than 100 square feet. In C or I districts, where permitted by zoning district regulations, outdoor storage, junk, scrap and refuse piles shall be limited to that area designated on an approved site plan.
24. Storage structure, incidental to a permitted use, provided no such structure that is accessory to a single family detached or attached dwelling in the R-2 through R-20 Districts shall exceed 200 square feet in gross floor area.
25. Swimming pool and bathhouse, private.

26. Tennis, basketball or volleyball court, and other similar private outdoor recreation uses.
27. Wayside stands, but subject to the following limitations:
 - A. Shall be permitted only in the R-A through R-4 Districts, on a lot containing at least two (2) acres.
 - B. Structure shall not exceed 400 square feet in gross floor area.
 - C. Shall be permitted only during crop-growing season, and such structures shall be removed except during such season.
 - D. Shall be for the expressed purpose of sale of agricultural products grown on the same property, or the sale of products of approved home occupations conducted on the same property. For the purpose of this Ordinance, plants which are balled, burlapped and bedded shall not be considered as growing on the same property.
 - E. Shall not be subject to the location requirements set forth in Sect. 104 below, but shall be located a minimum distance of twenty-five (25) feet from any lot line.
 - F. Shall be located so as to provide for adequate off-street parking spaces and safe ingress and egress to the adjacent street.
 - G. Notwithstanding the provisions of Article 12, a wayside stand may have one (1) building-mounted sign, mounted flush against the stand, which does not exceed ten (10) square feet in area.
28. The keeping of animals in accordance with the provisions of Sect. 2-512.

10-103

Use Limitations

1. No accessory structure shall be occupied or utilized unless the principal structure to which it is accessory is occupied or utilized.
2. All accessory uses and structures shall comply with the use limitations applicable in the zoning district in which located.
3. All uses and structures accessory to single family detached dwellings, to include those extensions permitted by Sect. 2-412, shall cover no more than thirty (30) percent of the area of the minimum required rear yard.
4. All accessory uses and structures shall comply with the maximum height regulations applicable in the zoning district in which they are located, except as may be qualified by Sect. 2-506.
5. The following use limitations shall apply to fences:
 - A. Barbed wire fences are prohibited in all zoning districts except on lots exceeding two (2) acres or more in size in the R-A through R-1 Districts. Barbed wire strands may be used to enclose storage areas, other similar industrial or commercial uses or swimming pools where the strands are restricted to the uppermost portion of the fence and do not extend lower than a height of six (6) feet from the nearest ground level.

- B. It shall be unlawful for any person to construct, install, maintain, or allow or cause to be constructed, installed, or maintained, an electric fence upon any lot of two (2) acres or less in area, located within a subdivision as defined in Chapter 101 of The Code, The Subdivision Ordinance.

10-104

Location Regulations

1. If an accessory-type building is attached to a principal building by any wall or roof construction, it shall be deemed to be a part of the principal building and shall comply in all respects with the requirements of this Ordinance applicable to a principal building, except as qualified in Sect. 2-412.
2. The required minimum yards referenced in this Section shall refer to the minimum yards in the applicable zoning district for the principal building(s) with which the accessory-type building is associated.
3. Except as may be qualified by Sect. 2-505, a fence or wall may be located as follows. Such regulations shall not be deemed to negate the screening requirements of Article 13.
 - A. In any yard on any lot containing not less than two (2) acres located in the R-A through R-1 Districts, a fence or wall not exceeding seven (7) feet in height is permitted.
 - B. In any front yard on any lot, a fence or wall not exceeding four (4) feet in height is permitted.
 - C. In any side or rear yard on any lot, a fence or wall not exceeding seven (7) feet in height is permitted.
 - D. In any yard of an industrial use permitted by the provisions of this Ordinance, a fence or wall not exceeding eight (8) feet in height is permitted.
 - E. Notwithstanding the above provisions, a fence or wall which is an integral part of any accessory use such as a tennis court or swimming pool shall be subject to the location regulations of Par. 10 below.
4. Trellises, gates and gate posts may be located within any required minimum front yard as follows:
 - A. Two (2) trellises, not to exceed eight (8) feet in height nor four (4) feet in width.
 - B. Four (4) gate posts without limit as to height or width.
 - C. Two (2) gates not to exceed eight (8) feet in height.
 - D. Gates and gate posts exceeding four (4) feet in height shall not exceed in maximum width fifteen (15) percent of the lot width.
5. Ground-supported antenna structures for the operation of private radio facilities under Parts 95, 97 and/or 99 of the Federal Communications Commission regulations may be permitted in any R district as follows:
 - A. Structures sixty-five (65) feet or less in height shall not be located closer to any lot line than a distance equal to one-fifth (1/5) of their height.

ARTICLE 10

ACCESSORY USES, ACCESSORY SERVICE USES AND HOME OCCUPATIONS

PART 1 10-100 ACCESSORY USES AND STRUCTURES

10-101 Authorization

Accessory uses and structures are permitted in any zoning district, unless qualified below, but only in connection with, incidental to, and on the same lot with a principal use or structure which is permitted within such district.

10-102 Permitted Accessory Uses

Accessory uses and structures shall include, but are not limited to, the following uses and structures; provided that such use or structure shall be in accordance with the definition of Accessory Use contained in Article 20.

1. Amusement machines, but only accessory to eating establishments, motels, hotels, bowling alleys, skating facilities, and establishments for billiards, ping pong, indoor archery, and other indoor games of skill, and retail sales establishments with greater than 5000 square feet of floor area open to the general public.
2. Antenna structures.
3. Barns and any other structures that are customarily incidental to an agricultural use, but only in the R-A through R-1 Districts on a tract of land not less than five (5) acres; provided, however, a stable or other structure for livestock or domestic fowl may be permitted on a lot of less than five (5) acres where such livestock or domestic fowl are kept in accordance with the provisions of Sect. 2-512 or Sect. 8-917. In no instance shall such structures be used for retail sales except as may be permitted for a plant nursery by the provisions of Part 5 of Article 9.
4. Carports.
5. Child's playhouse, not to exceed 100 square feet in gross floor area, and child's play equipment.
6. Doghouses, runs, pens, rabbit hutches, cages, and other similar structures for the housing of commonly accepted pets, but not including kennels as defined in Article 20.
7. Fallout shelters.
8. Garages, private.
9. Garage and yard sales, in R districts, shall be permitted not more than twice in any one calendar year and shall be limited to items not specifically purchased for resale.
10. Gardening.

Supp. No. 27, 3-26-90

11. Guest house or rooms for guests in an accessory structure, but only in the R-A through R-E Districts, and provided such house is without kitchen facilities and is used for the occasional housing of guests of the occupants of the principal structure, and not as rental units or for permanent occupancy as house-keeping units.
12. Home child care facilities.
13. Inoperative motor vehicles, as defined in Chapter 110 of The Code, provided such vehicles are kept within a fully enclosed building or structure or are kept completely screened or shielded from public view in accordance with Chapter 110 of The Code.
14. Motor vehicle fuel storage tanks in the C and I districts and in R districts when accessory to a use other than a dwelling.
15. Parking and loading spaces, off-street, as regulated by Article 11.
16. Parking of one (1) commercial vehicle per dwelling unit in an R district subject to the following limitations:
 - A. No garbage truck, tractor and/or trailer of a tractor-trailer truck, dump truck, construction equipment, cement-mixer truck, wrecker with a gross weight of 12,000 pounds or more, or similar such vehicles or equipment shall be parked in any R district.
 - B. Any commercial vehicle parked in an R district shall be owned and/or operated only by the occupant of the dwelling unit at which it is parked.
17. Porches, gazebos, belvederes and similar structures.
18. Quarters of a caretaker, watchman or tenant farmer, and his family, but only in the R-A through R-E Districts on a parcel of twenty (20) acres or more.
19. Recreation, storage and service structures in a mobile home park.
20. Residence for a proprietor or storekeeper and his/her family located in the same building as his/her place of occupation.
21. Servants quarters, but only in the R-A through R-4 Districts on a lot of two (2) acres or more. Servants quarters located in a structure detached from the principal dwelling shall comply with the applicable zoning district bulk regulations for single family dwellings.
22. Signs, as permitted by Article 12.
23. Statues, arbors, trellises, clotheslines, barbeque stoves, flagpoles, fences, walls and hedges, gates and gateposts, and basketball standards to include rim, net and backboard.
24. Storage, outside, in R districts, to include a compost pile, provided such storage is located on the rear half of the lot, is screened from the view from the first story window of any neighboring dwelling, and the total area for such outside storage does not occupy more than 100 square feet. In C or I districts, where permitted by zoning district regulations, outdoor storage, junk, scrap and refuse piles shall be limited to that area designated on an approved site plan.
25. Storage structure, incidental to a permitted use, provided no such structure that is accessory to a single family detached or attached dwelling in the R-2 through R-20 Districts shall exceed 200 square feet in gross floor area.
26. Swimming pool and bathhouse, private.

27. Tennis, basketball or volleyball court, and other similar private outdoor recreation uses.
28. Wayside stands, but subject to the following limitations:
 - A. Shall be permitted only in the R-A through R-4 Districts, on a lot containing at least two (2) acres.
 - B. Structure shall not exceed 400 square feet in gross floor area.
 - C. Shall be permitted only during crop-growing season, and such structures shall be removed except during such season.
 - D. Shall be for the expressed purpose of sale of agricultural products grown on the same property, or the sale of products of approved home occupations conducted on the same property. For the purpose of this Ordinance, plants which are balled, burlapped and bedded shall not be considered as growing on the same property.
 - E. Shall not be subject to the location requirements set forth in Sect. 104 below, but shall be located a minimum distance of twenty-five (25) feet from any lot line.
 - F. Shall be located so as to provide for adequate off-street parking spaces and safe ingress and egress to the adjacent street.
 - G. Notwithstanding the provisions of Article 12, a wayside stand may have one (1) building-mounted sign, mounted flush against the stand, which does not exceed ten (10) square feet in area.
29. The keeping of animals in accordance with the provisions of Sect. 2-512.

10-103

Use Limitations

1. No accessory structure shall be occupied or utilized unless the principal structure to which it is accessory is occupied or utilized.
2. All accessory uses and structures shall comply with the use limitations applicable in the zoning district in which located.
3. All uses and structures accessory to single family detached dwellings, to include those extensions permitted by Sect. 2-412, shall cover no more than thirty (30) percent of the area of the minimum required rear yard.
4. All accessory uses and structures shall comply with the maximum height regulations applicable in the zoning district in which they are located, except as may be qualified by Sect. 2-506.
5. The following use limitations shall apply to fences:
 - A. Barbed wire fences are prohibited in all zoning districts except on lots exceeding two (2) acres or more in size in the R-A through R-1 Districts. Barbed wire strands may be used to enclose storage areas, other similar industrial or commercial uses or swimming pools where the strands are restricted to the uppermost portion of the fence and do not extend lower than a height of six (6) feet from the nearest ground level.



691-2215

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

Office of Comprehensive Planning
Zoning Enforcement Branch
10555 Main Street
Fairfax, Virginia 22030



October 29, 1985

Certified Mail
Return Receipt Requested
Receipt No. P 512 962 699

Mr. Orville N. Collier
10109 Milstead Road
Great Falls, Virginia 22066

RE: 10109 Milstead Road
Forrestville Subd., Lot 38
Tax Map Ref: 7-4 ((1)) 38
Zoning District: R-E

Dear Mr. Collier:

Reference is made to my several site inspections, and our last telephone conversation of August 19, 1985. These conversations were in regard to your belief that a Major Vehicle Service Establishment is a permitted use on the referenced property by virtue of Article 15, Nonconformities, of the Fairfax County Zoning Ordinance. It was your understanding that this use was permitted since Non-Residential Use Permit (Non-Rup) A-687-81 was approved on April 30, 1981, to C & C Auto Repair.

However, research of the files in the Zoning Administration Division revealed that by letter dated March 2, 1983, from Mr. Philip G. Yates, former Zoning Administrator, Non-Rup A-687-81 was deemed to have been issued in error and was declared null and void. A copy of this letter is enclosed for your convenient reference.

Based on the above, please be advised that a Major Vehicle Service Establishment is not a permitted use in the R-E district and Par. 5 of Sect. 2-302 of the Zoning Ordinance states that no use shall be allowed in any district which is not permitted by the regulations for the district. By permitting the continued operation of a Major Vehicle Service Establishment on the referenced property is an infraction of Par. 5 of Sect. 2-302 of the Zoning Ordinance.

Therefore, may this letter serve as an official notice of infraction and you are hereby requested to clear this infraction within forty-five (45) days after receipt of this notice. This may be accomplished by ceasing any repair of any vehicles and removing all vehicles from the property, with the exception of vehicles that are registered to the bona fide residents of the property.

Mr. Collier
October 29, 1985
Page 2

It should be noted that a Major Vehicle Service Establishment in an R district is deemed to be an infraction of the Zoning Ordinance punishable by a civil penalty of \$50.00. Failure to clear this infraction within the time period specified above may result in the issuance of a summons requiring payment of the established civil penalty or appearance in court to contest the charge.

Furthermore, you are keeping junk vehicles behind a fenced area on the property. For your information and review, I have attached a copy of the pertinent sections of the Zoning Ordinance which address junk vehicles. You will note that Sect. 2-508 of the Ordinance does allow the diligent repair of junk vehicles provided the repairs are completed within a period not to exceed twenty-one (21) days. However, if the repairs cannot be accomplished within the twenty-one (21) day time frame, the vehicle must be either removed from the property or placed in a fully enclosed structure.

Therefore, you have twenty-one (21) days from receipt of this letter to either repair the junk vehicle(s) noted above, remove the junk vehicle(s) from the property, or place the junk vehicle(s) in a fully enclosed structure. If this is not done within the twenty-one (21) days, this letter will serve as official notice that you are in violation of Sect. 2-508 of the Zoning Ordinance and you will have a additional nine (9) days in which to clear the violation. The violation can be cleared by accomplishing one of the three procedures outlined above.

In addition, you are storing tires and miscellaneous vehicle parts on the referenced property. This is a violation of Par. 23 of Sect. 10-102 of the Ordinance which allows:

Storage, outside in R districts, to include a compost pile, provided such storage is located on the rear half of the lot, is screened from the view from the first story window of any neighboring dwelling, and the total area for such outside storage does not occupy more than 100 square feet....

This letter will advise you that you have thirty (30) days in which to comply with Par. 23 of Sect. 10-102.

Compliance can be accomplished by locating the outside storage to the rear half of the lot, screening it from the view from the first story window of any neighboring dwelling and limiting it to a total area not exceeding 100 square feet.

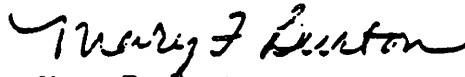
A follow-up inspection will be made thirty (30) days from the date you receive this letter. If you have failed to comply with this notice at that time, this office will have no alternative but to seek legal remedies to gain compliance with the Zoning Ordinance.

Mr. Collier
October 29, 1985
Page 3

For your information, this office notifies the Fairfax County Office of Assessments of any vehicle observed during an investigation that does not have a valid County decal displayed. The purpose of this is to ensure that Personal Property Taxes are being paid on vehicles that are kept on private property.

Should you have any questions or the need for elaboration, please do not hesitate to contact me.

Sincerely yours,



Mary F. Burton
Senior Zoning Inspector

MPB/bsw

Enclosure: A/S

cc: ZAD Central Files

PS Form 3811, July 1982

- **SENDER:** Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
☒ Show to whom and date delivered
☐ Show to whom, date, and address of delivery ..
 2. ☐ **RESTRICTED DELIVERY**
 (The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL \$

3. ARTICLE ADDRESSED TO:

*Mr. Orville N. Collier
10109 Milstone Road
Great Falls Va. 22066*

4. TYPE OF SERVICE:

- ☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER

P512962679

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE ☐ Addressee ☐ Authorized agent

O. N. Collier

5. DATE OF DELIVERY

11-1-85

POSTMARK

(may be on reverse side)

6. ADDRESSEE'S ADDRESS (only if requested)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

RETURN RECEIPT

• GPO: 1982-378-083

Exhibit

M



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

Office of Comprehensive Planning
Zoning Administration Division
10555 Main Street
Fairfax, Virginia 22030



March 13, 1986

Certified Mail
Return Receipt Requested
Receipt No. P 108 048 630

Mr. Orville N. Collier
10109 Milstead Road
Great Falls, Virginia 22066

RE: 10109 Milstead Road
Forrestville Subd., Lot 38 (Acreage)
Tax Map Ref: 7-4 ((1)) 389
Zoning District: R-E

Dear Mr. Collier:

A site inspection conducted on March 7, 1986, at approximately 11:20 A.M., revealed that you continue to operate a Major Vehicle Service Establishment (C&C Auto Repair) from the above-referenced property in violation of the Fairfax County Zoning Ordinance.

On November 1, 1985, you received a Notice of Violation from this office informing you that a Major Vehicle Service Establishment was not a permitted use in a residential district and was in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance. A copy of this notice is attached for your convenient reference.

Based on the aforementioned, may this letter service as a final notice that you remain in violation of Par. 5 of Sect. 2-302 of the Ordinance and you are directed to clear this violation within ten (10) days after receipt of this notice. This may be accomplished by ceasing the repair of vehicles and removing all vehicles from the property, with the exception of the vehicles that are registered to the bona fide residents of the property.

Exhibit

N

Mr. Orville N. Collier
March 13, 1986
Page 2

It is noted that the operation of a Major Vehicle Service Establishment in an R district is deemed to be an infraction of the Zoning Ordinance punishable by a civil penalty of \$50.00. Failure to clear this infraction within the time period specified above may result in the issuance of a summons requiring payment of the established civil penalty or appearance in court to contest the charge.

Should you have any questions or need for elaboration, please do not hesitate to contact me.

Sincerely,


Mary F. Burton
Senior Zoning Inspector

/mb

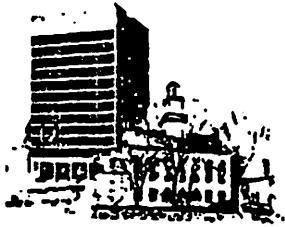
Attachment: A/S

cc: ZAD Central File

PS Form 3811, July 1983 447-846

DOMESTIC RETURN RECEIPT

<p>● SENDER: Complete items 1, 2, 3 and 4.</p> <p>Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. <u>The return receipt fee will provide you the name of the person delivered to and the date of delivery.</u> For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.</p>	
<p>1. <input type="checkbox"/> Show to whom, date and address of delivery.</p> <p>2. <input type="checkbox"/> Restricted Delivery.</p>	
<p>3. Article Addressed to:</p> <p><i>C.N. Collier</i> <i>10109 Mistwood Road</i> <i>Great Falls, Va. 22066</i></p>	
<p>4. Type of Service:</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail</p>	<p>Article Number</p> <p><i>P108048630</i></p>
<p>Always obtain signature of addressee or agent and DATE DELIVERED.</p>	
<p>5. Signature - Addressee</p> <p><i>X</i></p>	
<p>6. Signature - Agent</p> <p><i>X P. Collier</i></p>	
<p>7. Date of Delivery</p> <p><i>3-15-86</i></p>	
<p>8. Addressee's Address (ONLY if requested and fee paid)</p>	



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

Office of Comprehensive Planning
Zoning Administration Division
10555 Main Street
Fairfax, Virginia 22030



September 15, 1986

Certified Mail
Return Receipt Requested
Receipt No. P 108 048 736

Mr. Orville N. Collier
10109 Milstead Road
Great Falls, Virginia 22066

RE: 10109 Milstead Road
Forrestville Subd., Lot 38 (Acreage)
Tax Map Ref: 7-4 ((1)) 389
Zoning District: R-E

Dear Mr. Collier:

A site inspection conducted on September 8, 1986, at approximately 1:45 P.M., revealed that you continue to operate a Vehicle Major Service Establishment (C&C Auto Repair) from the above-referenced property in violation of the Fairfax County Zoning Ordinance.

A Vehicle Major Service Establishment is defined by the Zoning Ordinance as follows:

Buildings and premises wherein major mechanical and body work, repair of transmissions and differentials, straightening of body parts, painting, welding or other similar work is performed on vehicles. Vehicle light service establishments may be permitted as an ancillary use, however, vehicle major service establishments shall not be deemed to include HEAVY EQUIPMENT AND SPECIALIZED VEHICLE SALE, RENTAL AND SERVICE ESTABLISHMENTS.

You were notified by certified mail on November 11, 1985, and March 15, 1986, that to continue to operate a Vehicle Major Service Establishment was in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance which states:

No use shall be allowed in any district which is not permitted by the regulations for the district.

Exhibit

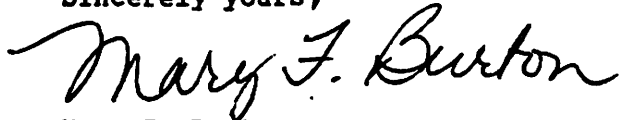
P

Mr. Orville N. Collier
September 15, 1986
page 2

A copy of these letters are enclosed for your convenient reference.

My site inspection of September 8, 1986, confirmed that you remain in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance and therefore you have left this office with no alternative than to forward this matter to the Office of the County Attorney.

Sincerely yours,

A handwritten signature in cursive script that reads "Mary F. Burton". The signature is written in dark ink and is positioned above the printed name and title.

Mary F. Burton
Senior Zoning Inspector

MFB/daf

Enclosures: A/S

cc: John R. Spring
Assistant County Attorney
ZAD Central Files

● **SENDER:** Complete items 1 and 2 when additional services are desired, and complete items 3 and 4. Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☒ Show to whom delivered, date, and addressee's address. 2. ☐ Restricted Delivery.

3. Article Addressed to: Mr. Orville N. Collier 10109 Milstead Road Great Falls, Virginia 22064	4. Article Number P108 048 736 Type of Service: <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail Always obtain signature of addressee or agent and DATE DELIVERED .
5. Signature - Addressee X <i>Ruth Whitaker</i>	8. Addressee's Address (ONLY if requested and fee paid)
6. Signature - Agent X <i>R. K. Kunk</i>	
7. Date of Delivery 9/12/84	

PS Form 3811, Feb. 1986

DOMESTIC RETURN RECEIPT



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

OFFICE OF COMPREHENSIVE PLANNING
ZONING ADMINISTRATION DIVISION
ZONING ENFORCEMENT BRANCH
4050 Legato Road, Suite 801
Fairfax, Virginia 22033
246-1300



August 14, 1989

SHERIFF'S LETTER

Mr. Orville N. Collier
10109 Milstead Road
Great Falls, Virginia 22066

Re: 10109 Milstead Road
Tax Map Ref: 7-4 ((1)) 38
Zoning District: R-E

Dear Mr. Collier:

A site inspection conducted on August 3, 1989 at 12:35 P.M. revealed that you continue to operate a Vehicle Major Service Establishment (C & C Auto Repair) from the above referenced property in violation of the Fairfax County Zoning Ordinance. For your information the Zoning Ordinance defines a Vehicle Major Service Establishment as:

Buildings and premises wherein major mechanical and body work, repair of transmissions and differentials, straightening of body parts, painting, welding or other similar work is performed on vehicles. Vehicle light service establishments may be permitted as an ancillary use, however, vehicle major service establishments shall not be deemed to include HEAVY EQUIPMENT AND SPECIALIZED VEHICLE SALE, RENTAL AND SERVICE ESTABLISHMENTS.

By letters dated March 2, 1983, October 29, 1985 and March 13, 1986 you were advised that a Vehicle Major Service Establishment was not a permitted use in a residential district and was in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance. A copy of those notices are attached for your convenient reference.

Mr. Orville N. Collier
August 14, 1989
Page 2

Based on the aforementioned, may this letter serve as a final notice that you remain in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance and that you are directed to clear this violation within fifteen (15) days of receipt of this notice. This can be accomplished by ceasing the repair of vehicles and removing all vehicles from the property with the exception of the vehicles that are registered to the bona fide residents of the property.

Should you have any questions or the need for elaboration, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Tammy R. Brown".

Tammy R. Brown
Senior Zoning Inspector

Attachments: A/S

TRB/bao



COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

OFFICE OF COMPREHENSIVE PLANNING
ZONING ADMINISTRATION DIVISION
ZONING ENFORCEMENT BRANCH
4050 Legato Road, Suite 801
Fairfax, Virginia 22033
246-1300



August 14, 1989

SHERIFF'S LETTER

Mr. Orville N. Collier
10109 Milstead Road
Great Falls, Virginia 22066

Re: 10109 Milstead Road
Tax Map Ref: 7-4 ((1)) 38
Zoning District: R-E

Dear Mr. Collier:

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By letters dated March 2, 1983, October 29, 1985 and March 13, 1986 you were advised that a Vehicle Major Service Establishment was not a permitted use in a residential district and was in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance. A copy of those notices are attached for your convenient reference.

Mr. Orville N. Collier
August 14, 1989
Page 2

Based on the aforementioned, may this letter serve as a final notice that you remain in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance and that you are directed to clear this violation within fifteen (15) days of receipt of this notice. This can be accomplished by ceasing the repair of vehicles and removing all vehicles from the property with the exception of the vehicles that are registered to the bona fide residents of the property.

Should you have any questions or the need for elaboration, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Tammy R. Brown". The signature is fluid and elegant, with the first name "Tammy" and last name "Brown" clearly distinguishable.

Tammy R. Brown
Senior Zoning Inspector

Attachments: A/S

TRB/bao

§ 15.1-495.1: Repealed by Acts 1975, c. 641.

§ 15.1-496. Applications for special exceptions and variances. — Applications for special exceptions and variances may be made by any property owner, tenant, government official, department, board or bureau. Such application shall be made to the zoning administrator in accordance with rules adopted by the board. The application and accompanying maps, plans or other information shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board. No such special exceptions or variances shall be authorized except after notice and hearing as required by § 15.1-431. The zoning administrator shall also transmit a copy of the application to the local commission which may send a recommendation to the board or appear as a party at the hearing. The governing body of any county, city or town may provide by ordinance that substantially the same application will not be considered by the board within a specified period, not exceeding one year. (Code 1950, §§ 15-828 to 15-830, 15-832, 15-833, 15-850; Code 1950, § 15-968.10; 1950, p. 176; 1962, c. 407; 1966, c. 256; 1975, cc. 521, 641; 1989, c. 407.)

The 1969 amendment added the last sentence.

Law Review. — For survey of Virginia law on municipal corporations for the year 1975-1976, see 62 Va. L. Rev. 1455 (1976).

Failure to apply for special exception. — Where, when property owner filed an application to rezone his property from A-2 to B-2, he told the commission and the county board of supervisors that he planned to operate an automobile graveyard, and the board rezoned

his property, the board may have intended thereby to grant him a special exception; however, as an automobile graveyard was not then and is not now a permitted use in a B-2 zone, and the owner did not apply for a special exception, the board had no power to grant an exception by implication, and the county government was not bound by the zoning administrator's opinion to the contrary. *Board of Supvs. v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987).

§ 15.1-496.1. Appeals to board. — An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal shall stay all proceedings in furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown. (1975, c. 521; 1983, c. 12.)

Burden of proving illegal use of land is on challenger of land's use. — In a civil action in which a use is challenged as illegal, the challenging party has the initial burden of producing evidence to show the uses permitted in the zoning district in which the land is

located and that the use of the land is not a permitted use. Upon this showing, the burden shifts to the landowner to show that his use is a lawful nonconforming use. *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 353 S.E.2d 727 (1987).

PART 3**18-300 APPEALS****18-301****Initiation**

Any person aggrieved or any officer, department, board, commission or authority of the County affected by any decision of the Zoning Administrator or by any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this Ordinance may appeal such decision to the BZA, except an appeal which relates to a proffered condition shall be taken to the Board as provided for in Par. 10 of Sect. 204 above.

18-302**Authorization**

The Zoning Administrator shall administer and interpret the Zoning Ordinance. The BZA shall hear and decide all cases of appeal by persons as set forth in Sect. 301 above. The BZA shall also hear and decide applications for interpretation of any district boundary if uncertainty remains after application by the Zoning Administrator of the rules specified in Sect. 2-204.

18-303**Time Limit on Filing**

Appeals shall be filed within thirty (30) days from the date of the decision appealed by filing a notice of appeal with the Zoning Administrator and the BZA. Such notice shall specify the grounds for such appeal, and shall be filed in accordance with the provisions of Sect. 304 below.

18-304**Submission Requirements**

Every application to appeal shall contain all of the following information:

1. Four (4) copies of an application on forms provided by the County, completed and signed by the appellant. Such application shall not require the execution of an affidavit.
2. Four (4) copies of a statement signed by the appellant setting forth the following information:
 - A. The order, requirement, decision or determination which is the subject of the appeal.
 - B. The date, to the best of the appellant's knowledge, upon which the decision was made.
 - C. The appellant's grounds for the appeal and the reasons therefor.
3. Such other supportive data as the appellant may desire in the record, including plats, plans, drawings, charts or related material.
4. An application fee as provided for in Sect. 106 above.

18-305**Processing**

1. Upon receipt of an appeal, the Zoning Administrator shall immediately transmit a copy to the BZA and request a date and time for public hearing.
2. Upon receipt, the BZA shall review the application to determine that it is complete and timely filed, shall set a date and time for the public hearing, and

Reprint 9/88

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

Complainant,

v.

ORVILLE N. COLLIER

Respondent.

IN CHANCERY NO. 120132

AFFIDAVIT

STATE OF VIRGINIA :
 : to-wit
COUNTY OF FAIRFAX :

THIS DAY, I, Tammy R. Brown, personally appeared before the undersigned notary public in the state and county aforesaid and being duly sworn according to law, made oath that;

1. I am currently employed with the Office of Comprehensive Planning, Zoning Enforcement Branch, as one of the agency's Senior Zoning Inspectors. My responsibilities include the investigation and enforcement of Zoning Ordinance violations within Fairfax County.

2. During a recent inspection on January 23, 1991, at 11:30 a.m., the Respondent admitted to me that he is now and has been operating a vehicle major service establishment on the subject property for at least eleven (11) years and does not intend to cease operation "until you put me behind bars".

Exhibit

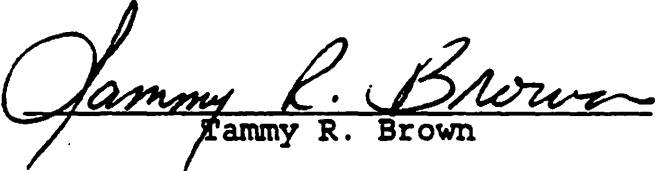
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3. Later, during a follow-up inspection on January 24, 1991 at 12 noon, I observed that the Respondent continues to use the property located at 10109 Milstead Road (hereinafter "subject property") as a vehicle major service establishment and as a storage yard which is greater than 100 square feet. During this inspection, I took the six (6) photographs which are attached hereto and incorporated by reference as Attachment 1.

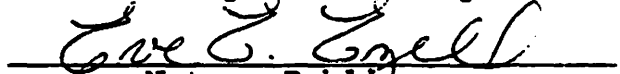
4. The subject property is zoned to the R-E District.

5. The use of the subject property as a vehicle major service establishment in a R-E District is in violation of Fairfax County Zoning Ordinance § 2-302(5).

6. The use of the subject property for a storage yard occupying more than 100 square feet is in violation of Fairfax County Zoning Ordinance § 10-102(24).


Jammy R. Brown

Subscribed and sworn to before me a Notary Public in the County and State aforesaid this 27th day of February, 1991.


Notary Public

My commission expires: March 24, 1992



1



2

Attachment 1



3



4



5



6

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN,
FAIRFAX COUNTY ZONING ADMINISTRATOR,

Petitioner,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the Respondent, ORVILLE N. COLLIER ("Collier"), by counsel, and in response to Petitioner's Bill of Complaint, states as follows:

1. Collier admits that the Board of Supervisors is the duly elected governing body of Fairfax County, Virginia. The remaining allegations in this Paragraph relate only to matters of law the therefore no response is required; if such a response is deemed necessary, the remaining allegations in this Paragraph are denied.

2. Collier admits that Jane W. Gwinn is the duly designated Zoning Administrator of Fairfax County. The remaining allegations in this Paragraph relate only to matters of law and therefore no response is required.

3. Collier admits that he is an owner of the referenced property and that Exhibit A is a true and accurate copy of the deed, which speaks for itself. The remaining allegations in this Paragraph are denied.

4. Collier admits that the property contains approximately two (2) acres. The other allegations in this Paragraph relate only to matters of law, and therefore no response is required; otherwise, Collier denies the further allegations in this Paragraph.

5. Collier admits that a Non-Residential Use Permit numbered A-687-81 relating to the subject property was granted. All remaining allegations in this Paragraph are denied.

6. The allegations in this Paragraph relate only to matters of law and therefore no response is required; however, to the extent that the allegations of Paragraph 6 correctly state the provisions of the referenced ordinances, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

7. The allegations in this Paragraph relate only to matters of law and therefore no response is required; however, to the extent that the allegations of Paragraph 7 correctly state the provisions of the referenced ordinance, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

8. The allegations in this Paragraph relate only to matters of law and therefore no response is required; however, to the extent that the allegations of Paragraph 8 correctly state the provisions of the referenced ordinance, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

9. Collier admits that he received a letter dated March 2, 1983, which letter speaks for itself. All remaining allegations of this paragraph are denied.

10. Collier admits that he received the letter dated March 2, 1983 on March 5, 1983. All remaining allegations of this Paragraph are denied.

11. The allegations in this Paragraph relate only to a matter of law and therefore no response is required; however, to the extent that the allegations of Paragraph 11 correctly state the provisions of the referenced ordinance, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

12. The allegations in this Paragraph relate only to a matter of law and therefore no response is required; however, to the extent that the allegations of Paragraph 12 correctly state the provisions of the referenced ordinance, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

13. The allegations in this paragraph relate only to matters of law, and therefore no response is required; otherwise, Collier denies the allegations in this Paragraph.

14. The allegations in this Paragraph relate only to a matter of law and therefore no response is required; however, to the extent that the allegations of Paragraph 14 correctly state the provisions of the referenced ordinance, lawfully and duly adopted by the Fairfax County Board of Supervisors, they are admitted and to the extent that they do not, they are denied.

15. Collier admits that he received a letter dated October 29, 1985, which letter speaks for itself. All remaining allegations in this Paragraph are denied.

16. Collier admits that he received the letter dated October 29, 1985 on November 1, 1985. All remaining allegations in this Paragraph are denied.

17. Collier admits that he received a letter dated March 13, 1986, which letter speaks for itself. All remaining allegations in this Paragraph are denied.

18. Collier admits that he received the letter dated March 13, 1986 on March 15, 1986. All remaining allegations in this Paragraph are denied.

19. Collier admits that he received a letter dated September 15, 1986, which letter speaks for itself. All remaining allegations in this Paragraph are denied.

20. Collier admits that he received the letter dated September 15, 1986 on September 18, 1986. All remaining allegations in this Paragraph are denied.

21. Collier admits that he received a letter dated August 14, 1989, which letter speaks for itself. All remaining allegations in this Paragraph are denied.

22. Collier admits that he received the August 14, 1989 letter. Collier does not recall the time or circumstances of receipt, therefore the allegations pertaining thereto are denied. It is further denied that Exhibit S to the Bill of Complaint in any manner indicates personal service upon Collier. Collier further denies all other allegations in this paragraph.

23. The allegations in this Paragraph relate only to matters of law, and therefore no response is required; however, to the extent that this Paragraph correctly characterizes the referenced statute and ordinances, it is admitted and to the extent it does not, it is denied.

24. Collier admits that he has not yet appealed anything purporting to be a decision or order to the Board of Zoning Appeals. All other allegations in this Paragraph relate only to matters of law, and therefore no response is required; otherwise, Collier denies the remaining allegations in this Paragraph.

25. The allegations in this Paragraph relate only to matters of law, and therefore no response is required; otherwise, Collier denies the allegations in this Paragraph.

26. Denied.

27. Denied.

28. Admitted.

29. The allegation in this Paragraph relates only to a matter of law, and therefore no response is required.

30. The allegations in this Paragraph relate only to matters of law, and therefore no response is required.

31. All other allegations in the Bill of Complaint for Declaratory Judgment and Injunctive Relief not expressly addressed or admitted herein are denied.

DEFENSES

1. Respondent affirmatively asserts that the use of his property is legal and proper as a pre-existing nonconforming use (or grandfathered use) on the following grounds:

a) The Zoning Ordinance in effect at the time the Respondent began his current use of the property permitted such use and such use has continued without lapse.

b) The decision by the Zoning Administrator that the Respondent's use of the property was a nonconforming use is "a thing certain and not subject to attack," under Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988).

2. Complainant is not being irreparably harmed and no significant damage could result from withholding injunctive relief.

3. The ordinances governing Vehicle Major Service Establishments and Storage are unconstitutionally vague and overbroad.

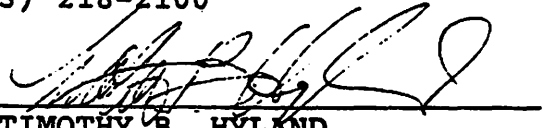
4. The parties sending the letters to Respondent were not authorized to issue notices of violation.

5. Respondent is not violating the Zoning Ordinance.

6. Respondent intends to rely on any other defenses, affirmative or otherwise, of which he may become aware prior to or during trial.

ORVILLE N. COLLIER
By counsel

ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

BY: 
TIMOTHY B. HYLAND
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Answer and Grounds of Defense was mailed, first class postage prepaid, this 8th day of May, 1991, to Jan L. Brodie, Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Complainant.


TIMOTHY B. HYLAND

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

IN CHANCERY NO. 120132

MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Complainant Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and moves this Court to enter summary judgment in favor of the Complainant based upon the following grounds:

1. The Board of Supervisors has designated Complainant Jane W. Gwinn as the Fairfax County Zoning Administrator. Under the provisions of Va. Code § 15.1-491(d) (Supp. 1991), the Zoning Administrator has all necessary authority to administer and enforce the Fairfax County Zoning Ordinance (hereinafter "Zoning Ordinance"), including the ordering in writing of the remedying of any condition found to be in violation of the Zoning Ordinance, and the bringing of legal action in the form of injunctive relief to insure compliance with the ordinance.

2. Respondent Orville N. Collier (hereinafter "Collier") is the owner of record of property located at 10109 Milstead Road (hereinafter "subject property") by virtue of a deed of bargain and sale recorded among the land records of Fairfax County in Deed Book 4600, at page 347. Respondent admits that he is the current owner of the subject property in his Answer, paragraph 3, filed on May 8, 1991.

3. The subject property contains approximately two (2) acres. This fact is admitted in Respondent's Answer, paragraph 4, filed on May 8, 1991. The subject property is zoned to the R-E District (Residential Estate District).

4. On April 30, 1981, Collier was issued a Non-Residential Use Permit (Non-Rup) Certificate No. A-687-81 relating to the subject property. This fact is admitted in Respondent's Answer, paragraph 5, filed on May 8, 1991.

5. By letter dated March 2, 1983, the Zoning Administrator issued a notice of violation to Collier which revoked Collier's Non-Rup dated April 30, 1981, since it had been issued in error, and declared same to be null and void in accordance with Zoning Ordinance § 18-111. The Notice of violation also informed Collier that the parking and/or storage of thirty-four (34) vehicles on the subject property is in violation of Zoning Ordinance § 2-508 and directed Collier to cease the repair and remove from the subject property all vehicles which are not registered in Collier's name or the name of the full time resident of the subject property. Collier was

also directed to repair, place in a fully enclosed structure, or remove from the subject property any of the junk vehicles listed in the March 2, 1983, letter not registered in Collier's name or the name of the full time resident of the subject property within thirty (30) days of the receipt of the March 2, 1983, letter. Copies of the March 2, 1983, notice of violation and Zoning Ordinance §§ 2-508 and 18-111 are attached hereto and incorporated by reference as Exhibit A-1, A-2 and A-3, respectively.

6. Collier admits receiving the March 2, 1983, notice of violation on March 5, 1983, in his Answer, paragraph 10, filed on May 8, 1991.

7. By letter dated October 29, 1985, Senior Zoning Inspector Mary F. Burton issued Collier another notice of violation for the continued use of the subject property as a major vehicle service establishment in the R-E District in violation of Zoning Ordinance § 2-302(5). Collier was directed to clear the violation within forty-five (45) days after receipt of the October 29, 1985, notice of violation by ceasing the repair of any vehicles and removing all vehicles from the subject property, with the exception of vehicles that are registered to the bona fide residents of the subject property.

The notice of violation also informed Collier that the keeping of junk vehicles behind a fenced area on the subject property was in violation of Zoning Ordinance § 2-508 and ordered Collier to repair or remove the junk vehicles from the subject property within twenty-one (21) days of the receipt of the notice of violation or to place the junk vehicles in a

fully enclosed structure. If this was not done within twenty-one days, this letter served as official notice that Collier was in violation of Zoning Ordinance § 2-508 and would have an additional nine (9) days in which to clear the violation.

In addition, the October 29, 1985, notice of violation informed Collier that the use of the subject property to store tires and miscellaneous vehicle parts is in violation of Zoning Ordinance § 10-102(23) and ordered Collier to comply with § 10-102(23) within thirty days by locating the outside storage to the rear half of the lot, screening it from view from the first story window of any neighboring dwelling and limiting it to a total area not exceeding 100 square feet. Copies of the October 29, 1985, notice of violation and Zoning Ordinance §§ 2-302(5) and 10-102(23) are attached hereto and incorporated by reference as Exhibit B-1, B-2 and B-3, respectively. On March 27, 1990, Zoning Ordinance § 10-102(23) was renumbered as Zoning Ordinance § 10-102(24). A copy of Zoning Ordinance § 10-102(24) is attached hereto and incorporated by reference as Exhibit B-4.

8. Collier admits receiving the October 29, 1985, notice of violation on November 1, 1985, in his Answer, paragraph 16, filed on May 8, 1991.

9. By letter dated March 13, 1986, Senior Zoning Inspector Mary F. Burton issued yet another notice of violation for the continued operation of a major vehicle service establishment (C&C Auto Repair) from the subject property in violation of Zoning Ordinance § 2-302(5) and ordered Collier to

clear the violation within ten (10) days after receipt of the notice of violation by ceasing the repair of vehicles and removing all vehicles from the subject property, with the exception of the vehicles that are registered to the bona fide residents of the subject property. A copy of the March 13, 1986, notice of violation is attached hereto and incorporated by reference as Exhibit C. Collier admits receiving the March 13, 1986, notice of violation on March 15, 1986, in his Answer, paragraph 18, filed on May 8, 1991.

10. By letter dated September 15, 1986, Senior Zoning Inspector Mary F. Burton issued Collier an additional notice of violation for the continued operation of a vehicle major service establishment (C&C Auto Repair) from the subject property in violation of Zoning Ordinance § 2-302(5). A copy of the September 15, 1986, notice of violation is attached hereto and incorporated by reference as Exhibit D. Collier admits receiving the September 15, 1986, notice of violation on September 18, 1986, in his Answer, paragraph 20, filed on May 8, 1991.

11. By letter dated August 14, 1989, Senior Zoning Inspector Tammy R. Brown issued Collier a notice of violation for the continued use of the subject property as a vehicle major service establishment (C&C Auto Repair) and directed Collier to clear the violation within fifteen (15) days of receipt of the notice of violation by ceasing the repair of vehicles and removing all vehicles from the subject property

with the exception of the vehicles that are registered to the bona fide residents of the subject property. A copy of the August 14, 1989, notice of violation is attached hereto and incorporated by reference as Exhibit E. Collier admits receiving the August 14, 1989, notice of violation in his Answer, paragraph 22, filed on May 8, 1989.

12. Va. Code § 15.1-496.1 (1989) and Zoning Ordinance §§ 18-301 and 18-303 provide, inter alia, that any person aggrieved by any decision of the Zoning Administrator or by an order, requirement, decision or determination of any other administrative officer made in the administration and enforcement of the Zoning Ordinance may appeal such decision, order, requirement or determination to the Board of Zoning Appeals (hereinafter "BZA") within 30 days of the decision, order requirement or determination. Copies of the above-referenced sections are attached hereto for the Court's convenience as Exhibits F-1 and F-2, respectively.

13. Collier never appealed the decisions and orders set forth in the March 2, 1983, October 29, 1985, March 13, 1986, September 15, 1986, and August 14, 1989, notices of violation to the BZA. This fact is admitted by Collier in his Answer, paragraph 24, filed on May 8, 1991.

14. By failing to appeal the March 2, 1983, October 29, 1985, March 13, 1986, September 15, 1986, and August 14, 1989, decisions and orders of the Zoning Administrator to the BZA, the decisions that Collier's use of the subject property as a vehicle major service establishment is in violation of

Zoning Ordinance § 2-302(5) and that the use of the subject property for storage is in violation of § 10-102(24) are "thing[s] certain and not subject to attack by the Defendant." Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988).

15. Collier admits that "he performs repair services upon automobiles, including mechanical and transmission repair" in Respondent's Response to Complainant's Requests for Admission, paragraph 5, filed on June 4, 1991. Furthermore, Collier admits that he, his agent or employee did repair work on two vehicles not owned by him on the subject property on or about May 6, 1991, in Respondent's Response to Complainant's Requests for Admission, paragraphs 2 3 and 4, filed on June 4, 1991.

16. As is more particularly set forth in the affidavit of Tammy R. Brown, which affidavit is attached hereto and incorporated by reference as Exhibit G, the Respondent continues to operate a vehicle major service establishment on the subject property in violation of Zoning Ordinance § 2-302(5).

17. There is no genuine dispute as to the material facts set forth above.

WHEREFORE, based upon the foregoing grounds, Complainant, by counsel, requests this Court to:

1. Declare the Respondent to be in violation of Zoning Ordinance § 2-302(5) by the use of the subject property as a vehicle major service establishment.

2. Issue a mandatory injunction requiring the

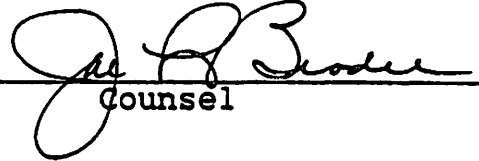
Respondent to cease the operation of a vehicle major service establishment from the subject property and remove all vehicles and items associated with the vehicle major service establishment.

3. Issue a prohibitory injunction permanently enjoining the Respondent, his agents or employees, from using the subject property as a vehicle major service establishment as defined by Zoning Ordinance § 20-300.


4. Grant Complainant such other relief as this Court may deem appropriate.

Respectfully submitted,

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR

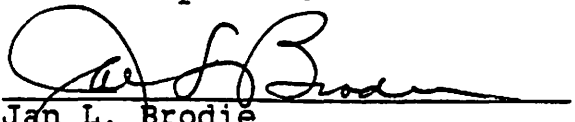
By 
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By 
Jan L. Brodie
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
703) 246-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage pre-paid, this 26th day of August 1991, to Timothy B. Hyland, Esquire, Odin, Feldman & Pittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.


Jan L. Brodie

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

Complainant,

v.

ORVILLE N. COLLIER

Respondent.

IN CHANCERY NO. 120132

AFFIDAVIT

STATE OF VIRGINIA :
COUNTY OF FAIRFAX : to-wit

THIS DAY, I, Tammy R. Brown, personally appeared before the undersigned notary public in the state and county aforesaid and being duly sworn according to law, made oath that;


1. I am currently employed with the Office of Comprehensive Planning, Zoning Enforcement Branch, as one of the agency's Senior Zoning Inspectors. My responsibilities include the investigation and enforcement of Zoning Ordinance violations within Fairfax County.

2. During an inspection on August 14, 1991, at 11:10 a.m., I observed that the Respondent continues to use the property located at 10109 Milstead Road (hereinafter "subject property") as a vehicle major service establishment and is storing approximately 20 vehicles on the subject property.

During this inspection, I took the four (4) photographs which are attached hereto and incorporated by reference as Attachment 1.

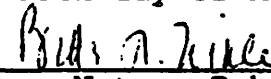
3. The subject property is zoned to the R-E District.

4. The use of the subject property as a vehicle major service establishment in a R-E District is in violation of Fairfax County Zoning Ordinance § 2-302(5).



Tammy R. Brown

Subscribed and sworn to before me a Notary Public in the County and State aforesaid this 23th day of August 1991.



Notary Public

My commission expires: Jan. 30, 1992

JLB/brz.1085



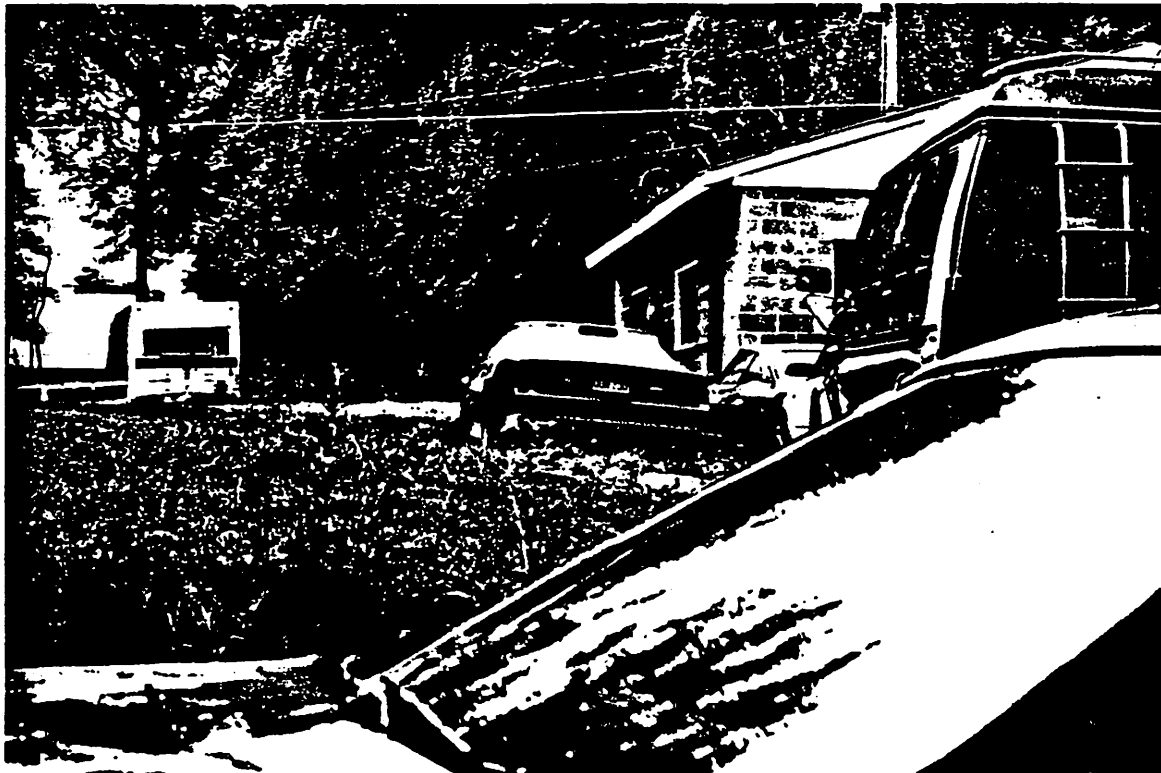
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B.



C.



D.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Respondent, Orville N. Collier, by Counsel, and moves this Court to enter summary judgment in favor of the Respondent, and against the Complainant, and in support thereof states the following:

1. Complainant filed this suit on February 27, 1991, seeking declaratory and injunctive relief against the Respondent.

2. In support of her suit, Complainant attached to and incorporated in her Bill of Complaint a number of documents, including a Non-Residential Use Permit dated April 30, 1981, which permit was signed by Philip G. Yates, Zoning Administrator. A copy of said permit is attached hereto as Exhibit A. See also Exhibit B to Complainant's Bill of Complaint.

3. The Non-Residential Use Permit signed by the Zoning Administrator provides that the subject property may be used as a "Major vehicle Establishment, Non-Conforming use".

4. Complainant has admitted that "the Zoning Administrator issued a Non-Residential Use Permit Certificate to C & C Auto Repair to use the entire floor of the building on the subject property as a major vehicle establishment, non-conforming use." See Complainant's Response to Respondent's First Request for Admissions, Paragraph 2.

5. Complainant has admitted that on or about May 19, 1970, a building permit was issued for the construction of a 1,200 square foot garage structure on Respondent's property. See Complainant's Response to Respondent's First Request for Admissions, Paragraph 1.

5. The issuance and content of the Non-Residential Use Permit constituted a decision of the Zoning Administrator, appealable to the Board of Zoning Appeals pursuant to Virginia Code Ann. § 15.1-496.1.

6. Complainant has admitted that neither Complainant, nor any other person or entity has appealed the decision of the Zoning Administrator that use of the subject property as a Vehicle Major Service Establishment constituted a legal, pre-existing non-conforming use. See Complainant's Response to Respondent's First Request for Admissions, Paragraph 3.

7. Because the the April 30, 1981 decision of the Zoning Administrator was not appealed within the requisite time period, the decision that Respondent's use of the property as a vehicle major service establishment is a legal, pre-existing non-conforming use is a "thing certain and not subject to attack" by the Zoning Administrator or any other person or entity. Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988); See also, Rucker Realty v. Board of Zoning Appeals, 16 Va. Cir. 191 (Fairfax Cir. 1989) (later dismissed as moot).

ODIN, FELDMAN & PITTLEMAN, P.C.
ATTORNEYS AT LAW
SUITE 1100 • 9302 LEE HIGHWAY • FAIRFAX, VIRGINIA 22031
(703) 218-2100

8. Nothing herein shall be deemed to waive any defenses raised in Respondent's Grounds of Defense or hereafter raised in any manner.

WHEREFORE, based upon the foregoing, Respondent requests that this Court enter summary judgment in its favor, and against the Complainant, and Respondent further requests that this Court deny Complainant's Motion for Summary Judgment.

ORVILLE N. COLLIER
By Counsel

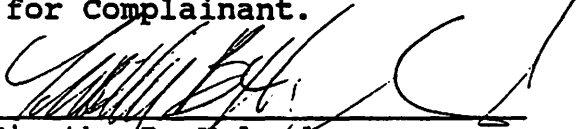
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22030
(703) 218-2130

BY: 

Timothy B. Hyland, VSB No. 31163
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Cross-Motion for Summary Judgment was hand-delivered this 6th day of September, 1991, to Jan L. Brodie, Assistant County Attorney, Office of the County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Complainant.


Timothy B. Hyland

2958G

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

DEFENDANT'S MEMORANDUM IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT

INTRODUCTION

This suit comes before the Court on Complainant's Motion for Partial Summary Judgment and on Respondent's Cross-Motion for Summary Judgment. Both sides rest their claims for Summary Judgment upon the finality of unappealed decisions of County officials. As set forth below it is clear that the Zoning Administrator is bound by the earliest of the decisions, a final, unappealed decision made in 1981.

BACKGROUND

Respondent, O. N. Collier ("Collier"), is a resident of the Great Falls area of Fairfax County. By vocation and avocation, Collier repairs automobiles. In 1970, Collier obtained a building permit for the construction of a 1,200 square foot garage structure on the property he now owns jointly with his spouse, Patricia A. Collier.^{1/} See Respondent's Request for Admission No. 1, and

^{1/}Contrary to the assertion of the Zoning Administrator in Paragraph 2 of her Motion for Partial Summary Judgment, Respondent has never admitted that he is the owner of the property. He has admitted only that he is an owner of the property. See Respondent's Answer, Paragraph 3.

Complainant's response thereto, attached hereto as Exhibit A. In April of 1981, Collier, acting through his sole proprietorship, C & C Auto Repair, applied for and was granted a non-residential use permit to use the above-mentioned garage structure on the subject property as a Major Vehicle Service Establishment, Non-Conforming Use.^{2/} See Exhibit A to Respondent's Cross-Motion for Summary Judgment. The Non-Residential Use Permit Certificate is signed by "Philip G. Yates, Zoning Administrator." The issuance of this permit has never been appealed by any person or entity. See Respondent's Request for Admission No. 3, and Complainant's response thereto.

As set forth in great detail in the Complainant's Motion for Partial Summary Judgment, the Zoning Administrator and several zoning inspectors, in 1983, 1985, 1986 and 1989, wrote letters requesting that Collier remove what they felt was a use or were uses which were in violation of the Fairfax County Zoning Ordinance. Because Collier did not appeal these letters^{3/} to the Board of Zoning Appeals, Complainant asserts that Collier is,

^{2/}Section 20-300 of the Zoning Ordinance defines a "non-conforming use" as "A . . . use, lawfully existing on the effective date of this Ordinance or prior ordinances, which does not conform with the regulations of the zoning district in which it is located"

^{3/}Contrary to the assertions in Paragraphs 5-11 of Complainant's Motion for Partial Summary Judgment, Respondent has not admitted to ever receiving a "notice of violation." He has admitted only to receiving letters from the Zoning Administrator and the several zoning inspectors.

as a matter of law, in violation of Zoning Ordinance § 2-302(5) of the Zoning Ordinance. As set forth below, this is incorrect in that it ignores earlier events which render moot the letters of 1983, 1985, 1986 and 1989.

STATUTORY BACKGROUND

The decision of this Court on both Complainant's Motion for Partial Summary Judgment and Respondent's Cross-Motion for Summary Judgment rests exclusively upon the meaning of Virginia Code Ann. § 15.1-496.1. This statute provides, in pertinent part:

An appeal to the board [of zoning appeals] may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board [of zoning appeals], a notice of appeal specifying the grounds thereof.

In Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988), the Court held that because the operator of a trash hauling business had failed to appeal letters from the Zoning Administrator's office which asserted that he was in violation of the zoning ordinance, the decision of the Zoning Administrator "was a thing decided and was not subject to attack." *Id.* at 621, 369 S.E.2d at 412. It follows, therefore, that a failure to appeal a decision of the Zoning Administrator pursuant to Code § 15.1-496.1 renders the decision of the Zoning Administrator binding upon the party who failed to

appeal. Indeed, this is the basis for the Zoning Administrator's Motion for Partial Summary Judgment.

ARGUMENT

I. THE NON-RESIDENTIAL USE PERMIT ISSUED ON APRIL 30, 1981 CONSTITUTES A DECISION OF THE ZONING ADMINISTRATOR, AND WAS THEREFORE APPEALABLE TO THE BOARD OF ZONING APPEALS.

As discussed above, on April 30, 1981 the Zoning Administrator issued to Collier a Non-Residential Use Permit which denominated Collier's use of the property a non-conforming use. No appeal was taken by "any person aggrieved or by any officer, department, board or bureau affected by the decision." Thus, given the plain language of Code § 15.1-496.1, Collier's use of the subject property is a legal non-conforming use so long as the issuance of the Non-Residential Use Permit constitutes a "decision of the Zoning Administrator" or an "order, requirement, decision or determination made by any other administrative officer." It is clear that the issuance of the permit was a decision of the Zoning Administrator, thereby triggering the appeal period under § 15.1-496.1.

The term "decision" is "a popular and not a technical or legal word. It is a very comprehensive term and has no fixed, legal meaning" Palmer Publishing Co. v. Smith, 109 S.W.2d 158 (Tex. 1937). As specifically applied to the case at bar, Lanner v. Board of Appeal of Tewksbury, 348 Mass. 220, 202 N.E.2d 777 (1964) is instructive. Lanner involved an appeal by a landowner from an adverse decision by the board of appeal regarding the buildings commissioner's issuance of a permit to an adjoining landowner. When

Lanner appealed the decision of the board to the Court, the Board attempted to recant its earlier ruling by claiming that it did not have jurisdiction to hear the case originally, since it could hear only those appeals taken "by any person aggrieved by any order or decision of the inspector of buildings or other administrative official" *Id.* at ____, 202 N.E.2d at 779. The Board argued that "the issuance of a building permit is not an order or decision of the inspector of buildings." *Id.* The Court disagreed with the Board of Appeal, holding that the issuance of a permit requires that a decision be made by the permitting official and thus constitutes a "decision" under the statute.

This same view was adhered to by the Zoning Administrator in her brief to the Supreme Court of Virginia in Gwinn v. Alward. The Zoning Administrator stated:

[T]he Solid Waste Division, which is responsible for the issuance of trash hauling permits, properly presented to the Zoning Administrator the question, raised by Alward's submission of his trash hauling permit application, regarding whether Alward could store operable trash trucks at [the property].

It makes no difference under Virginia law how the Zoning Administrator becomes aware of a zoning issue requiring a decision

The reasoning in Lanner is particularly true in the case at bar, where the Zoning Administrator not only issued Collier a Non-Residential Use Permit, but supported his decision by deciding that Collier's use of the property was a non-conforming use. Because this was a decision by the Zoning Administrator, it was

appealable to the Board of Zoning Appeals. No appeals having been taken by any person or entity pursuant to Va. Code § 15.1-496.1, this decision became final and not subject to attack effective May 30, 1981, long before any of the letters purporting to cite Collier for zoning violations were mailed or received.

II. THE ZONING ADMINISTRATOR'S 1981 DETERMINATION THAT COLLIER'S USE OF THE PROPERTY WAS LEGAL AS A NON-CONFORMING USE IS FINAL AND BINDING UPON THE COMPLAINANT AS A MATTER OF LAW.

The Zoning Administrator is bound by the decision of April 30, 1981. As set forth above, Virginia Code § 15.1-496.1 provides that anyone wishing to dispute a zoning administrator's decision must appeal to the Board of Zoning Appeals within thirty (30) days after the decision. The Supreme Court of Virginia has ruled that the failure to make such an appeal renders the unappealed decision a "thing certain and not subject to attack." Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988). While the Complainant relies upon this authority for her position in this action, a look at the pleadings and admissions shows quite clearly that this authority leads to the inescapable conclusion that Respondent must prevail as to the issues raised herein.

The Zoning Administrator's attempt to reverse her predecessor's decision is in clear conflict with the mandates of the legislature in its enactment of § 15.1-496.1 and the Supreme Court in its holding in Gwinn v. Alward. The General Assembly and Supreme Court have manifested their intents that zoning administrators' decisions be both reliable and final once the thirty-day appeal period has passed. No appeal of the 1981 decision was made by the Zoning Administrator, or by any officer,

department, board or bureau of the County. Therefore, the statute clearly provides that the April 30, 1981 decision is binding upon both Mr. Collier and the Zoning Administrator.

This interpretation of state law is not at all new or novel in Fairfax County. The Circuit Court of Fairfax County has ruled that a zoning administrator cannot change her decision after the appeal period has passed. In George Rucker Realty Corp. v. Board of Zoning Appeals of the Town of Herndon, 16 Va. Cir. 191 (Fairfax Cir. 1989) (later dismissed as moot), Judge Bach of this Court found that:

The language of Virginia Code § 15.1-496.1 clearly contemplates that a municipality . . . must appeal a decision by the Zoning Administrator by which they are aggrieved. The language of this section also contemplates that a failure to file an appeal within the requisite thirty days results in the Zoning Administrator's decision becoming final and binding. A conclusion to the contrary would clearly circumvent the legislature's intention that such decisions provide finality to the zoning process.

A copy of Judge Bach's opinion is attached hereto as Exhibit B. This decision makes clear that the April 30, 1981 decision of the Zoning Administrator is final, binding and conclusive. The letters of the Zoning Administrator and inspectors, all of which were written subsequent to the 1981 decision are null and void and of no effect whatsoever.

The Rucker opinion, moreover, was not an aberration. In The Henry A. Long Company v. Board of Supervisors, Chancery No. 114487 (Master File No. 115184), this same finding was expressed in the Final Order. In paragraph 3 of the Order, a copy of which is attached hereto

as Exhibit C, it is stated that "The Interpretation [of the Zoning Administrator] was not appealed within the time limitations established by ordinance and thus is final." The ordinance referred to is Fairfax County Zoning Ordinance § 18-303 which, along with §§ 18-301 and 18-302, incorporates Va. Code § 15.1-496.1 into the Zoning Ordinance.

To permit a zoning administrator to simply change her and her predecessors' decisions at will would devastate the system intended by the General Assembly and upon which various individuals and entities, including the County, depend to obtain definitive findings regarding how a given property may be used. If a zoning administrator can make such reversals, every person requesting or affected by an opinion of a zoning administrator would have to seek a decision of the Board of Zoning Appeals to assure that their rights under the ordinance were protected. This is certainly not the legislature's intent -- this is tantamount to a finding that the Zoning Administrator is ultimately without any power at all to interpret or make decisions pursuant to the ordinance.

While this policy determination may result in occasional mistakes becoming irreversible,^{4/} the General Assembly has determined that the greater evil to be avoided was the uncertainty brought about by allowing a zoning administrator to reverse herself at will. Today, zoning administrators' opinions are required by lenders as a prerequisite to the settlement of almost all loans secured by property intended for development or redevelopment. Every day, countless dollars are invested in Virginia based on determinations by

^{4/}Respondent does not, however, concede that the Zoning Administrator's decision of April 30, 1981 was in error.

zoning administrators. The impact upon the economy of this County if the Zoning Administrator were permitted to make such reversals and if the Zoning Administrator's opinions could not be relied upon by landowners, investors and lenders would be catastrophic.

In addition, the legislature has provided a safeguard to protect against zoning administrators' mistakes through its enactment of Va. Code § 15.1-496.3, which allows persons who had no actual notice of the issuance of a building permit to challenge the issuance of that permit in court even though no appeal to the BZA has been filed. This arrangement obviously was intended as a check on any abuse of the preference for certainty manifested in Va. Code § 15.1-496.1.

An additional issue that the Zoning Administrator will doubtless raise is the existence of Zoning Ordinance § 18-114. This provision purports to make invalid any permit "issued, granted or approved in violation of any provision of this Ordinance." For several reasons, any argument that this provision overcomes or impedes the finality of an unappealed decision of the Zoning Administrator is without merit. First, for this provision of the Zoning Ordinance to be applicable to this case, the Zoning Administrator must show that Collier's use of the property is and was in fact not a non-conforming use. This cannot, of course, be raised at this stage of the proceedings, as the issue of whether Collier indeed has and had a non-conforming use is a question of fact. Second, Va. Code § 1-13.17 provides that no ordinance may be inconsistent with state law. For Zoning Ordinance § 18-114 to be applicable to the situation at bar, the plain language and intent of Va. Code § 15.1-496.1 would have to be wholly emaciated. The County's attempt to eliminate the fact that it

is bound by Va. Code § 15.1-496.1 by simply enacting Zoning Ordinance § 18-114 is contrary to the well-established rule of law provided in Va. Code § 1-13.17. Moreover, § 18-114 need not be found invalid to reach this result. In Board of Supervisors v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980), the Supreme Court noted that "If both the statute and ordinance can stand together, courts are obliged to harmonize them" Here, Zoning Ordinance § 18-114 can be harmonized with Va. Code § 15.1-496.1 by interpreting Zoning Ordinance § 18-114 to give the Board of Zoning Appeals authority to reverse the decision of the Zoning Administrator in an appeal timely brought where a permit was improvidently granted. However, once a decision is final (i.e., 30 days after an unappealed decision is made), the Zoning Administrator cannot attack the decision by claiming that it was incorrect. Such attack must be first raised before the BZA in an appeal brought within the statutory time period.

CONCLUSION

The Zoning Administrator's 1981 decision that Collier's use of the property as a Vehicle Major Service Establishment is a pre-existing, legal non-conforming use is final and binding, and the letters issued in 1983 and thereafter are of no effect. Therefore, Respondent, O. N. Collier, by Counsel, respectfully requests this Court to enter a decree declaring that his use of the subject property as a Vehicle Major Service Establishment is a legal non-conforming use, and denying Complainant's request to enjoin the Respondent from such use of the subject property.

Respectfully Submitted,

ORVILLE N. COLLIER
By Counsel

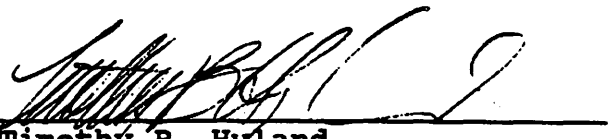
ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

BY:


Timothy B. Hyland, VSB #31163

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Defendant's Memorandum in Support of Cross-Motion for Summary Judgment was sent by facsimile and first class mail, postage prepaid to Jan L. Brodie, Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, this 11th day of September, 1991.


Timothy B. Hyland

2970G

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN,
FAIRFAX COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

RESPONDENT'S FIRST REQUEST FOR ADMISSIONS

TO: JANE W. GWINN,
FAIRFAX COUNTY ZONING ADMINISTRATOR
c/o Jan L. Brodie, Assistant County Attorney
4100 Chain Bridge Road
Tenth Floor
Fairfax, Virginia 22030

COMES NOW the Respondent, Orville N. Collier, by counsel and pursuant to Rules 4:1 and 4:11 of the Rules of the Supreme Court of Virginia, requests the Complainant to admit or deny the truth of the following within twenty-one (21) days after service of this request. For the purpose of this Request for Admissions, the following definition applies:

"Subject property" refers to the property located at 10109 Milstead Road, Great Falls, Virginia 22066, and also known as Fairfax County Tax Map No. 7-4-((1))-38.

PLEASE ADMIT THE FOLLOWING:

1. On or about May 19, 1970, a building permit was issued for the construction of a 1,200 square foot garage structure on the subject property.
2. On April 30, 1981, the Zoning Administrator issued a Non-Residential Use Permit which deemed Respondent's use of the entire



floor of the building on the subject property as a vehicle major service establishment a non-conforming use.

3. There has been no appeal, at any time to the Board of Zoning Appeals by any person or entity relating in any manner to the Non-Residential Use Permit referenced in Paragraph 2, or the matters stated in the permit.

4. At some time between 1956 and 1959, inclusive, there was no zoning ordinance in effect in Fairfax County, Virginia.

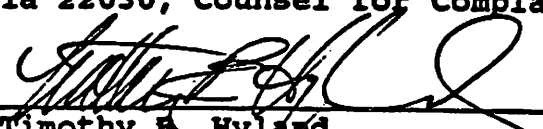
ORVILLE N. COLLIER
By Counsel

ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

BY: 
TIMOTHY B. HYLAND, Esquire
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Respondent's First Request for Admissions was hand delivered this 15th day of May, 1991, to Jan L. Brodie, Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Complainant.


Timothy B. Hyland

2556G

ODIN, FELDMAN & PITTLEMAN, P.C.
ATTORNEYS AT LAW
SUITE 1100 • 9302 LEE HIGHWAY • FAIRFAX, VIRGINIA 22031
(703) 218-2100

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

IN CHANCERY NO. 120132

COMPLAINANT'S RESPONSE TO RESPONDENT'S
FIRST REQUEST FOR ADMISSIONS

COMES NOW Complainant Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and serves her Response to Respondent's First Request for Admissions upon Respondent, and states as follows:

1. Admitted.

2. In response to Request No. 2, Complainant admits that on April 30, 1981, the Zoning Administrator issued a Non-Residential Use Permit Certificate to C & C Auto Repair to use the entire floor of the building on the subject property as a major vehicle establishment, non-conforming use. A copy of the certificate is attached to the Bill of Complaint for Declaratory Judgment and Injunctive Relief as Exhibit B. Complainant further admits that said certificate was issued in error and deemed null and void by the Zoning Administrator by letter dated March 2, 1983.

- 3. Admitted.
- 4. Denied.

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR

By: Jan L. Brodie
Counsel

DAVID T. STITT
COUNTY ATTORNEY

By: Jan L. Brodie
Jan L. Brodie
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 246-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Complainant's Response to Respondent's First Request for Admissions was mailed first-class, postage pre-paid, this 4th day of June 1991, to Timothy B. Hyland, Esquire, Odin, Feldman & Rittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.

Jan L. Brodie
Jan L. Brodie

CIRCUIT COURT OF FAIRFAX COUNTY

George H. Rucker Realty Corp.

v.

**Board of Zoning Appeals
of the Town of Herndon**

June 14, 1989

Case No. (Chancery) 108793

HEADNOTE: A decision of a zoning administrator can be appealed to the board of zoning appeals, but it cannot be reversed by a successor zoning administrator.

By JUDGE F. BRUCE BACH

This matter is before the Court on petitioner's Memorandum of Law, the opposition thereto and petitioner's reply. Oral argument was heard on May 18, 1989.

The parties have agreed that this appeal is to be heard on the Board of Zoning Appeals record pursuant to Section 15.1-497 of the Code of Virginia. Petitioner, George H. Rucker Realty Corporation ("Rucker") is the owner of 0.62 acres of real property located in the Town of Herndon, Virginia. Respondent, The Town of Herndon Board of Zoning Appeals ("BZA") is empowered under the Code of Virginia and the zoning ordinance of the Town of Herndon, Virginia, to hear and decide appeals from any interpretation of the zoning ordinance made by the Zoning Administrator of the Town of Herndon.

The subject property is zoned in the RM-2 multiple family residential district. On June 24, 1987, Rucker requested an interpretation from the town Zoning Administrator, then David P. Larsen ("Larsen"), regarding whether Jefferson Square, which Rucker proposed to construct on the subject property, would be considered "duplexes."

On July 16, 1987, Larsen determined that Jefferson Square constituted "five two-family dwellings." ("Larsen Interpretation"). Rucker proceeded to seek site plan

EXHIBIT

B

approval for the subject property. On July 28, 1988, Norman Hammer, as Counsel for owners of certain real property located near the subject property, requested an interpretation from Robert Stalzer, the town's new Zoning Administrator ("Stalzer").

On July 29, 1988, Stalzer issued a determination ("Stalzer Interpretation") stating that Jefferson Square constituted a "multiple-family dwelling" rather than "five two-family dwellings." Under the Stalzer Interpretation, the Jefferson Square site plan did not meet the required setbacks, thus preventing the proposed development from being approved.

On August 2, 1988, Rucker appealed the Stalzer Interpretation to the BZA. On August 25, 1988, a public hearing was held by the BZA. On September 22, 1988, a divided BZA rendered its decision upholding the Stalzer Interpretation. The BZA ruled that it did not have authority to rule or decide on the extent of the Zoning Administrator's authority in this particular case and ruled that the Stalzer interpretation of the Jefferson Square site plan was correct.

The 1950 Code of Virginia, § 15.1-496.1, as amended, provides in pertinent part that:

An appeal to the Board may be taken by any person aggrieved or by an officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration and enforcement of this article or any ordinance adopted pursuant thereto. Such appeal should be taken within thirty days after the decision appealed from by filing with the zoning administrator and with the board a notice of appeal specifying the grounds thereof.

The language of Virginia Code § 15.1-496.1 clearly contemplates that a municipality such as the Town of Herndon must appeal a decision by the Zoning Administrator by which they are aggrieved. The language of this section also contemplates that a failure to file an appeal within

the requisite thirty days results in the Zoning Administrator's decision becoming final and binding. A conclusion to the contrary would clearly circumvent the legislature's intention that such decisions provide finality to the zoning process.

The purpose underlying Virginia Code § 15.1-496.1 is to provide a mechanism through which an individual may rely on the zoning administrator's decision if an appeal is not taken within thirty days of that decision. Petitioner and respondent agree that a requirement that every decision of the zoning administrator must be appealed if there is any ground for contention or error would paralyze the development process and add substantial administrative and legal costs to a system already overburdened by its volume. The statutory language of § 15.1-496.1 provides the method through which parties are relieved from appealing to the BZA every decision that a Zoning Administrator makes.

The language of Virginia Code § 15.1-496.1 provides for a final interpretation by the zoning administrator which may be relied upon by the party to whom that decision is rendered. A decision of the zoning administrator which becomes final absent an appeal within the thirty-day period should allow a builder, contractor, and/or individual the right to rely on this decision and permit a party to proceed with the proposed project. A conclusion to the contrary would have far reaching consequences on the economic and financial stability of the construction and development industries. The Court concludes that the failure of the Town of Herndon to appeal the Larsen interpretation within the thirty days required under Virginia Code Section 15.1-496.1 resulted in the Larsen interpretation becoming a final and binding decision on the Town of Herndon.

Assuming, *arguendo*, that the Town was not bound by the Larsen interpretation, the Court will now address whether the BZA made a proper determination on the merits of the case in adopting the Stalzer interpretation that the proposed development constituted multi-family dwellings.

Section 28-2 of the Town of Herndon's zoning ordinance provides the definitions for the type of structures that are at issue in this proceeding. Respondent asserts that the definition of a "dwelling unit" is what permits more than one dwelling to be included in a single building. Res

pondent concludes that if all the units are connected with party walls and share a common roof structure, then they are a single building or structure under the zoning ordinance definitions. Respondent asserts that petitioner's proposed development constitutes a single building which contains both vertical and horizontal party walls. Respondent concludes that it is a single structure, containing ten dwelling units. Petitioner asserts that the structure consists of five "two-family dwellings."

The Town of Herndon Zoning Ordinances defines a two-family dwelling as "A building designed for or occupied exclusively by two families living independently of each other." The Town of Herndon zoning ordinance defines a building as "any structure having a roof supported by columns or walls for the housing or enclosure of persons or property of any kind." Respondent would have the Court conclude that the proposed development is actually a single building, similar to a typical apartment building. Respondent asserts that the existence of horizontal party walls between the structures would require the Court to conclude that there are ten dwelling units, and therefore, that the proposed building constitutes a "multi-family dwelling."

The Court's interpretation of the definition for "building" as set forth in the zoning ordinance does not render itself to the Respondent's position that the connection of these units with horizontal party walls and the existence of a common roof structure, would require the Court to conclude that the proposed structure constitutes a "multi-family dwelling." The Court concludes that the proposed project consists of five structures each with their own roof and walls to support it. The existence of a "horizontal party wall" within each of these five units requires that each unit be designated a two-family dwelling. The Court concludes that the proposed development constitutes five two-family dwellings under the definitions set forth in the zoning ordinance.

The decision by the Board of Zoning Appeals of the Town of Herndon, Virginia, rendered on September 22, 1988, in BZA case number 88-11, was erroneous.

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

IN RE: ZONING ORDINANCE
AMENDMENT 12-11-89

Master File No. 115184

This Document Relates To:

Chancery No. 214487
(The Henry A. Long Company, et al.)

DECREE OF SUMMARY JUDGMENT AND FINAL ORDER

On June 4, 1990, came Complainants, by counsel, and Defendants, by counsel, upon the Complainants' Motion for Summary Judgment. Upon consideration of the Complaint for Declaratory Judgment, the exhibit submitted by Defendants as Exhibit 1 to the Master File, Defendants' response, and the argument of counsel, it appearing to the Court that there is no genuine dispute as to any material fact for the purposes of Complainants' Motion and that the parties are at issue, based upon the stipulations by counsel for the Defendants, the Court hereby

FINDS AND DECLARES as follows:

1. On November 25, 1985, the Board of Supervisors of Fairfax County rezoned 1048.98 acres of land known as Westfields, The International Corporate Center at Dulles ("Westfields") designated proposal number RZ 78-S-063 (the "Rezoning"). As a part of the Rezoning, The Henry A. Long Company, the developer of Westfields, and Defendants agreed to certain voluntary proffers pursuant to Va. Code Ann. § 15.1-491(a) and § 18-203 of the Fairfax County Zoning Ordinance (the "Proffers"), a copy of which



is attached to this Decree as Exhibit A and incorporated by reference.

2. Amendment Number 89-185 to the Fairfax County Zoning Ordinance adopted December 11, 1989 (the "C&I Amendment"), whether lawful or unlawful, facially or as applied, purports to apply to Westfields except insofar as the C&I Amendment conflicts with the Proffers.

3. The Zoning Administrator of Fairfax County, acting in her official capacity pursuant to § 18-103 of the Fairfax County Zoning Ordinance, issued an Interpretation on December 29, 1989, a copy of which is attached as Exhibit B and incorporated by reference. The Interpretation was not appealed within the time limitations established by ordinance and thus is final.

4. In the Interpretation, the Zoning Administrator found that the Proffers conflict with the C&I Amendment. The Court finds that whether the C&I Amendment is lawful or unlawful, facially or as applied, the C&I Amendment does not apply to Westfields to the extent it conflicts with the Proffers.

Accordingly, the Court DECREES as follows:

a. The C&I Amendment applies to Westfields except insofar as the C&I Amendment conflicts with the Proffers;

b. Due to the conflict in the Proffers admitted to by Defendants, office development in the I-3, I-4 and I-5 Districts and establishments for research, development and training in the I-5 District are

permitted by right within those portions of Westfields subject to the Rezoning.

c. Due to the conflict in the Proffers admitted to by Defendants, uses within those portions of Westfields owned by Complainants and subject to the Rezoning may be developed in accordance with floor area ratios ("FAR's") set forth in the Proffers and as depicted and amplified on the plat attached hereto as Exhibit C.

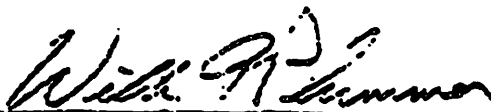
d. No structure or use within those portions of Westfields subject to the Rezoning was or will be rendered nonconforming by the C&I Amendment.

Objections of Defendants stated in open court herein on June 4, 1990 are hereby noted and preserved.

It is FURTHER DECREED that the findings and declarations herein apply only to this cause.

It is FURTHER DECREED that this cause is dismissed and that this Decree is final.

Entered this 8th day of June, 1990.



William G. Plummer, Judge
Fairfax County Circuit Court

PRESENTED:

McGUIRE, WOODS, BATTLE & BOOTHE
8280 Greensboro Drive, Suite 900
Post Office Box 9346
McLean, Virginia 22102
(703) 712-5000

By: 

Et. A. Prichard
John S. Stump
William G. Broadus, Jr.
Thomas F. Farrell, II

Counsel for Complainants

SEEN AND OBJECTED TO:

HIRSCHNER, FLINISCEER, WEINBERG,
COX & ALLEN, P.C.
629 East Main Street
Post Office Box 10
Richmond, Virginia 23202
(804) 771-9500

By: 

Everett G. Allen, Jr.
Mallon G. Funk, Jr.
Keith D. Heyette
John R. Walk
Robert J. Billingsley

Counsel for Defendants

4

Original retained in the office of
the Clerk of the Circuit Court of
Patrick County, Virginia

A COPY TESTE:
WARREN E. BARRY, CLERK

By: 
Deputy Clerk



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

COUNTY OF FAIRFAX
Fax: (703) 385-4432

CITY OF FAIRFAX
(703) 248-2221

RICHARD J. JAMBORSKY
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
F. BRUCE BACH
QUINLAN H. HANCOCK
JOHANNA L. FITZPATRICK
J. HOWE BROWN
JACK B. STEVENS
THOMAS A. FORTKORT
MICHAEL P. McWEENY
ROSEMARIE ANNUNZIATA
THOMAS S. KENNY
MARCUS D. WILLIAMS
JUDGES

JAMES KEITH
LEWIS D. MORRIS
BURCH MILLSAP
BARNARD F. JENNINGS
LEWIS H. GRIFFITH
RETIRED JUDGES

October 23, 1991

Jan L. Brodie, Esq.
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Timothy B. Hyland, Esq.
ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031

Re: Gwinn v. Collier
In Chancery No. 120132

Dear Counsel:

This matter is before the Court on complainant's Motion for Partial Summary Judgment and respondent's Cross Motion for Summary Judgment. For the following reasons, the respondent's Motion for Summary Judgment is granted. The complainant's Motion for Partial Summary Judgment is denied.

The complainant, Jane W. Gwinn, in her capacity as a Fairfax County Zoning Administrator, claims in the pleadings that the Non-Residential Use Permit (Non-RUP), dated April 30, 1981, allowing the use of the property as a Vehicle Major Service Establishment, Nonconforming Use, had been issued in error. This caused the respondent, Orville V. Collier, to be in violation of Fairfax County Zoning Ordinance §2-302(5) by the use of his property as a Vehicle Major Service Establishment, Nonconforming Use. Additionally, the complainant claims that the parking of thirty-four (34) vehicles on the property is a violation of Fairfax County Zoning Ordinance §2-508.

The complainant asks the Court to issue a prohibitory injunction permanently enjoining the respondent from using the

Gwinn v. Collier
In Chancery No. 120132
October 23, 1991
Page 2

subject property as a Vehicle Major Service Establishment.

The respondent asserts in his response that his use of the property is legal and proper as a pre-existing nonconforming use and has filed a Cross-Motion for Summary Judgment, asking the Court to enter a decree declaring that his use of the subject property as a Vehicle Major Service Establishment is a lawful, nonconforming use.

The April 30, 1981 Non-RUP permit issued to Collier constituted a decision by the Zoning Administrator. In Lanner v. Board of Appeal of Tewksbury, 348 Mass. 220 (1964), the Court held that the issuance of a permit requires that a decision be made by the permitting administrator. Thus, the issuance of the permit was a decision under the zoning statute.

In the present case, the Zoning Administrator issued the Non-RUP on April 30, 1981. The issuance to Collier of a Non-RUP for a nonconforming use constituted a decision by the zoning administrator.

The complainant had thirty days to appeal the April 30, 1981 decision to the Board of Zoning Appeals. Virginia Code §15.1-496.1 and Fairfax County Zoning Ordinance §§18-301 and 18-303 provide inter alia:

[a]n appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any administrative officer in the administration or enforcement of this article or any ordinance adapted pursuant thereto. Such appeal shall be taken within thirty days after the decision...

The Supreme Court of Virginia has ruled that the failure to make such an appeal renders the unappealed decision a "thing certain and not subject to attack." Gwinn v. Alward, 235 Va. 616, 621 (1988).

As discussed above, on April 30, 1981, the Zoning Administrator issued to Collier a Non-RUP which denominated Collier's use of the property as a Nonconforming Use. No appeal was taken "by any person aggrieved or by any officer, department, board or bureau affected by the decision" within the appeal period under §15.1-496.1. Collier's use of the property as a Vehicle Major Service Establishment is a legal nonconforming use by the lack of an appeal within the appealable period.

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The requirements and policy of Va. Code §15.1-496.1 has previously been addressed in Fairfax County in George Rucker Realty Corp. v. Board of Zoning Appeals of the Town of Herndon, 16 Va. Cir. 191 (Fairfax Cir. 1989). Judge Bach of the Circuit Court of Fairfax found that:

The language of Virginia Code §15.1-496.1 clearly contemplates that a municipality. . . must appeal a decision by the Zoning Administrator by which they are aggrieved. The language of this section also contemplates that a failure to file an appeal within the requisite thirty days results in the Zoning Administrator's decision becoming final and binding. A conclusion to the contrary would clearly circumvent the legislature's intention that such decisions provide finality to the zoning process.

Because no appeals were taken by any person or entity pursuant to Va. Code §15.1-496.1, the Zoning Administrator's April 30, 1981 decision became final and not subject to appeal effective May 30, 1981.

The complainant's Partial Motion for Summary Judgment is based on the theory that the April 30, 1981 Non-RUP was issued in error and thus, is void ab initio. This claim is based on Fairfax County Zoning Ordinance 18-111 (currently 18-114) which states:

No officer, board, agency or employee of the County shall issue, grant or approve any permit, license, certificate or other authorization for the erection of any building or for any use of land or building that would not be in full compliance with the provisions of this Ordinance. Any such permit, license, certificate or other authorization issued, granted or approved in violation of any of the provisions of this Ordinance shall be null and void and of no effect without the necessity of any proceedings for revocation or nullification thereof. . . .

This proposition must fail because it involves a question of fact, making Summary Judgment inappropriate. In the pleadings, the complainant has claimed that the April 30, 1981 Non-RUP was issued in error because the vehicle repair business was never a legally permitted use of the property. The respondent asserts that the use of his property is a legal and proper pre-existing nonconforming use. Thus, this is a question of fact, precluding this Court from granting partial Summary Judgment to the complainant.

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This Court further believes that an administrator's ability to unilaterally void past zoning decisions under §18-114 would create an intolerable situation for property owners. No person affected by a decision of a zoning administrator could unreservedly rely on that decision without seeking a decision from the Board of Zoning Appeals to assure that their rights under the ordinance were protected. The potential impact upon the property owners of this County would be intolerable if the Zoning Administrator were permitted to make such reversals. Barring fraud or bad faith on the part of the permittee, those affected by zoning administrator's decisions should be able to properly rely on these decisions.

Additionally, Fairfax County Zoning Ordinance §18-114 conflicts with Virginia Code §15.1-496.1 by not allowing for any proceeding for revocation or nullification of the permit. Virginia Code §15.1-496.1 reads, "[a]n appeal to the board may be taken by any person aggrieved. . . by any decision of the zoning administrator. . . within thirty days of the decision. . ." Virginia Code §1-13.17 provides that no ordinance may be inconsistent with state law. Thus, state law prevails here in requiring the filing of an appeal within thirty days in order to contest the granting of the permit.

The Zoning Administrator does have the authority to conclude that the respondent's use of the land violates the original grant of Major Vehicle Servicing Establishment, Nonconforming Use. Lawful nonconforming uses. . . "may be continued only so long as the then existing or a more restricted use continues. . ." Va. Code §15.1-492. Additionally, Fairfax County Zoning Ordinance §15-103(1) states that "[a]ny nonconforming use. . . may be continued but shall not be enlarged or extended, nor shall any structural alteration be made in any building in which such use is conducted.

If the Zoning Administrator concludes that the respondent's use of the property has changed or expanded, the Administrator would notify the respondent of the decision, and the respondent could appeal that decision to the Board of Zoning Appeal within thirty days as allowed by Virginia Code §15.1-496.1.

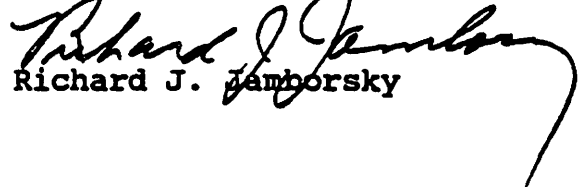
For these reasons, the Court finds that the Zoning Administrator has ruled that Collier's use of the property as a Vehicle Major Service Establishment is a pre-existing, lawful, nonconforming use. Since the decision was not appealed, the Zoning Administrator's decision establishes the use of the property to be a pre-existing, lawful, nonconforming use. Therefore, the respondent's Motion for Summary Judgment is granted. The complainant's Motion for Partial Summary Judgment

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is denied.

Mr. Hyland will please prepare an order on the basis of this opinion letter and forward it to opposing counsel for her signature.

Very truly yours,


Richard J. Zamborsky

RJJ/sf

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

IN CHANCERY NO. 120132

COMPLAINANT'S MOTION FOR RECONSIDERATION

COMES NOW the Complainant, Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and moves this Court to reconsider the decision set forth in the Court's letter opinion dated October 23, 1991, based on the following:

- I. THE ZONING ADMINISTRATOR IS NOT ESTOPPED FROM CORRECTING THE ERRONEOUS ISSUANCE OF A NON-RESIDENTIAL USE PERMIT CERTIFICATE BY FAILING TO APPEAL UNDER VA. CODE § 15.1-496.1.

On April 30, 1981, Tammy Brown, Zoning Inspector, issued a Non-Residential Use Permit Certificate ("Non-RUP") to the C & C Auto Repair for a "Major vehicle establishment, non-conforming use, 120 sq. ft." A true and accurate copy of said Non-RUP is attached hereto and incorporated herein by reference as Exhibit A.

By letter dated March 2, 1983, Philip G. Yates, Zoning Administrator, informed Defendant Orville N. Collier (hereinafter "Collier") that based on a review of notarized statements submitted by Collier and the Fairfax County Zoning Ordinance "[t]he Non-Rup dated April 30, 1981, was issued in error and is hereby declared to be null and void in accordance with the provisions of Sect. 18-111 of the Zoning Ordinance" This decision was not appealed to the Board of Zoning Appeals under Va. Code § 15.1-496.1 (1989). A true and accurate copy of the March 2, 1983, letter is attached hereto and incorporated by reference as Exhibit B.

In its letter opinion dated October 23, 1991, this Court states that "Collier's use of the property as a Vehicle Major Service Establishment is a legal non-conforming use by the lack of an appeal [of the April 30, 1981, decision] within the appealable period" under Va. Code § 15.1-496.1 and grants Collier summary judgment. In effect, this Court has ruled that the Zoning Administrator is estopped from challenging the nonconforming status of the vehicle major service establishment due to the failure to appeal an erroneous decision by her office. It is respectfully submitted that the Court's decision is contrary to the precedents established by the Supreme Court of Virginia, which has consistently held that the doctrine of estoppel does not apply to a local government in the discharge of its governmental functions.

In Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968), the Supreme Court of Virginia dealt with the issuance of a building permit for the erection of a canopy in violation of the 30-foot setback requirement. After the canopy was constructed, the City directed Segaloff to correct the structure to comply with the Zoning Ordinance. Segaloff contended that the City was "estopped from withdrawing the building permit issued to them and from complaining as to the canopy." Id. at 261, 163 S.E.2d 137. However, the Court held that "[w]hen a municipality grants such a permit, it is acting in its governmental, not proprietary, capacity and is not estopped as the result of its acts or those of its agents or employees." Id. This holding has been repeatedly enunciated and reinforced by the Supreme Court in a long line of cases since Segaloff, before and after Alward. See WANV, Inc. v. Houff, 219 Va. 57, 244 S.E.2d 760 (1978); Price v. City of Blacksburg, 221 Va. 168, 266 S.E.2d 899 (1980); Hurt v. Caldwell, 222 Va. 91, 279 S.E.2d 138 (1981).

The primary case relied upon by this Court in its letter opinion is Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988), where it was held that, because a landowner failed to appeal a notice of zoning violation, the violation was "a thing decided and was not subject to attack by Alward." It is respectfully submitted that the Court's reliance on Alward with respect to Collier's Motion for Summary Judgment is misplaced for several reasons.

First, Alward dealt with a situation in which the landowner had failed to timely assert a claim that his use was entitled to the status of a lawful nonconforming use. As to that landowner, such rights were personal and no other party would have had standing to make such a claim. As to the issuance of the Non-Residential Use Permit Certificate on April 30, 1981, in the instant case, the right of the Zoning Administrator to revoke a permit which has been erroneously issued is a governmental right to which the Zoning Administrator is entitled as a governmental official acting on behalf of all of the citizens of Fairfax County. As set forth previously, it is clear that estoppel does not apply to the assertion of such actions taken in the discharge of governmental functions.. All cases citing Alward have dealt only with a landowner who has failed to appeal a decision. See Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 385 S.E.2d 561 (1989); Notestein v. Board of Supervisors, 240 Va. 146, 393 S.E.2d 205 (1990); Falls v. Virginia State Bar, 240 Va. 416, 397 S.E.2d 671 (1990).

Second, the use of the phrase "not subject to attack" by the Court in Alward should not be read to mean that a governmental official cannot change or correct an erroneous decision. The phrase is appropriate with reference to a private party who fails to assert personal rights since that private party has not been vested with any governmental

powers. In effect, the letter opinion of October 23, 1991, stated that this Court could not grant any relief to the Complainant because the decision to issue the Non-Residential Use Permit Certificate was not appealed. Collier's attempt to rely on Alward is clearly improper based on the cases cited above, all of which preceded the Alward decision.

If there were any doubt as to the application of the estoppel rule to Collier's permit after the Alward decision, that doubt was dispelled when, post-Alward, the Supreme Court decided Board of Supervisors v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987) and Crestar Bank v. Martin, 238 Va. 232, 383 S.E.2d 714 (1989). See also Taylor v. Shaw and Cannon Company, 236 Va. 15, 372 S.E.2d 128 (1988); Notestein v. Board of Supervisors of Appomattox County, 240 Va. 146, 393 S.E.2d 205 (1990).

Citing Segaloff, the Supreme Court ruled in Booher, that the board of supervisors was not bound by a zoning administrator's opinion which was contrary to the ordinance even though the opinion was issued three years earlier and the landowner had expended approximately \$30,000 in reliance on the zoning administrator's interpretation. Booher at 481, 352 S.E.2d 321. The Court held that the government was not precluded under the doctrine of estoppel from changing its position. The Supreme Court of Virginia has never held that the Zoning Administrator is estopped from correcting a mistake

because the erroneous issuance of a permit was not appealed within thirty days under Va. Code § 15.1-496.1.

In Crestar Bank, the zoning administrator had issued building permits allowing mobile homes to be erected in violation of the zoning ordinance. In a suit brought by neighboring landowners, the Supreme Court ruled that the building permits issued by the zoning administrator were void. Significantly, the Supreme Court remanded the matter back to the trial court "with instructions to abate the zoning violations involved in this case." Id. at 236, 283 S.E.2d 716.

Implicit in the Court's ruling in Crestar Bank is the notion that the County should have, of its own volition, sought to abate the building permits which had been erroneously issued. The fact that the County had failed to take such action in Crestar Bank, or to appeal the issuance of the permits, did not prevent the Supreme Court from ruling that the zoning violation must be abated.

The General Assembly has prescribed certain procedures such as notice, advertisement and public hearings which must be followed in the adoption and amendment of zoning ordinances. Va. Code §§ 15.1-431 (Supp. 1991) and 15.1-493 (Supp. 1991). By ruling that a governmental official such as the zoning administrator is barred from correcting an erroneous decision which has not been appealed, this Court's ruling has the effect of allowing amendments to a zoning ordinance without compliance

with any of the mandatory requirements set forth above. If an erroneous decision cannot be corrected, the zoning administrator and other administrative officials would somehow become vested with the right to amend the zoning ordinance without any notice to the public and without any public hearings relating to such an amendment. It is respectfully submitted that Alward does not stand for such a proposition and to rely on Alward as being in favor of Collier's position is erroneous as a matter of law.

II. THERE IS NO VESTED RIGHT IN A PERMIT ISSUED IN VIOLATION OF THE ZONING ORDINANCE.

Collier appears to be claiming that by the Zoning Administrator's failure to appeal an erroneous issuance of a Non-RUP, he now has a vested interest in the Non-RUP and the right to operate a major vehicle service establishment as a lawful nonconforming use. However, in Town of Blacksburg v. Price, 221 Va. 168, 171, 266 S.E.2d 899, 901 (1978), the Supreme Court of Virginia held that where a permit was issued in variance with an existing zoning ordinance, "[t]he permit was void ab initio and no vested rights were acquired by the permittee."

III. In 1981, VA. CODE § 15.1-496.1 ONLY PROVIDED FOR AN APPEAL OF A DECISION BY THE ZONING ADMINISTRATOR.

Prior to 1983, Va. Code § 15.1-496.1 provided that "[a]n appeal to the board may be taken by any person aggrieved

or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator." It was not until 1983 that the Acts of the Assembly amended § 15.1-496.1, effective July 1, 1983, to include "or any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto." 1983 Va. Acts, ch. 12. A copy of Chapter 12 of the 1983 Acts of Assembly is attached hereto and incorporated herein by reference as Exhibit C.

Courts deciding motions for summary judgment must adopt those inferences most favorable to the non-moving party. Piland Corp. v. League Construction Company, Inc., 238 Va. 187, 189, 380 S.E.2d 652, 653 (1989). The April 30, 1981, Non-RUP was issued by Tammy Brown, a zoning inspector, and not by the Zoning Administrator, Philip G. Yates ("Yates"). The March 2, 1983, revocation letter states that "this office issued a Non-Residential Use Permit" and not Yates himself. Consequently, the April 30, 1981, decision was not appealable under Va. Code § 15.1-496.1 because it was not a decision of the Zoning Administrator.

IV. A COURT OF RECORD SPEAKS ONLY THROUGH ITS ORDERS AND DECREES.

This Court relies on a letter opinion issued by Fairfax County Circuit Court Judge F. Bruce Bach in George

Rucker Realty Corp. v. Board of Zoning Appeals of the Town of Herndon, 16 Va. Cir. 191 (Fairfax Cir. 1989) in its decision that Va. Code § 15.1-496.1 requires the Zoning Administrator to appeal an erroneous decision within thirty days or that decision becomes final. However, a court of record speaks only through its orders and decrees. Hill v. Hill, 227 Va. 569, 318 S.E.2d 292 (1984). Judge Bach's decision was never incorporated in an order or decree because the case was dismissed as moot, could not have been subject to an appeal and, therefore is not controlling in this case. In any event, it is respectfully submitted based on the arguments presented herein that the Rucker letter is not the law of Virginia and should not be followed by this Court.

V. THIS COURT'S DECISION WOULD PRECLUDE THE ZONING ADMINISTRATOR FROM CORRECTING A MISTAKE FOR A LANDOWNER.

Public officials are presumed to have acted honestly and lawfully. Board of Supervisors of Stafford County v. Safeco Insurance Company, 226 Va. 329, 310 S.E. 2d 445 (1983). In this case, there is no allegation of an unlawful motive behind the Zoning Administrator's March 2, 1983, decision invalidating the Non-RUP. Therefore, the effect of this Court's decision is to preclude the Zoning Administrator, when acting in good faith, from correcting any mistake not appealed within thirty days because the system requires some degree of

certainty. If the Zoning Administrator is informed or concludes that a mistake has been made to the detriment of a landowner, such as the unlawful denial of a permit, she is powerless to correct an obviously incorrect decision after the thirty day appeal period. Considering the holdings in Segaloff, Booher and Price, it is quite unlikely the Supreme Court intended such a result.

VI. SUMMARY JUDGMENT IS NOT PROPER BECAUSE COLLIER HAS NOT SHOWN THAT THE ALLEGED NONCONFORMING USE WAS NOT DISCONTINUED FOR MORE THAN TWO YEARS AS REQUIRED BY VA. CODE § 15.1-492 AND BECAUSE COLLIER ADMITS THAT THIS USE IS GREATER THAN WHAT WAS GRANTED UNDER THE NON-RUP.

Va. Code § 15.1-492 (1989) provides that a lawful nonconforming use may continue "only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years." (Emphasis added). The burden is on Collier to show that his use is lawfully nonconforming and that the alleged nonconforming use was not discontinued for more than two years. Knowlton v. Browning-Ferris Industries of Virginia, 220 Va. 571, 260 S.E.2d 232 (1979). Collier has failed to meet that burden.

Assuming, arguendo, that the Court is correct in its decision that the zoning administrator is estopped from challenging the erroneous issuance of the Non-RUP by virtue of the County's failure to appeal within thirty days, there is still no evidence before the Court upon which the Court could

find that there has not been an abandonment or discontinuance. Furthermore, even if the Court concluded that there had been no abandonment, Collier would be limited to a nonconforming use of 120 square feet as contemplated by his April 30, 1991, Non-RUP, and not the 1,200 square foot garage claimed in Defendant's Memorandum in Support of Cross-Motion for Summary Judgment. Defendant's Memorandum, p. 2. Consequently, summary judgment should not have been granted because the lawfulness of the use is still at issue.

VII. SUMMARY JUDGMENT CAN NOT BE GRANTED IF ANY MATERIAL FACT IS IN DISPUTE.

This Court states that the issue of whether the issuance of the Non-RUP is void ab initio is a question of fact. However, if any material fact is in dispute, summary judgment cannot be entered in favor of Collier. Piland Corp. at 189, 380 S.E.2d 653. It is respectfully submitted that the Court cannot deny the County's request for summary judgment on the basis of disputed facts and still grant summary judgment for Collier.

VIII. SUMMARY JUDGMENT WAS GRANTED EVEN THOUGH BOTH PARTIES ADDRESSED ONLY ONE OF THE ALLEGED VIOLATIONS.

In the Complainant's Motion for Summary Judgment and in Defendant's Motion for Summary Judgment, only the issue of the major vehicle service establishment was addressed. Neither

party argued the lawfulness of the storage yard on the subject property. However, this Court's opinion appears to grant the Defendant summary judgment without resolving whether the storage yard on the subject property is in violation of Fairfax County Zoning Ordinance 2-302(5) as contended by the Complainant. It is respectfully submitted that there is no basis upon which this Court could rule on summary judgment as to the lawfulness of the storage yard.

WHEREFORE, based on the foregoing grounds and those set forth in her Motion for Partial Summary Judgment, the Complainant, Jane W. Gwinn, by counsel, respectfully requests that this Court reconsider and reverse the October 23, 1991, letter opinion, grant Partial Summary Judgment in favor of the Complainant, and grant the Complainant such other relief as may be deemed proper.

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

By J. Patrick Taves
Counsel

ROBERT LYNDON HOWELL
ACTING COUNTY ATTORNEY

By J. Patrick Taves
J. Patrick Taves
Senior Assistant County Attorney
Jan L. Brodie
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
(703) 246-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage prepaid, this 6th day of December 1991, to Timothy B. Hyland, Esquire, Odin, Feldman & Pittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.


J. Patrick Taves

JLB.1180

of the county administrator; or in the case of any county organized under the form of government set out in article *Article 2* of chapter *Chapter 13* (§ 15.1-588 et seq.) or in article *Article 3* (§ 15.1-674 et seq.) of chapter *Chapter 14* or in article *Article 2* (§ 15.1-728 et seq.) of chapter *Chapter 15* of Title 15.1 of the Code of Virginia, a statement that a copy of the full text of the ordinance is on file in the office of the clerk of the county board. *Even though the publication contains the full text of the ordinance, a complete copy shall be available for public inspection in the offices named herein.*

After the enactment of such ordinance by the governing body, such ordinance shall become effective upon adoption or upon a date fixed by the governing body.

Except as hereinafter provided, emergency ordinances under authority of this section may be adopted without notice of intention, but no emergency ordinance shall be enforced for more than sixty days unless readopted in conformity with the provisions of this section.

No ordinance which imposes or increases any tax or levy shall be adopted unless fourteen days shall have elapsed following the last required publication of intention to propose the same for passage.

All laws or ordinances heretofore enacted by a governing body under authority of this section shall be deemed to have been validly enacted, unless some provision of the Constitution of Virginia or the United States has been violated in such enactment.

CHAPTER 12

An Act to amend and reenact § 15.1-496.1 of the Code of Virginia, relating to appeals to Board of Zoning Appeals.

[H 435]

Approved March 7, 1983

Be it enacted by the General Assembly of Virginia:

1. That § 15.1-496.1 of the Code of Virginia is amended and reenacted as follows:

§ 15.1-496.1. Appeals to board.—An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal shall stay all proceedings in furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown.

CHAPTER 13

An Act to amend and reenact § 60.1-88.01 of the Code of Virginia, which regulates an

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN,
FAIRFAX COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

DEFENDANT'S RESPONSE TO COMPLAINANT'S
MOTION FOR RECONSIDERATION

COMES NOW the Respondent Orville N. Collier, by counsel, and submits to the Court his response to Complainant's Motion for Reconsideration, as follows:

INTRODUCTION

The Complainant has raised in her Motion for Reconsideration the same issues she raised in argument before the Court on the Cross-Motions for Summary Judgment. These arguments are no more valid now than they were in September, and Complainant's Motion for Reconsideration should be summarily denied.

Complainant's various arguments will be addressed below.

I. Estoppel is irrelevant to the Court's ruling.

In her argument in support of her Motion for Partial Summary Judgment, Complainant raised the same estoppel cases she now relies upon. These cases are inapposite, as (1) Respondent has not pleaded estoppel and (2) none of the cited cases address the finality provision of Va. Code Ann. § 15.1-496.1. This includes the cases Complainant now

cites as "post-Alward."^{1/} It appears that Complainant is claiming that procedural time limits are inapplicable to a local government and its officials. This is patently incorrect. See, i.e., Occoquan Land Dev. Corp. v. Cooper, 239 Va. 363, 389 S.E.2d 464 (1990).

Complainant has now proffered the view that the ruling of the Court allows amendment to the zoning ordinance without following statutory procedures. This is a nonsequitur. Respondent has not claimed, nor has the Court ruled, that the zoning ordinance has been amended. The issue here is finality of a decision, applicable only to the property in question.

II. Respondent has not claimed a vested right in the Non-Residential Use Permit.

Respondent has not made any claim of a vested right in the Non-Residential Use Permit. Again, it is the finality of the unappealed decision of the Zoning Administrator which is relevant here.

III. Complainant's claim that the 1981 decision was not made by the Zoning Administrator is entirely meritless.

In paragraph 2 of her Response to Respondent's First Request for Admissions, Complainant states that ". . . Complainant admits that on April 30, 1981, the Zoning Administrator issued a Non-Residential Use Permit . . . to use the entire floor of the building on the subject property. . . ." Therefore, the claim that the issuance of the permit was not a decision of the Zoning Administrator is entirely without merit, by the Complainant's own admission.

^{1/}Contrary to the assertion in Complainant's Motion for Reconsideration, Board of Supervisors v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987) was decided prior to Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988).

Moreover, Complainant has attached as Exhibit A to her Motion for Reconsideration the Non-Residential Use Permit which is the basis of this action. On its face, this Non-Residential Use Permit is signed by "Philip G. Yates, Zoning Administrator." Below this signature, in typeface, is "By: Tammy Brown." The Zoning Administrator's signature is, in itself, sufficient to render the permit a decision of the Zoning Administrator. However, even in the unlikely event that it is determined that this is insufficient, the most basic rules of agency demonstrate that the "By:" portion of the Non-Residential Use Permit renders the permit a decision of the Zoning Administrator. See 2A C.J.S. Agency § 250; Fairfax County Code § 1-1-3.

IV. The Court can use persuasive authorities in deciding a case.

Complainant's claim that the Court is precluded from using the Rucker decision as persuasive authority is baseless, and requires no response from the Respondent.

V. Complainant's Assertion That This Court's Decision Would Preclude The Zoning Administrator From Correcting Mistakes Is Illogical.

The Argument in Part V of Complainant's Motion for Reconsideration is so internally flawed as to be unworthy of consideration. The Complainant concedes that given the Court's ruling she does, in fact, have the power to correct an incorrect decision during the thirty (30) day appeal period, yet she claims that she cannot correct incorrect decisions. This is nonsensical. An incorrect decision of the Zoning Administrator must be appealed to the BZA within

the appeal period or it is final. This is a simple rule, and Complainant's attempts to muddy the water are unworthy of the Court's consideration.

In addition, the Complainant refers to the intent of the Supreme Court. The intent of the Supreme Court in Segaloff, Booher and Price is not germane to this case; the pertinent issue, as recognized by the Court, is the intent of the General Assembly in enacting § 15.1-496.1. This intent was addressed extensively in the Court's letter opinion and in the argument on the Motions for Summary Judgment and need not be revisited here.

VI. Respondent has properly demonstrated the existence of a legal, pre-existing non-conforming use.

Complainant claims that Respondent has not met his burden to show that his use is lawfully non-conforming and that such use was not discontinued for more than two years. Again, the Complainant is being fatally inconsistent.

First, this Court has ruled that, as a matter of law, that the Zoning Administrator's decision that Respondent's use is legally non-conforming is final and binding. Thus the first element of establishing a non-conforming use is met.

It is unnecessary in this case for Respondent to show non-discontinuance. Complainant has not pleaded discontinuance of use. Indeed, she repeatedly claims that Respondent's use of the property pursuant to his Non-Residential Use Permit is a "continuing violation." Respondent only need prove that which is pleaded against him.

Lastly, Complainant has admitted that the garage structure used by the Respondent is 1,200 square feet in area and that the Zoning Administrator issued a Non-Residential Use Permit to use the entire floor of the structure as a "major vehicle establishment, non-conforming use." Since the entire floor of the building occupies 1,200 square feet, the permit allows for the non-conforming use to this extent. The permit language relating to 120 square feet is an obvious typographical error, and should be ignored by the Court. Indeed, when measuring the extent of property, a quantity figure (i.e., 120 s.f.) is the least favored means, while a description by established lines (i.e., "the entire floor") is the among most favored. See Providence Properties, Inc. v. United Virginia Bank, 219 Va. 735, 745, 251 S.E.2d 474, ____ (1979).

VII. No genuine issue of material fact existed relating to the grounds for summary judgment raised by Respondent.

As the Court recognized, Respondent's Motion for Summary Judgment rested upon facts which were, and remain, not in dispute. Because the parties' respective motions were mutually exclusive (i.e., resting upon essentially the same facts and issues of law), the reason for denial of Complainant's motion is immaterial. Notwithstanding the immateriality of the grounds for denying Complainant's motion, the Court properly found that as framed, Complainant's motion raised a material fact, and that no material facts were disputed relating to Respondent's motion.

VIII. The Parties only addressed one issue because Complainant asked for relief only as to the alleged violation relating to the Vehicle Major Service Establishment.

As her final argument, Complainant claims that summary judgment could not be granted since "only the issue of the major vehicle service establishment was addressed." As the Court recognized, Complainant requested in her Bill of Complaint relief only as to the vehicle major service establishment. In addition, the affidavit of Senior Zoning Inspector Tammy Brown, attached to the Bill of Complaint, attested only to her belief that the property was being used as a Vehicle Major Service Establishment. As a final note, Complainant's Motion for Reconsideration mischaracterizes her own pleadings, claiming that the "storage yard on the subject property is in violation of Fairfax County Zoning Ordinance § 2-302(5). Even where storage is mentioned (as a conclusion of law) in the Bill of Complaint, it is concluded to be a violation of Fairfax County Zoning Ordinance § 10-102(24), not § 2-302(5). Complainant cannot now attempt to amend its pleading by bringing a Motion for Reconsideration.

CONCLUSION

Complainant's Motion for Reconsideration is without significant merit. Complainant has ignored the reasoning of the Court's letter opinion, basic principles of law, and most notably its own pleadings and admissions. Respondent respectfully requests that this Court deny Complainant's Motion for Reconsideration, reaffirm the Court's letter opinion of October 23, 1991, award Respondent his costs expended herein, and award Respondent his reasonable attorneys' fees incurred in defending Complainant's Motion for Reconsideration.

Respectfully submitted,

ORVILLE N. COLLIER

By Counsel

ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

BY:


Timothy B. Hyland, Esquire
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Respondent's Response to Complainant's Requests for Admission was sent by facsimile and mailed, first class postage prepaid to J. Patrick Taves, Senior Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030 this 12th day of December, 1991.


Timothy B. Hyland

3324G

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

IN CHANCERY NO. 120132

COMPLAINANT'S SUPPLEMENTARY MEMORANDUM
IN SUPPORT OF MOTION FOR RECONSIDERATION AND
IN RESPONSE TO THE RESPONSE FILED BY RESPONDENT

COMES NOW the Complainant, Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and submits her response to Defendant's Response to Complainant's Motion for Reconsideration, as follows:

- I. COLLIER HAS CONCEDED THAT THE ZONING ADMINISTRATOR IS NOT ESTOPPED FROM CORRECTING AN ERRONEOUS DECISION.

Collier argues on page 1 of his Response that estoppel is irrelevant to the Court's decision because "the Respondent (Collier) has not pleaded estoppel." If, as argued by Collier, estoppel is inapplicable, then Collier has, in effect, admitted that the Zoning Administrator had the power and authority to correct the erroneous decision to issue the Non-Residential Use Permit when said permit was revoked on March 2, 1983. It is

respectfully submitted that this Court has implied that the Zoning Administrator was without any power or authority to revoke Collier's permit. Collier cannot have it both ways by stating, on one hand, that the Zoning Administrator has no authority to correct an erroneous decision, and, on the other hand, in an attempt to sidestep the applicable authority, that he is not claiming that the Zoning Administrator has no such authority.

Having conceded the power and authority of the Zoning Administrator to revoke his permit in 1983, Collier fails to explain why he is not bound by the revocation of his permit and the numerous notices of violations issued thereafter. Under the case of Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988), a property owner cannot contest a notice of violation which he has not appealed. However, Gwinn v. Alward does not stand for the same proposition as it relates to a zoning official correcting an incorrect decision. The property owner in Alward raised the defense of "estoppel based on prior adjudications that Alward's present use of the premises was a lawful, nonconforming use." Id. at 619, 369 S.E.2d 412. The Supreme Court of Virginia rejected this defense as being incorrect, as a matter of law, because "[e]stoppel does not apply to the government in the discharge of its governmental functions." Id. at 621, 369 S.E.2d 413. Collier's argument which was supported by this Court's letter opinion is, fundamentally, the same argument, if not a weaker argument, than was rejected in Alward itself. Under Alward, a zoning official is not precluded from enforcing a zoning ordinance

based on prior adjudications that a landowner's use is lawfully nonconforming. Under Collier's argument and this Court's letter opinion, however, a prior non-adjudication (failure to appeal) would preclude the zoning administrator from enforcing the ordinance. Collier fails to explain why a party which purports to have a "prior adjudication" in his favor is entitled to lesser rights than a party, such as himself, who is arguing that there has been a failure to appeal.

II. COLLIER'S RELIANCE ON THE "FINALITY PROVISION OF VA. CODE ANN. § 15.1-496.1" IS MISPLACED.

Collier also argues that none of the "estoppel" cases cited by the Complainant address the "finality provision" of Va. Code § 15.1-496.1. Defendant's Response to Complainant's Motion for Reconsideration, p. 1. However, there is no language in Va. Code § 15.1-496.1 which states that a zoning official has only the remedy of an appeal to the board of zoning appeals in correcting an erroneous decision or that, if no appeal is taken, the entire County government is inextricably bound (estopped) and cannot make any such change.

The statute relied upon by Collier, Va. Code § 15.1-496.1, says that certain parties "may" appeal a zoning decision, it does not say that they "shall" appeal. The only times "shall" is used in this statute is with reference to what "shall" be done in order to properly prosecute an appeal once an appeal has been filed. Furthermore, the General Assembly has evidenced no intent in this statute which would reveal that, having failed to appeal a decision, either the Board of

Supervisors or any officer or employee of the Board is totally precluded from correcting an erroneous decision. It is respectfully submitted that Collier's position attempts to read words into the statute where they do not exist.

Collier's attempt to distinguish Segaloff and its progeny on the ground that they do not address Va. Code § 15.1-496.1 seems to assume either that the alleged "finality" statute is of recent vintage or that the Supreme Court of Virginia was simply in error in failing to recognize the legal import of the statute. Collier ignores the fact that Va. Code § 15.1-496.1 is not a new statute. Segaloff was decided in 1968 and the same alleged "finality" provisions had been in existence for many years. For example, a review of Chapter 407 of the 1962 Acts of Assembly clearly reveals the right under the statute then designated as Va. Code § 15.1-968.10 to appeal a decision of the zoning administrator to the board of zoning appeals within thirty days. Needless to say, the statute relied upon by Collier is hardly of recent vintage.

Collier's attempt to distinguish Segaloff and its progeny also implies that those cases were incorrectly decided because they did not discuss the alleged "finality" statute. There is no basis to conclude that Segaloff or any other case cited by the Petitioner was wrongly decided. Collier fails to explain why Segaloff continues to be relied upon by the Supreme Court in numerous situations which mirror the facts in the case at bar. The reason Segaloff and its progeny do not mention the alleged "finality" statute when discussing the authority of a zoning official to correct an erroneous decision is the one

Collier seeks to avoid; to wit, the alleged "finality" statute was and is irrelevant to the question of whether a zoning official can correct an erroneous decision.

III. COLLIER'S ADMISSION THAT HE IS NOT CLAIMING VESTED RIGHTS CONTRADICTS THE LEGAL THEORY WHICH HE PREVIOUSLY ESPOUSED IN THIS CASE.

Collier's argument to this Court in support of his request for summary judgment relied upon the theory that a great deal of money is invested in Virginia based on decisions of zoning administrators, that property owners should be able to rely on those decisions, and that the result would be "catastrophic" if total reliance could not be placed on such administrative decisions. See Defendant's Memorandum in Support of Cross-Motion for Summary Judgment, at 8-9. In essence, the "detrimental reliance" argument made by Collier was a claim of vested rights. See Board of Supervisors v. Cities Service Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972), Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972). Assuming, arguendo, that the 1981 permit was not void and that therefore Collier could have a vested right in it and in fact had one, then the County could do nothing to affect that right. However, Collier now states that he has made no claim of vested rights, thereby conceding that he has no vested property right in the 1981 permit. Defendant's Response to Complainant's Motion for Reconsideration, p. 2. Having conceded that he has no vested property right, Collier has virtually conceded that his "detrimental reliance" argument is nothing but a fiction. If

the zoning administrator is not estopped from issuing a new decision, and Collier has no vested property rights in this case, it is difficult to understand why he is not bound by the revocation of his permit in 1983, the issuance of several notices of violation regarding his illegal use, and his failure to appeal that revocation or any of those notices. As stated elsewhere, there is a fundamental difference between a private party failing to appeal a decision of the zoning administrator, and the zoning administrator not appealing his/her own decision.

IV. IF IT IS RULED THAT AN ERRONEOUS, UNAPPEALED ZONING DECISION OF AN ADMINISTRATIVE OFFICIAL CANNOT BE CORRECTED, THEN THAT OFFICIAL WILL HAVE BEEN GIVEN LEGISLATIVE POWER TO AMEND THE ZONING ORDINANCE.

Collier argues that an erroneous zoning decision by an administrative official does not result in an amendment of the zoning ordinance because such a decision only affects the property in question. Defendant's Response to Complainant's Motion for Reconsideration, p. 2. However, Collier fails to explain how a "final" decision permitting an illegal use of only one piece of property, without any notice, advertisement or public hearings in conformance with the statutory prerequisites, is any less an amendment of the zoning ordinance than would be a decision affecting many properties. If accepted, the "finality" argument espoused by Collier means that, no matter how erroneous a zoning decision may be and no matter whether the decision affects one property or thousands of properties, the zoning administrator, the official authorized to administer and enforce the zoning ordinance under

Va. Code § 15.1-491(d), cannot enforce the provisions of the ordinance unless it has been reversed in an appeal to the BZA. The effect of that position is that the zoning ordinance can be administratively amended by an employee who is not even a member of the Board of Supervisors. Collier's position is totally illogical and incorrect because, if the zoning ordinance cannot be enforced contrary to an erroneous decision, then, to the extent that Collier's finality argument applies, the ordinance has been amended by administrative fiat and is meaningless as to the affected property. This, of course, is simply contrary to law, Va. Code §§ 15.1-427 et seq., and contrary to the separation of powers and our system of government wherein only elected legislators, acting as a body, may legislate.

V. THIS COURT HAS RULED THAT THE ZONING ADMINISTRATOR CAN ONLY CORRECT AN INCORRECT DECISION VIA AN APPEAL TO THE BOARD OF ZONING APPEALS

Collier argues that the "Complainant concedes that given the Court's ruling she does, in fact, have the power to correct an incorrect decision during the thirty (30) day appeal period" Defendant's Response to Complainant's Motion for Reconsideration, p. 3. Respondent Gwinn has never made any such argument to this Court. It is Respondent Gwinn's understanding that this Court has ruled that there is only one way to change any zoning decision and that is by way of an appeal to the BZA. As a result, under this Court's ruling and the position espoused by Collier, the minute any administrative zoning decision has been made it cannot be changed by the

administrative official; it must be appealed to the BZA. The fallacy of this theory is not only revealed by Segaloff and its progeny, but also by virtue of the fact that even decisions adverse to property owners cannot be corrected administratively. In the event this Court does not change its original decision in this case, this Court has mandated that the hands of zoning officials are strictly bound and has required aggrieved property owners to waste money on an appeal to the BZA even though all parties, the zoning official and property owner, agree that a mistake has been made. There is no way out of this dilemma under the "finality" theory espoused by Collier and agreed to by this Court. Collier has never explained to this Court why the General Assembly would want property owners to be required to pursue expensive appeals to the BZA when all of the parties are in agreement on the issue at hand. It would be little solace for a property owner appealing to the BZA in such a situation to know that the zoning official agrees with the appeal, because there would always exist the possibility that a neighbor would not be in agreement and would oppose the appeal.

VI. RESPONDENT GWINN IS NOT ARGUING THAT PROCEDURAL TIME LIMITS NEVER APPLY TO A LOCAL GOVERNMENT OR ITS OFFICIALS.

Collier attempts to set up a straw man and then knock it down by saying that "[i]t appears that Complainant is claiming that procedural time limits are inapplicable to a local government and its officials." Defendant's Response to Complainant's Motion for Reconsideration, p. 2. Complainant

Gwinn has never made any such argument. Indeed, the case cited by Collier in this regard, Occoquan Land Development Corp. v. Cooper, 239 Va. 363, 389 S.E.2d 464 (1990), has nothing to do with Va. Code § 15.1-496.1. The decision being appealed to the circuit court in that case was that of the State Technical Review Board, a state agency. Occoquan Land deals with the procedural appellate requirements emanating from Rule 2A:2 of the Rules of the Supreme Court of Virginia and does not lend any support to Collier's erroneous "finality" argument. The weakness of Collier's arguments in the case at bar is obvious if he is required to resort to the citation of a case which has nothing to do with the issue he has raised in the case at bar.

VII. COLLIER HAS FAILED TO MEET HIS BURDEN OF PROOF EVEN IF THE 1981 PERMIT IS "FINAL AND BINDING."

It is beyond dispute that the landowner (Collier) has the burden of establishing that his use is a lawful nonconforming use. Knowlton v. Browning Ferris Industries of Va., Inc., 220 Va. 571, 260 S.E.2d 232 (1979). Assuming, arguendo, that the issuance of the permit is "final and binding," Collier has failed to meet his burden of proving that he has a lawful nonconforming use at present. At best, Collier has established that in 1981 his use was lawfully nonconforming. Collier has failed to establish, in any manner whatsoever, that he never abandoned or discontinued the use in existence in 1981. Collier has further failed to establish that his use is of the same character as in 1981 and that it is not merely an accessory use which, under Browning-Ferris,

cannot be made the basis of a principal nonconforming use. Id. at 236. It is respectfully submitted that the Zoning Administrator's allegation that Collier's use is a "continuing violation" falls far short of proving that Collier has never abandoned or discontinued his nonconforming use.

Contrary to his burden of proof, Collier argues that the Zoning Administrator has not pleaded that he has discontinued his use. The Zoning Administrator does not have the burden to show that Collier's use has not been discontinued. Browning-Ferris makes it clear that such a burden rests on Collier's shoulders, not on the Zoning Administrator.

VIII. COLLIER HAS FAILED TO SHOW THAT THERE IS NO GENUINE DISPUTE AS TO MATERIAL FACTS.

Complainant Gwinn has pointed out that this Court stated that there is a dispute as to a material fact regarding whether the issuance of the Non-RUP is void ab initio. Complainant's Motion for Reconsideration, p. 11. Collier's response to the Complainant's argument is rather curious as he maintains that the two parties' motions were "mutually exclusive." Defendant's Response to Complainant's Motion for Reconsideration, p. 5. Collier's definition of the term "mutually exclusive" is that said motions are "resting upon essentially the same facts and issues of law." Defendant's Response to Complainant's Motion for Reconsideration, p. 5. If Collier's definition is taken as true, then he has essentially agreed with the Complainant's position on this point because

the same "facts" cannot be in dispute for one party's motion while at the same time not being "in dispute" for the other party's motion. In the event that Collier's definition is simply inadvertent in its phraseology, then it is clear that he is asking this Court to grant him property rights even though the very permit he is relying upon may be void ab initio. Any such ruling by this Court would be incorrect, as a matter of law, because a permit which is void ab initio does not, by definition, grant any property rights to the permittee.

CONCLUSION

Based on the grounds set forth previously, both orally and in writing, and the grounds set forth above, Complainant Gwinn, by counsel, respectfully requests this Court to reconsider the rulings set forth in the letter opinion in this case, to deny Collier's request for partial summary judgment, to grant partial summary judgment in favor of the Complainant, and to grant Complainant such other relief as may be deemed just and proper.

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

By J. Patrick Tamm
Counsel

ROBERT LYNDON HOWELL
ACTING COUNTY ATTORNEY

By J. Patrick Taves
J. Patrick Taves
Senior Assistant County Attorney
Jan L. Brodie
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(703) 246-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via facsimile and mailed first-class, postage prepaid, this 16th day of January 1992, to Timothy B. Hyland, Esquire, Odin, Feldman & Pittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.

J. Patrick Taves
J. Patrick Taves

JPT.1826



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

COUNTY OF FAIRFAX
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JUDGES

JAMES KEITH
LEWIS D. MORRIS
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RETIRED JUDGES

May 18, 1992

J. Patrick Taves, Esq.
Senior Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Timothy B. Hyland, Esq.
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031

Re: Gwinn v. Collier
In Chancery No. 120132

Dear Counsel:

This matter came before the Court on Plaintiff's Motion to Reconsider the Court's letter opinion of October 23, 1991. The motion is denied based on the reasons set forth below.

The Plaintiff contends that the Court should reconsider its opinion based on the Plaintiff's contention that the Zoning Administrator is not estopped from correcting its issuance of a non-residential use permit (Non-RUP) though it failed to appeal the issuance under § 15.1-496.1 of the Code of Virginia, as amended.

The Zoning Administrator was not estopped from correcting its decision through the appeal process before the thirty-day limitation period had run. However, a proper appeal was not brought. Therefore, the 1981 decision to allow the nonconforming use became final. In interpreting the statute in a way as to give effect to the intention of the legislature, no other reading than that the County was bound by the thirty day appeal period can be made. See Andrews v. Shepard, 201 Va. 412 (1959). The case relied on by Plaintiff, Segaloff v. City of Newport News, 209 Va. 259 (1968) was decided before the passage of the

applicable statute. In addition, the cases relied on by Plaintiff involve the issuance of building permits, not a use permit as is at issue in the present case.

Plaintiff also argues that the Defendant appeared to argue that he had a vested interest in the Non-RUP. See § 15.1-492 of the Virginia Code, as amended. The Defendant did not quite make this argument. He merely argues that the use of the property as a pre-existing non-conforming use is a "thing certain and not subject to attack" because the decision was not appealed. Gwinn v. Alward, 235 Va. 616, 621 (1988). Though, as Plaintiff correctly noted, that case involved the failure of a landowner to appeal a notice of a zoning violation, § 15.1-596.1 sets forth the same requirement of appeal for the County.

The Plaintiff is not without a remedy if the Defendant is in violation of the terms of the permit. As stated in my previous letter, the Zoning Administrator does have the authority to conclude that the Respondent's use of the land violates the original grant of the Non-RUP. Va. Code §§ 15.1-492 and 15.1-496.1.

Plaintiff argues that the decision to allow the nonconforming use was not appealable by the County in 1981 because the relevant statute only allowed for appeal of decisions of the Zoning Administrator and the certificate was issued by a Zoning Inspector. A look at the certificate itself clearly shows that the certificate was granted by the Zoning Inspector as the agent of the Zoning Administrator as it bears the signature stamp of the Zoning Administrator and was merely created by the Zoning Inspector. Thus the version of the statute in effect at the time the 1981 permit was issued does apply.

Issue was taken with the Court's reference to a decision of Judge Bach. Though the decision of Judge Bach in George Rucker Realty Corp. v. Board of Zoning Appeals of the Town of Herndon, 16 Va. Cir. 191 (Fairfax Cir. 1989) is not controlling in this case, its logic is certainly persuasive. Even if the case had not been dismissed as moot on other grounds, Judge Bach's decision would not have been binding on this Court's decision but would have maintained its status as persuasive authority.

The Plaintiff voiced concern that the Zoning Administrator's hands would be tied from correcting a mistake for the landowner.

Section 15.1-496.1 provides any one aggrieved by a decision concerning zoning with an avenue of appeal, including both the Zoning Administrator and landowners. Thus, though the Zoning Administrator may not be able to correct a mistake beyond the appeal date that is to the detriment of landowners, landowners cannot be heard to complain if they have slept on their rights and have not sought an appeal within the thirty days. Though it is generous of the Zoning Administrator to want to correct erroneous decisions beyond the appeal date, as with any other kind of statute of limitations, once the date for bringing an action has passed, without a waiver by the non-moving party, the action does not survive.

Plaintiff, through her own pleadings and exhibits has established that the nonconforming use has been continuous. Defendant raised the affirmative defense that the use has been continuous. Plaintiff requests that summary judgment not be granted in favor of the Defendant because she argues, assuming arguendo that the use was continuous and that the Zoning Administrator cannot challenge the Non-RUP, the Defendant should be limited to a nonconforming use of 120 square feet. This kind of relief was not requested in Plaintiff's Bill of Complaint and raises a different cause of action.

Plaintiff argues that because the granting of the Non-RUP was erroneous, it is void ab initio. Whether or not the 1981 Non-RUP was issued in error because the vehicle repair business was allegedly never legally permitted on the property, a reading of § 18-114 of the Fairfax County Zoning Ordinance in conjunction with § 15.1-496.1 results in the inevitable conclusion that the Board of Zoning Appeals had authority under the Fairfax ordinance to declare that the issuance of the permit was void ab initio if an appeal had been timely brought and if the permit was, in fact, erroneously granted.

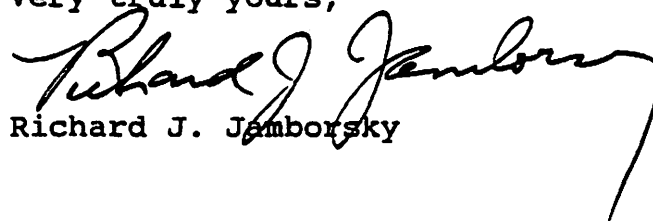
Plaintiff asserts that because the storage yard was allegedly not addressed by the parties in their motions that the Court should reconsider its grant of Summary Judgment on this issue. However, Fairfax County Zoning Ordinance § 2-508 (Plaintiff's Exhibit D) states that junk vehicles may be stored at vehicle major service establishments, provided that such storage is in accordance with applicable provisions of the ordinance for such uses. Thus Plaintiff's assertion creates a circular argument and goes back to the question of whether

Gwinn v. Collier
Chancery No. 120132
May 18, 1992
Page 4

Defendant has expanded his use beyond that which was granted in his permit, an issue not before this Court.

Therefore, the Court affirms its letter opinion of October 23, 1991. Please submit another draft Order reciting the Court's decision of October 23, 1991 and its denial of the motion to reconsider.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Richard J. Jamborsky", written in dark ink. The signature is fluid and extends to the right with a long, sweeping tail.

Richard J. Jamborsky

RJJ/sb

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

COMPLAINANT'S MOTION FOR RECONSIDERATION

COMES NOW the Complainant, Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and moves this Court to reconsider the ruling set forth in its October 1991 and May 1992 letter opinions based on the grounds set forth in the Memorandum of Points and Authorities filed herewith.

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

By J. Patrick Taves
Counsel

ROBERT LYNDON HOWELL
ACTING COUNTY ATTORNEY

By J. Patrick Taves
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage prepaid, this 2nd day of July 1992, to Timothy B. Hyland, Esquire, Odin, Feldman & Pittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.

J. Patrick Taves
J. Patrick Taves

JPT.1956

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

COMPLAINANT'S MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

COMES NOW the Complainant, Jane W. Gwinn, Fairfax County Zoning Administrator, by counsel, and submits this memorandum of points and authorities in support of her Motion for Reconsideration.

INTRODUCTION

On October 23, 1991, this Court issued a letter opinion which granted the motion for summary judgment filed by the Respondent, Orville N. Collier (hereinafter "Collier"). On December 6, 1991, the Complainant, Jane W. Gwinn, Fairfax County Zoning Administrator, filed a motion which asked the Court to reconsider the decision set forth in the October 23, 1991, letter opinion. This Court issued a second letter opinion dated May 18, 1992, which denied the Complainant's

motion. This memorandum will refer to this Court's letter opinions as "the October 1991 letter" and "the May 1992 letter," respectively. The instant motion is being brought in light of a recent decision issued by the Supreme Court of Virginia which contradicts the rulings of this Court.

On April 17, 1992, the Supreme Court of Virginia issued a decision in Dick Kelly Enterprises, Virginia Partnership, #11 v. City of Norfolk, Kelly, 8 VLR 2706 (April 17, 1992) (referred to hereinafter as "Kelly"), which is pertinent to the issues raised in the case at bar. Kelly involved a situation where, as here, the landowner failed to appeal a decision of the zoning administrator regarding the subject property to the board of zoning appeals. In Kelly the circuit court granted summary judgment to the City of Norfolk because the landowner failed to appeal the zoning administrator's decision to the board of zoning appeals. The Supreme Court specifically affirmed this ruling on appeal.

In the case at bar this Court has denied the zoning administrator's motion for summary judgment even though Collier, the landowner, failed to appeal the zoning administrator's decision in 1983 to revoke the 1981 Non-Residential Use Permit to the board of zoning appeals (hereinafter "BZA"). In addition, this Court has ignored the fact that Collier failed to appeal any of the four notices of violations issued to him from 1985 to 1989. In Kelly, the Supreme Court of Virginia summarily rejected the landowner's attempt to raise equitable defenses which were based on, inter

alia, the landowner's allegation that "the City revised its interpretation of the applicable regulations" Kelly, 8 VLR at 2714, 2716. In the case at bar this Court has summarily adopted the same type of equitable argument which was rejected in Kelly. Simply stated, this Court's decisions in the case at bar stand for the proposition that the Zoning Administrator has no authority to take any action which is contrary to the 1981 Non-RUP. Without using the word "estoppel", this Court is saying that Complainant Gwinn's predecessor was estopped from revoking the 1981 Non-RUP as he did in 1983. If, on the other hand, Complainant Gwinn's predecessor was not estopped from taking action after the thirty-day appeal period had expired, then he still had the authority in 1983 to revoke the 1981 Non-RUP.

The decisions of this Court in favor of Collier cannot be reconciled with the Kelly decision. It is assumed that this Court was not aware of the Kelly decision as there is no reference to Kelly in the May 1992 letter. Based on the Kelly decision, Complainant Gwinn respectfully requests that this Court retract the decisions set forth in the October 1991 and May 1992 letters, and grant partial summary judgment in her favor on the issue of the use of the subject property as a vehicle major service establishment in violation of Fairfax County Zoning Ordinance § 2-302(5).

Complainant Gwinn preserves all of the arguments previously posited before this Court, both orally and in writing, with regard to the motions for summary judgment filed

in this case. Accordingly, the fact that all of those arguments are not restated herein should not be taken to mean that the Complainant waives any of those previous arguments.

I. THIS COURT'S RULING THAT THE ZONING ADMINISTRATOR IS ESTOPPED FROM CORRECTING AN ERRONEOUS DECISION IS CONTRADICTED BY THE SUPREME COURT'S RULING IN KELLY.

This Court stated in the May 1992 letter that "[t]he Zoning Administrator was not estopped from correcting its decision through the appeal process before the thirty-day limitation period had run." This Court went on, however, to state that "the 1981 decision to allow the nonconforming use became final" because "a proper appeal was not brought." The implication is that, indeed, the Zoning Administrator is estopped from correcting the 1981 decision because no appeal was taken within the thirty-day period set forth in Va. Code § 15.1-496.1.

This Court has ruled, for all intents and purposes, that the zoning administrator is estopped from correcting an incorrect decision if no appeal has been taken to the board of zoning appeals. In Kelly, the Supreme Court of Virginia restated that, under Virginia law, equitable defenses such as estoppel do not apply to the state or local governments when acting, as here, in a governmental capacity. Kelly, 8 VLR at 2716. Kelly clearly reaffirms the principle that estoppel and other equitable defenses are inapplicable to the zoning administrator's enforcement of the ordinance.

II. THE ZONING ADMINISTRATOR NEVER MOUNTED A JUDICIAL ATTACK AGAINST THE 1981 NON-RUP "DECISION".

Kelly is also instructive because it explores the rationale behind the principle espoused in Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988), that to a landowner, an unappealed decision was "a thing decided and was not subject to attack." The Supreme Court clearly states in Kelly that its conclusion "stems from the settled rule that exhaustion of administrative remedies where zoning ordinances are involved is essential before a judicial attack may be mounted against the interpretation of such ordinances." Kelly, 8 VLR at 2711-12 (emphasis added).

Significantly this underlying doctrine does not apply to Complainant Gwinn in the case at bar. Here, Complainant Gwinn is not and has never attempted to mount any judicial attack on any prior interpretation. The reason, of course, is that in 1983, eight years before the instant suit was filed, Gwinn's predecessor revoked the very permit belatedly relied upon by Collier. This particular portion of the Kelly decision is instructive because it vitiates the very theory relied upon by Collier in the case at bar.

III. SEGALOFF AND ITS PROGENY CONTINUE TO BE RECOGNIZED AS THE LAW OF VIRGINIA AFTER THE ENACTMENT OF VA. CODE § 15.1-496.1

In the May 1992 letter opinion this Court dismissed the seminal precedent of Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968), by saying that it "was decided

before the passage of the applicable statute." The applicable statute, Va. Code § 15.1-496.1, was originally adopted in 1975; Segaloff was decided in 1968. The error in this reasoning becomes obvious when it is realized that numerous cases have cited and relied upon Segaloff after the inception of Va. Code § 15.1-496.1. See, e.g., Crestar Bank v. Martin, 238 Va. 232, 383 S.E.2d 714 (1989); Taylor v. Shaw & Cannon Co., 236 Va. 15, 372 S.E.2d 128 (1988); Board of Supervisors v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987); Hurt v. Caldwell, 222 Va. 91, 279 S.E.2d 138 (1981); Town of Blacksburg v. Price, 221 Va. 168, 266 S.E.2d 899 (1980); and WANV, Inc. v. Houff, 219 Va. 57, 244 S.E.2d 760 (1978). In addition, the recent Kelly case cites Segaloff and other cases decided after 1975, including Booher and Gwinn v. Alward for the proposition relied upon here by Complainant Gwinn: that estoppel does not apply to the exercise of governmental functions. Kelly, 8 VLR at 2716. In fact, in Gwinn, the principal case relied upon by this Court, the Supreme Court cited and relied upon Segaloff. Gwinn v. Alward, 369 S.E.2d at 413. There should be no doubt after Kelly that, contrary to this Court's letter opinion, Segaloff is alive and well.

IV. SEGALOFF AND ITS PROGENY APPLY TO ALL ZONING DECISIONS BY ADMINISTRATIVE OFFICIALS, NOT JUST THOSE WHICH INVOLVE THE ISSUANCE OF BUILDING PERMITS.

This Court has also attempted to distinguish Segaloff and its progeny by stating that they "involve the issuance of building permits, not a use permit as is at issue in the present case." This reasoning is erroneous because it implies

that a decision to issue a building permit is not appealable to the BZA under Va. Code § 15.1-496.1. There is simply no rational basis for drawing such a distinction.

Furthermore, the issuance of a building permit is a decision which involves more change, by allowing new construction, as opposed to the 1981 Collier "decision" which purported to allow a use in an existing structure. It would make no sense to require appeals to the BZA by the zoning administrator when nothing new is built, but to not require such an appeal for monumental changes which could be constructed under a building permit.

Gwinn, the very case relied upon by this Court, did not involve the issuance of a building permit and, as noted previously, cites and relies upon Segaloff. In addition, Kelly dealt with the interpretation of a certificate of occupancy and the regulations applicable thereto.

V. THERE IS NO EXCEPTION UNDER VIRGINIA LAW FROM SEGALOFF AND ITS PROGENY FOR THOSE WHO CLAIM TO HAVE DETRIMENTALLY RELIED UPON AN INCORRECT ZONING DECISION OF AN ADMINISTRATIVE OFFICIAL.

Collier's arguments before this Court have been based, in part, on the theory that the results would be "catastrophic" for "landowners, investors and lenders" if the Zoning Administrator were to be allowed to correct erroneous decisions. See Defendant's Memorandum in Support of Cross-Motion for Summary Judgment, at 9. The Kelly decision rejected what could be called Collier's request for a "detrimental reliance" exception by refusing to carve out an

exception where lenders and tenants have suffered harm from alleged governmental delay or error in enforcement. Kelly, 8 VLR at 2716.

VI. THE ZONING ADMINISTRATOR CANNOT AMEND THE ZONING ORDINANCE.

One of the arguments Complainant Gwinn has presented to this Court on the issue at hand is that this Court's ruling has the effect of allowing amendments to a zoning ordinance without compliance with any of the mandatory requirements relating to notice, advertisement and public hearings. See Complainant's Motion for Reconsideration, at 6-7. This Court's decision never really addresses this particular consideration. However, Kelly states very clearly that "[n]o subordinate municipal official can bind the municipality to an incorrect or dishonest interpretation of the ordinance" Kelly, 8 VLR at 2717. This principle is in concert with the allied theory that the actions of administrative officials which are not authorized by the zoning ordinance are null and void. Krisnathevin v. Board of Zoning Appeals for Fairfax County, ___ Va. ___, 414 S.E.2d 595 (1992). It is respectfully submitted that this Court's letter opinions in the case at bar rule the opposite; that a subordinate governmental official can and does, in fact, bind the government if they fail to appeal their own decision to the BZA.

CONCLUSION

Based on the grounds set forth previously, both orally and in writing, and the grounds set forth above, Complainant Gwinn, by counsel, respectfully requests this Court to reconsider and retract the rulings set forth in the October 1991 and May 1992 letters, to deny Collier's request for summary judgment, to grant partial summary judgment in favor of the Complainant, and to grant the Complainant such other relief as may be deemed just and proper.

JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR

By J. Patrick Taves
Counsel

ROBERT LYNDON HOWELL
ACTING COUNTY ATTORNEY

By J. Patrick Taves
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(703) 324-2421
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage prepaid, this 2nd day of July 1992, to Timothy B. Hyland, Esquire, Odin, Feldman & Pittleman, P.C., 9302 Lee Highway, Suite 1100, Fairfax, Virginia 22031, Counsel for Respondent.


J. Patrick Taves

JPT.1826



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
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Fairfax, Virginia 22030

COUNTY OF FAIRFAX
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CITY OF FAIRFAX
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MARCUS D. WILLIAMS
JUDGES

JAMES KEITH
LEWIS D. MORRIS
BURCH MILLSAP
BARNARD F. JENNINGS
LEWIS H. GRIFFITH
RETIRED JUDGES

July 15, 1992

J. Patrick Taves, Esq.
Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064

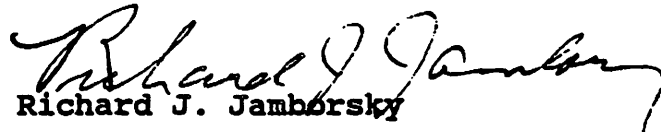
Timothy B. Hyland, Esq.
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031

Re: Gwinn v. Collier
In Chancery No. 120132

Dear Counsel:

This matter came before the Court on complainants' second motion for reconsideration. The second motion for reconsideration is based on the case of Dick Kelly Enterprises v. Norfolk, 8 VLR 2706 (1992). That case is distinguishable from the case before this Court for several reasons, one of which is that the appellants in Kelly never obtained any Non RUP to permit them to use their property in a way other than described in the ordinance and there was no material issue in dispute as to the fact that the appellants did not meet the standard for a valid nonconforming use on the effective date of the ordinance. Therefore, the motion to reconsider is denied.

Very truly yours,


Richard J. Jamborsky

RJJ/wf

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JANE W. GWINN, FAIRFAX COUNTY
ZONING ADMINISTRATOR,

Complainant,

v.

ORVILLE N. COLLIER,

Respondent.

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IN CHANCERY NO. 120132

FINAL DECREE

THIS MATTER CAME on to be heard upon Complainant's Motion for Summary Judgment and Respondent's Cross Motion for Summary Judgment, the Memoranda submitted by counsel therein and argument upon such motions held on September 13, 1991; the Court issued a letter ruling on October 23, 1991, in which it was held that Complainant's Motion for Summary Judgment was denied, and Respondent's Cross Motion for Summary Judgment was granted; thereupon Complainant filed a Motion for Reconsideration, counsel submitted Memoranda thereon and argued said Motion for Reconsideration on December 13, 1991; the Court issued a letter ruling in the case dated May 18, 1992, in which Complainant's Motion for Reconsideration was denied; thereupon Complainant filed a second Motion for Reconsideration; the Court rendered a written letter ruling on July 15, 1992, in which Complainant's second Motion for Reconsideration was denied; and

IT APPEARING TO THE COURT that it should enter judgment in the case in accordance with the written letter rulings dated October 23, 1991, May 18, 1992, and July 15, 1992, it is therefore

ORDERED, ADJUDGED AND DECREED that Complainant's Motion for Summary Judgment is denied; Respondent's Cross Motion for Summary Judgment is granted; Complainant's Motion for Reconsideration is denied; and Respondent's Second Motion for Reconsideration is denied, and Judgment is hereby entered for the Respondent, with costs, for the reasons set forth in the Court's letter rulings dated October 23, 1991, May 18, 1992, and July 15, 1992, which are incorporated herein; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the use of the property as a major vehicle service establishment is not a violation of the Fairfax County Zoning Ordinance; and it is

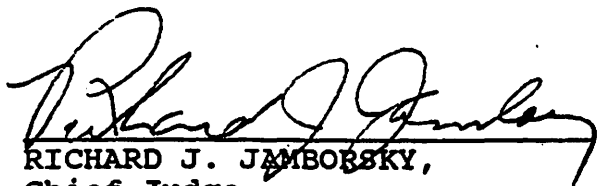
FURTHER, ORDERED, ADJUDGED AND DECREED that use of the property for storage purposes is not a violation of Section 10-102(24) of the Fairfax County Zoning Ordinance; and it is

FURTHER, ORDERED, ADJUDGED AND DECREED that the Complainant is not entitled to a prohibitory injunction enjoining Respondent, his agents and employees from using the property for storage; and it is

FURTHER, ORDERED, ADJUDGED AND DECREED that the Complainant is not entitled to a mandatory injunction requiring the Respondent to cease operation of a major vehicle service establishment and to remove all vehicles and items associated therewith from the property.

AND THIS CAUSE IS FINAL.

ENTERED this 12th day of February, 1993.


RICHARD J. JAMBORSKY,
Chief Judge
Circuit Court of Fairfax County

WE ASK FOR THIS:

ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway
Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

By: 

Timothy B. Hyland, Esquire
Virginia State Bar No. 31163
Counsel for Respondent

SEEN AND OBJECTED TO FOR THE FOLLOWING REASONS:

1. The Zoning Administrator is not estopped from correcting the erroneous issuance of a Non-Residential Use Permit by failing to appeal under Va. Code § 15.1-496.1.
2. The Court erroneously relies upon the case of Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988), for the proposition that if the zoning administrator fails to appeal his/her own decision to the board of zoning appeals within 30 days, even if the zoning administrator later concludes that the original decision was erroneous, then the original erroneous decision is "a thing certain and not subject to attack." The Court's decision erroneously fails to recognize that the case of Gwinn v. Alward applied to the failure of a property owner, not the zoning administrator, to appeal a zoning decision, and continued to recognize the principle of law that estoppel does not apply to the government in the discharge of its governmental functions, 235 Va. at 621, 369 S.E.2d at 412.
3. The Court's ruling erroneously disregards the fact that the permit issued to the Respondent for the subject property on April 30, 1981, was declared by the zoning administrator to be issued in error and to be null and void on March 2, 1983, that the Respondent failed to appeal said decision of March 2, 1983, to the board of zoning appeals, and that the Respondent was barred from challenging said decision of March 2, 1983, based on Gwinn v. Alward, 235 Va. 626, 369 S.E.2d 410 (1988).
4. The Court's ruling erroneously disregards the fact that the Respondent was issued separate notices of violations on October 29, 1985, March 13, 1986, September 15, 1986, and August 14, 1989, which informed him that his use of the subject property for a major vehicle service establishment violated the provisions of the Fairfax County Zoning Ordinance, that the Respondent failed to appeal any of said decisions to the board of zoning appeals, and that the Respondent was barred from challenging said decisions based on Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988).

5. The Court's ruling has the effect of granting to a zoning administrator and other non-elected officials the power and authority to amend the Zoning Ordinance without any notice, advertising or public hearing as required by the Virginia statutes.

6. The Court's ruling requires the Zoning Administrator to appeal his/her own erroneous decisions to the board of zoning appeals rather than simply retracting such decisions, even if the corrected decision is favorable to the property owner.

7. The Court's ruling necessarily concludes, contrary to the well established law of Virginia, that estoppel applies to a government official in the exercise of governmental functions.

8. The Court's ruling has the effect of granting vested rights to the property owner even though the property owner has failed to present sufficient evidence to establish vested rights.

9. The Court's ruling is internally inconsistent since it states that summary judgment is inappropriate for the Complainant because there is a genuine dispute as to a material fact, but then concludes that summary judgment in favor of the Respondent is appropriate.

10. The Court's ruling concludes that the Respondent's use of the subject property is a pre-existing, lawful, nonconforming use even though the Respondent failed to present any evidence to show when the use was started, that said use was lawful under the Fairfax County Zoning Ordinance when started, that such use was not discontinued for any period of two years from its inception, and that the character of the use has not changed from its inception. The burden is on the Respondent to establish the existence of a lawful nonconforming use. Knowlton v. Browning-Ferris Industries of Virginia, Inc., 220 Va. 571, 260 S.E.2d 232 (1979). Respondent has not satisfied his burden in the instant suit.

11. The Court concludes that the case of Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968), is inapplicable to the instant situation because it was decided before the passage of Va. Code § 15.1-496.1, but ignores the fact that the principles enunciated by the Supreme Court in the Segaloff decision have been cited and repeated in numerous cases since the adoption of Va. Code § 15.1-496.1. See, e.g., Dick Kelly Enterprises, Virginia Partnership, #11 v. City of Norfolk, ____ Va. ____, 416 S.E.2d 680 (1992); Crestar Bank v. Martin, 238 Va. 232, 383 S.E.2d 714 (1989); Taylor v. Shaw & Cannon, Co., 236 Va. 15, 372 S.E.2d 128 (1988); Board of Supervisors v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987); Hurt v. Caldwell, 222 Va. 91, 279 S.E.2d 138 (1981); Town of Blacksburg v. Price, 221 Va. 168, 266 S.E.2d 899 (1980); and WANV, Inc. v. Houff, 219 Va. 57, 244 S.E.2d 760 (1978).

12. The Court incorrectly rejects the applicability of the cases cited by the Complainant on the ground that those cases "involve the issuance of building permits, not a use permit as is at issue in

the present case." There is no discernible difference between the law applicable to issuance of building permits as opposed to the law which should be applicable to the instant situation. Assuming, arguendo, that there is any such discernible difference, the rights which should be accorded to a party securing the issuance of a building permit arguably should be greater than the rights which should be accorded to a person, such as the Respondent, who is merely advised that he may occupy an existing structure.

13. Assuming, arguendo, that the Respondent has the right to maintain a lawful nonconforming use, the Court incorrectly fails to conclude that such nonconforming use rights should be limited to 120 square feet, the area listed on the permit cited by the Respondent and the Court as the sole basis for the lawful nonconforming use. Furthermore, the Court has incorrectly concluded that the Complainant was required to raise a separate cause of action as to the limitation of the Respondent's use to 120 square feet, even though it is the same use (Vehicle Major Service Establishment) that Respondent's cause of action sought to enjoin in its entirety. The Court's ruling also incorrectly disregards the fact that Collier has admitted that the magnitude of his current use far exceeds the 120 square feet listed on the permit relied upon by the Court.

14. The Court's ruling seeks to grant affirmative relief to the Respondent in the form of declaratory judgments, even though the Respondent never filed a cross-bill. Accordingly, even if it is assumed that the Court has correctly granted summary judgment in favor of the Respondent, the Respondent is not entitled to any relief which exceeds the simple dismissal of the Complainant's suit.

15. The Court has granted summary judgment to the Respondent regarding his use of the subject property for outside storage in excess of § 10-102(24) (or its predecessor, § 10-102(23)) of the Zoning Ordinance even though summary judgment was never requested by the Respondent regarding this separate violation. In addition, the Court has, in effect, precluded the Complainant from presenting any evidence on the storage issue.

16. The Court's ruling erroneously disregards the fact that the Respondent was issued a notice of violation on October 29, 1985, which informed him that his use of the subject property for outside storage violated the provisions of the Fairfax County Zoning Ordinance § 10-102(24) (or its predecessor, § 10-102(23)), that the Respondent failed to appeal said decision to the board of zoning appeals, and that the Respondent was barred from challenging said decision based on Gwinn v. Alward, 235 Va. 616, 369 S.E.2d 410 (1988).

17. The Court's ruling erroneously relies upon other circuit court decisions, one of which was dismissed on other grounds, even though such decisions are in conflict with decisions of the Supreme Court of Virginia.

18. The ruling of the Supreme Court of Virginia in the case of Dick Kelly Enterprises, Virginia Partnership, #11 v. City of Norfolk, ____ Va. ____, 416 S.E.2d 680 (1992), supports the positions

taken by the Complainant in this case and should have been relied upon by the Court to deny the Respondent's request for summary judgment and to grant the Complainant's request for summary judgment. There is no proper basis upon which the Kelly decision can be distinguished from the case at bar.

19. The Complainant further notes and preserves all of the additional arguments it has made to the Court, both orally and in writing, relative to the issues decided in this Final Decree.

** SEE ADDITIONAL OBJECTIONS ON THE ATTACHED
PAGE 7.*

DAVID P. BOBZIEN
COUNTY ATTORNEY

By: *J. Patrick Taves*
J Patrick Taves
Senior Assistant County Attorney
Virginia State Bar No. 18610
Jan L. Brodie
Assistant County Attorney
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(703) 324-2421
Counsel for Complainant

A COPY TESTE
JOHN T. FREY, CLERK

BY: *J. Patrick Taves*
DECEMBER 1, 1999

NOTED AND FILED IN THE OFFICE OF
THE CLERK OF THE JUDICIAL COURT OF
THE COMMONWEALTH OF VIRGINIA

20. The Final Decree erroneously identifies Complainant's "Motion for Summary Judgment" instead of Complainant's "Motion for Partial Summary Judgment."

21. The Court's ruling taxes costs against the Complainant even though the Respondent's Motion for Summary Judgment never requested costs and no other motion was filed to request costs against the Complainant.

22. The Court's ruling erroneously grants declaratory relief to the Respondent because the Respondent never properly requested such relief through the filing of a cross-bill.

23. Assuming, arguendo, that declaratory relief can be requested and granted without the filing of a cross-bill, then the Court's ruling erroneously grants declaratory relief to the Respondent even though the Respondent's Motion for Summary Judgment did not request any such relief.

24. Assuming, arguendo, that declaratory relief can be granted based on a request made in a memorandum supporting a summary judgment motion, the declaratory relief granted by the Court exceeds and is inconsistent with the request made by the Respondent, and is in conflict with the letter opinions issued by the Court in this case.

25. The Final Decree erroneously grants relief with regard to § 10-102(24) even though such relief was never properly requested by the Respondent and the record fails to establish any basis for making such a ruling.

26. The Final Decree erroneously grants relief with regard to use of the subject property for storage because it is overbroad in that the language used could apply to any type of storage.

27. *The Court's ruling erroneously relies upon § 2-508 of the Fairfax County Zoning Ordinance even though said provision was deleted in 1985.*

J.P.T.

A COPY TESTE:
JOHN T. FREY, CLERK

By: 
Deputy Clerk

Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia

ASSIGNMENTS OF ERROR

1. The lower court erred in granting Collier summary judgment because it erroneously ruled that, because the Zoning Administrator had not appealed to the BZA the erroneous issuance of a Non-RUP to Collier, the decision to issue the Non-RUP was final and the Zoning Administrator was precluded from correcting that error by declaring the Non-RUP null and void.

2. The lower court erred in granting Collier summary judgment because it erroneously ruled, in effect, that zoning administrators and other non-elected officials have the authority to administratively amend a zoning ordinance without referral to the planning commission, or notice and advertising for a public hearing before the legislative body, the board of supervisors, as required by Virginia statutes.

3. The lower court erred in granting Collier summary judgment because the court erroneously concluded, in effect, that Collier had a vested right in a Non-RUP issued in contravention of the Zoning Ordinance even though Collier failed to present sufficient evidence to establish that his use was entitled to such status.

4. The lower court erred in granting Collier summary judgment because the court erroneously concluded that Collier's use of the property was a preexisting, lawful, nonconforming

use even though Collier failed to meet his burden to present sufficient evidence to establish that his use was entitled to such status.

5. Assuming, arguendo, that the lower court was correct in concluding that Collier has a right to maintain a preexisting, lawful, nonconforming use, the court erred in failing to conclude that such nonconforming use rights were limited to 120 square feet.

6. The lower court erred in denying the Zoning Administrator's Motion for Partial Summary Judgment as the court erroneously concluded that facts were in dispute and disregarded the fact that Collier had failed to appeal five zoning decisions relating to his use to the Board of Zoning Appeals, which made those decisions "thing[s] decided and . . . not subject to attack" under Gwinn v. Alward, 235 Va. 616, 621, 369 S.E.2d 410, 412.

7. The lower court erred in granting affirmative relief to Collier in the form of declaratory judgments because Collier never filed a cross-bill or any other pleading requesting such relief.

ARTICLE 10

ACCESSORY USES, ACCESSORY SERVICE USES AND HOME OCCUPATIONS

PART 1 10-100 ACCESSORY USES AND STRUCTURES

10-101 Authorization

Accessory uses and structures are permitted in any zoning district, unless qualified below, but only in connection with, incidental to, and on the same lot with a principal use or structure which is permitted within such district.

10-102 Permitted Accessory Uses

Accessory uses and structures shall include, but are not limited to, the following uses and structures; provided that such use or structure shall be in accordance with the definition of Accessory Use contained in Article 20.

1. Amusement machines, but only accessory to eating establishments, motels, hotels, bowling alleys, skating facilities, and establishments for billiards, ping pong, indoor archery, and other indoor games of skill, and retail sales establishments with greater than 5000 square feet of floor area open to the general public.
2. Antenna structures.
3. Barns and any other structures that are customarily incidental to an agricultural use, but only in the R-A through R-1 Districts on a tract of land not less than five (5) acres; provided, however, a stable or other structure for livestock or domestic fowl may be permitted on a lot of less than five (5) acres where such livestock or domestic fowl are kept in accordance with the provisions of Sect. 2-512 or Sect. 8-917. In no instance shall such structures be used for retail sales except as may be permitted for a plant nursery by the provisions of Part 5 of Article 9.
4. Carports.
5. Child's playhouse, not to exceed 100 square feet in gross floor area, and child's play equipment.
6. Doghouses, runs, pens, rabbit hutches, cages, and other similar structures for the housing of commonly accepted pets, but not including kennels as defined in Article 20.
7. Fallout shelters.
8. Garages, private.
9. Garage and yard sales, in R districts, shall be permitted not more than twice in any one calendar year and shall be limited to items not specifically purchased for resale.
10. Gardening.
11. Guest house or rooms for guests in an accessory structure, but only in the R-A through R-E Districts, and provided such house is without kitchen facilities and is used for the occasional housing of guests of the occupants of the principal structure, and not as rental units or for permanent occupancy as housekeeping units.
12. Home child care facilities.

FAIRFAX COUNTY ZONING ORDINANCE

13. Inoperative motor vehicles, as defined in Chapter 110 of The Code, provided such vehicles are kept within a fully enclosed building or structure or are kept completely screened or shielded from public view in accordance with Chapter 110 of The Code.
14. Motor vehicle fuel storage tanks in the C and I districts and in R districts when accessory to a use other than a dwelling.
15. Parking and loading spaces, off-street, as regulated by Article 11.
16. Parking of one (1) commercial vehicle per dwelling unit in an R district subject to the following limitations:
 - A. No garbage truck, tractor and/or trailer of a tractor-trailer truck, dump truck, construction equipment, cement-mixer truck, wrecker with a gross weight of 12,000 pounds or more, or similar such vehicles or equipment shall be parked in any R district.
 - B. Any commercial vehicle parked in an R district shall be owned and/or operated only by the occupant of the dwelling unit at which it is parked.
17. Porches, gazebos, belvederes and similar structures.
18. Quarters of a caretaker, watchman or tenant farmer, and his family, but only in the R-A through R-E Districts on a parcel of twenty (20) acres or more.
19. Recreation, storage and service structures in a mobile home park.
20. Residence for a proprietor or storekeeper and his/her family located in the same building as his/her place of occupation. In addition, a residence for an employee and his/her family may be located within the same building as a funeral home or chapel, or in conjunction with the approval of a special exception or special permit for a funeral chapel or funeral home, the Board or BZA may approve such residence in a separate detached structure.
21. Servants quarters, but only in the R-A through R-4 Districts on a lot of two (2) acres or more. Servants quarters located in a structure detached from the principal dwelling shall comply with the applicable zoning district bulk regulations for single family dwellings.
22. Signs, as permitted by Article 12.
23. Statues, arbors, trellises, clotheslines, barbeque stoves, flagpoles, fences, walls and hedges, gates and gateposts, and basketball standards to include rim, net and backboard.
24. Storage, outside, in R districts, to include a compost pile, provided such storage is located on the rear half of the lot, is screened from the view from the first story window of any neighboring dwelling, and the total area for such outside storage does not occupy more than 100 square feet. In C or I districts, where permitted by zoning district regulations, outdoor storage, junk, scrap and refuse piles shall be limited to that area designated on an approved site plan.
25. Storage structure, incidental to a permitted use, provided no such structure that is accessory to a single family detached or attached dwelling in the R-2 through R-20 Districts shall exceed 200 square feet in gross floor area.
26. Swimming pool and bathhouse, private.
27. Tennis, basketball or volleyball court, and other similar private outdoor recreation uses.

28. Wayside stands, but subject to the following limitations:
- A. Shall be permitted only in the R-A through R-4 Districts, on a lot containing at least two (2) acres.
 - B. Structures shall not exceed 400 square feet in gross floor area.
 - C. Shall be permitted only during crop-growing season, and such structures shall be removed except during such season.
 - D. Shall be for the expressed purpose of sale of agricultural products grown on the same property, or the sale of products of approved home occupations conducted on the same property. For the purpose of this Ordinance, plants which are balled, burlapped and bedded shall not be considered as growing on the same property.
 - E. Shall not be subject to the location requirements set forth in Sect. 104 below, but shall be located a minimum distance of twenty-five (25) feet from any lot line.
 - F. Shall be located so as to provide for adequate off-street parking spaces and safe ingress and egress to the adjacent street.
 - G. Notwithstanding the provisions of Article 12, a wayside stand may have one (1) building-mounted sign, mounted flush against the stand, which does not exceed ten (10) square feet in area.
29. The keeping of animals in accordance with the provisions of Sect. 2-512.

10-103**Use Limitations**

- 1. No accessory structure shall be occupied or utilized unless the principal structure to which it is accessory is occupied or utilized.
- 2. All accessory uses and structures shall comply with the use limitations applicable in the zoning district in which located.
- 3. All uses and structures accessory to single family detached dwellings, to include those extensions permitted by Sect. 2-412, shall cover no more than thirty (30) percent of the area of the minimum required rear yard.
- 4. All accessory uses and structures shall comply with the maximum height regulations applicable in the zoning district in which they are located, except as may be qualified by Sect. 2-506.
- 5. The following use limitations shall apply to fences:
 - A. Barbed wire fences are prohibited in all zoning districts except on lots exceeding two (2) acres or more in size in the R-A through R-1 Districts. Barbed wire strands may be used to enclose storage areas, other similar industrial or commercial uses or swimming pools where the strands are restricted to the uppermost portion of the fence and do not extend lower than a height of six (6) feet from the nearest ground level.
 - B. It shall be unlawful for any person to construct, install, maintain, or allow or cause to be constructed, installed, or maintained, an electric fence upon any lot of two (2) acres or less in area, located within a subdivision as defined in Chapter 101 of The Code, The Subdivision Ordinance.
- 6. The following use limitations shall apply to home child care facilities:
 - A. Subject to the provisions of Section 30-3-3 of The Code, the maximum number of children permitted at any one time shall be as follows:

PART 7

18-700 RESIDENTIAL AND NON-RESIDENTIAL USE PERMITS

18-701

Permit Required for Occupancy or Use

No occupancy or use shall be made of any structure hereinafter erected or of any premises hereinafter improved, and no change in use shall be permitted, unless and until a Residential or Non-Residential Use Permit has been approved in accordance with the provisions of this Part. A Residential or Non-Residential Use Permit shall be deemed to authorize and is required for both the initial and continued occupancy and use of the building or land to which it applies.

. . .

18-706

Permit Not To Validate Any Violation

No Residential or Non-Residential Use Permit shall be deemed to validate any violation of any provision of any law or ordinance.

Section 110-1-3. Administration and enforcement.

The Chief of Police shall be responsible for the administration and enforcement of this Chapter and shall be assisted by the Impoundment Officer. The Fairfax County Police Department shall assist in the enforcement of this Chapter in cooperation with the Chief of Police and the Impoundment Officer. (20-85-110.)

ARTICLE 2.**Definitions.****Section 110-2-1. Definitions.**

For the purposes of this Chapter, the following words and phrases shall have the meanings given:

(1) *Completely screened or shielded from view*: That the inoperative motor vehicle, trailer or semitrailer is not visible from any side or from above.

(2) *Impoundment Officer*: A police officer designated by the Chief of Police having duties which include the removal, storage and disposal of inoperative motor vehicles, trailers, and semitrailers.

(3) *Inoperative motor vehicle*: Any motor vehicle as herein defined which is not in operating condition, or which for a period of sixty (60) consecutive days or longer has been partially or totally disassembled by the removal of tires and wheels, the engine, or other essential parts required for operation of the vehicle.

(4) *Inoperative trailer or semitrailer*: Any trailer or semitrailer as herein defined which is not in operating condition, or which for a period of sixty (60) consecutive days or longer has been partially or totally disassembled by the removal of tires, wheels or other essential parts required for operation of the vehicle.

(5) *Motor vehicle*: Every vehicle as herein defined which is self-propelled or designed for self-propulsion, except that devices designed to be propelled by human or animal power, and devices designed to be used exclusively upon stationary rails or tracks shall not be considered to be motor vehicles.

(6) *Semitrailer*: Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests or is carried by another vehicle.

(7) *Trailer*: Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle.

(8) *Vehicle*: Every device in which, upon which or by which any person or property is or may be transported or drawn upon a highway, except devices moved exclusively by human power or used exclusively upon stationary rails or tracks. (20-85-110; 25-87-110.)

ARTICLE 3.**Inoperative Motor Vehicles, Trailers and Semitrailers.****Section 110-3-1. Keeping inoperative motor vehicles, trailers or semitrailers on property in the County prohibited.**

It shall be unlawful for any person, firm or corporation to keep any inoperative motor vehicle, trailer, or semitrailer on any property zoned for residential, commercial, industrial, or agricultural purposes unless such vehicle is kept within a fully enclosed building or

structure or is kept completely screened or shielded from view. Tarpaulins, tents and other similar temporary devices shall not be deemed to satisfy the enclosure and screening requirements of this Chapter. (20-85-110; 25-87-110.)

Section 110-3-2. Exceptions.

Section 110-3-1 shall not preclude the placement or storage of any inoperative motor vehicle, trailer, or semitrailer on any property containing a heavy equipment and specialized vehicle sale, rental and service establishment, a junkyard, a motor vehicle storage and impoundment yard, a service station, a vehicle light service establishment, a vehicle major service establishment or a vehicle sale, rental and ancillary service establishment, provided such placement or storage is in accordance with the applicable provisions of Chapter 112 (Zoning Ordinance) for such uses; nor shall Section 110-3-1 apply to a licensed business which on June 26, 1970, was regularly engaged in business as a salvage dealer or scrap processor. (20-85-110.)

Section 110-3-3. Notice of violation.

Any person, firm or corporation found in violation of Section 110-3-1 by the Chief of Police or by the Impoundment Officer shall be given written notice requesting compliance with its provisions within ten (10) days after receipt of notice. Such notice shall include a description of the inoperative motor vehicle, trailer, or semitrailer, and shall specify that failure to comply with the provisions of Section 110-3-1 may result in the towing, storage and disposal of such inoperative motor vehicle, trailer or semitrailer at the expense of the owner of the vehicle and/or the owner of the property on which the vehicle is found. Also, the notice shall specify that an appeal may be taken within ten (10) days of receipt of the notice, pursuant to Section 110-3-5. (20-85-110; 25-87-110.)

Section 110-3-4. Voluntary consent to removal and disposal.

Where the removal of any inoperative motor vehicle, trailer, or semitrailer is requested by the owner of the vehicle and, if different, the owner of the property on which it is found, then no notice of violation shall be necessary, and removal and disposal may be made immediately, notwithstanding the provisions of Section 110-3-6 or Section 110-3-8. The costs of such removal, storage and disposal shall be paid directly by the person(s), firm(s) or corporation(s) requesting such services and shall not be charged to the County, the Board of Supervisors, the Police Department or any other agency or employee of the County. (20-85-110; 25-87-110.)

Section 110-3-5. Appeals.

Any person aggrieved by a decision of the Chief of Police or the Impoundment Officer that a motor vehicle, trailer, or semitrailer is inoperative or is otherwise being kept in violation of Section 110-3-1 may appeal such decision to the County Executive or his designee by filing a notice of appeal with the Office of the County Executive within ten (10) days of receipt of the decision. Such notice of appeal shall state in writing:

- (1) The order, requirement, decision or determination which is the subject of the appeal;
- (2) The date upon which the decision was made; and
- (3) The reason(s) for the appeal.

An appeal under this Section shall stay enforcement until after the appeal has been heard by the County Executive or his designee.

At a hearing under this Section, the aggrieved person shall have the right to appear and present written statements, documents, photographs, oral testimony and other evidence, but there shall be no formal rules of evidence or procedure required for the conduct of the hearing.

V I R G I N I A

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

- - - - - X

JANE W. GWINN, :

Complainant, :

versus : IN CHANCERY NO. 120132

ORVILLE COLLIER, :

Defendant. :

- - - - - X

Fairfax, Virginia

Friday, September 13, 1991

The above-entitled matter came on to be heard before the Honorable RICHARD J. JAMBORSKY, a Judge in and for the Circuit Court of Fairfax County, in Courtroom 5-A, Fairfax County Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia 22030, beginning at approximately 2:30 o'clock p.m., before Joan P. Miller, a Verbatim Court Reporter.

JM-133-91

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Fairfax, Virginia 22030

(703) 591-30

1 APPEARANCES:

2 For the Complainant:

3 JAN L. BRODIE, Assistant County Attorney
4 County Attorney's Office
4100 Chain Bridge Road
Fairfax, Virginia 22030

5 For the Defendant:

6 TIMOTHY B. HYLAND, ESQUIRE
7 Odin, Feldman and Pittleman, P.C.
9302 Lee Highway
8 Suite 1100
Fairfax, Virginia 22031
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P R O C E E D I N G S

(The Court Reporter was sworn.)

MS. BRODIE: Good morning -- or good afternoon, Your Honor. I am Jan Brodie. I am the counsel for the Fairfax County Zoning Administrator, Jane W. Gwinn.

This morning, we are here on a motion for summary judgment and on a cross motion for summary judgment.

The motion for summary judgment is based on 15.1-496.1 of the Virginia Code and the effect of the defendant's failure to appeal the decision of the Zoning Administrator.

This is a zoning enforcement case, Your Honor, and it is focused on property located at 10109 Milstead Road. It is in an R-E district, a residential-estate district, and the defendant, Mr. Collier, is an owner of the property.

A bill of complaint was filed in this lawsuit, Your Honor, requesting that this Court declare the defendant in violation of section 2-302(5), it would be a violation of 2-302(5) by having a use not permitted in the district, the R-E district; and also requesting, among other things, injunctive relief requiring the defendant to cease the operation of a major vehicle -- major service -- major



1 vehicle service establishment at that location.

2 The background of this case, Your Honor, in
3 1981, a non-residential use permit was issued to the
4 defendant, Mr. Collier, for the property located at Milstead
5 Road.

6 THE COURT: And who issued it?

7 MS. BRODIE: The Zoning Administrator,
8 Phillip Yates, 1981. It was for a vehicle service
9 establishment, a non-conforming use. In 1983 -- and I will
10 refer to that as a non-RUP, Your Honor, as it is commonly
11 known.

12 In 1983, the same zoning administrator wrote
13 Mr. Collier a letter.

14 THE COURT: Mr. Yates?

15 MS. BRODIE: Yes. The letter that is
16 attached is A-1 to our motion stating that the issuance of
17 the non-RUP had been an error; that they had based the
18 issuance of the non-RUP on affidavits that had been
19 submitted saying that Mr. Collier had been in operation for
20 fifteen or twenty years.

21 However, a non-conforming use must satisfy
22 certain requirements, and one is that it was established
23 lawfully at one time. The zoning inspector, Mr. Yates,

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1 informed the owner of the property that further
2 investigation indicated that since 1941, the date of the
3 Fairfax County's first zoning ordinance, the use of a
4 vehicle service establishment in an R-E District had never
5 been allowed, had never been lawful.

6 And, therefore, the non-RUP had been issued
7 contrary to law and was null and void under section 18-111
8 of the zoning ordinance, now 18-114.

9 This was in conformance with the law of the
10 State of Virginia, dating way back to -- well, way back
11 1968, Your Honor, with the case of Segaloff versus the City
12 of Newport News and also another line of cases that I have
13 included in the case book, Your Honor.

14 Segaloff basically states that if -- that an
15 administrative agency cannot override a legislative act. In
16 that case, a permit was issued for a canopy, contrary to the
17 ordinance.

18 The Court found that the agency had no
19 authority, since it was contrary to the ordinance, to award
20 the permit and therefore the permit from its very beginning
21 was void and null.

22 This has been carried up to the last case
23 that I am familiar with is the Booher case number -- in



1 1987, number one in your case book.

2 In that case, there was a determination by
3 the Zoning Administrator that the owner of the property had
4 relied on for some three years and had invested \$30,000.

5
6 However, it was found that the issuance, or
7 the opinion, was contrary to the law and therefore again the
8 Supreme Court said that he had no authority to issue that
9 determination and therefore that determination was null and
10 void. And that is basically what the zoning administrator,
11 Mr. Yates, was doing in this letter.

12 Under Virginia Code Section 15.1-496.1, there
13 is an appeal provision for any type of decision by the
14 Zoning Administrator. And I mention this because in the
15 future, five letters were issued to, or four more letters
16 were issued to, Mr. Collier by the Zoning Administrator,
17 the new Zoning Administrator now being Jane Gwinn, having
18 transferred.

19 THE COURT: Let me interrupt you just for a
20 moment, though. I am sorry, but tell me where those
21 affidavits came from that Mr. Yates relied on in 1981 to
22 make the erroneous decision.

23 MS. BRODIE: I would have to -- it would be



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1 pure conjecture on my part, Your Honor, but I would assume
2 they were submitted with the application.

3 THE COURT: Go ahead.

4 MS. BRODIE: In October of 29 -- 29th, 1985,
5 a letter was written informing Mr. Collier that the use of
6 the property as a vehicle major service establishment was in
7 violation of Section 2-302(5); also that he had an
8 inordinate number of junk vehicles on the property in
9 violation of Section 2-508 and also that he was conducting
10 a storage yard in violation of 10-102(23).

11 We are focusing today primarily on the
12 vehicle service establishment.

13 That letter was admittedly received by Mr.
14 Collier as were three more letters dated March 13th, 1986,
15 September 15th, 1986, and August 14th, 1989.

16 All of these letters were received by Mr.
17 Collier; however, none of the letters were appealed to the
18 BZA, which is the remedy that is allowed under 15.1-496.1,
19 where a person aggrieved by a decision of the Zoning
20 Administrator may appeal within thirty days to the Court of
21 Zoning Appeals. This was not done.

22 Consequently, Your Honor, the opinions of the
23 -- or the determinations of the Zoning Administrator are now



1 I think certainly not subject to dispute under the case of
2 Gwinn v. Alward, which I have listed under page -- under
3 note two in our case book.

4 Gwinn v. Alward specifically addresses the
5 issue of failure to appeal on page 412 in the right column,
6 the last paragraph.

7 When this matter came to trial on the cross
8 bill, the decision of the Zoning Administrator that Alward
9 was operating a junk yard and parking operable trash
10 vehicles on the property in violation of the zoning
11 ordinance, was a thing decided and was not subject to attack
12 by it -- Alward.

13 This is so because Alward never appealed the
14 various decisions in which he was declared in violation of
15 the zoning ordinance.

16 At that time -- if the defendant,
17 hypothetically, had taken the opportunity to raise the
18 issues that were in the notices of violation, he could have
19 addressed the issues of non-conforming use. He could have
20 addressed the issues of whether he was in violation of
21 Section 2-302(5), the constitutionality of the definitions,
22 the vagueness issues, whether the Zoning Administrator who
23 had issued the letter for -- the Zoning Inspector who had



1 issued letter for the Zoning Administrator was the proper
2 person.

3 All of these types of issues could have been
4 addressed in the appeal to the BZA. They were not.

5 Therefore, Your Honor, we are requesting,
6 under the rationale of Gwinn v. Alward, that the failure to
7 appeal any of these notices of violation by the defendant,
8 precludes him from arguing that he is not in violation of
9 the Fairfax County zoning ordinance section 2-302(5), and we
10 are requesting an injunction asking him to cease the
11 operation.

12 THE COURT: Okay.

13 MR. HYLAND: Good afternoon, Your Honor. My
14 name is Tim Hyland. I am from Odin, Feldman and Pittleman,
15 representing Mr. Collier.

16 I have submitted a memorandum.

17 THE COURT: I read it.

18 MR. HYLAND: Thank you.

19 Under 496.1, the statute says that the
20 decision of the Zoning Administrator may be appealed, not
21 only by a person aggrieved, as the Zoning Administrator
22 pointed out, but also by any officer, department, board or
23 bureau of the County within thirty days after the decision



1 appeal was made.

2 Under Gwinn v. Alward, as she pointed out,
3 their failure to appeal the decision renders the decision
4 final and not subject to attack.

5 THE COURT: Are there any decisions that
6 could be made that would be null and void from the beginning
7 because they were without authority?

8 If he says that you can put a pig farm on a
9 home in Reston, and nobody appeals from it, are you stuck
10 with the pig farm throughout all eternity?

11 MR. HYLAND: I would say that under a
12 conjectural situation where, for instance, the Zoning
13 Administrator made the decision, came back or -- let us say
14 the Board of Supervisors appealed it within thirty days and
15 went to the BZA and said, no, she is not estopped by it.

16 In that case, and in that case only, that --
17 you would be correct that the other side is correct.

18 THE COURT: But your point is, that if the
19 Zoning Administrator makes a bad decision, even to the point
20 of permitting a pig farm in a residential home in Reston and
21 it does not get appealed within thirty days, and assume
22 further that the Zoning Administrator has absolutely no
23 authority to do this, that we are stuck with that decision



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1 and it can never be corrected?

2 MR. HYLAND: Outside the thirty days, that is
3 correct, Your Honor.

4 Now, whether that seems right or wrong, that
5 is something that the legislature has seen fit to do.

6 As you will see in the Rider v. Board of
7 Supervisors of Fauquier County case, the judge recognized
8 that this is really not a particularly desirable outcome
9 under many circumstances, but at the bottom of page 4,
10 moving on to 5, that is two lines at the bottom, it is more
11 certain, however, that neither the board nor -- filed a
12 timely appeal from the December 15th interpretation of the
13 zoning ordinance, nor the interpretation rendered by the
14 Zoning Administrator before the Planning Commission
15 thereafter.

16 As such they may now not -- not now be heard
17 to complain about that interpretation. While the Court
18 realizes the practical problems attendant to appealing the
19 opinions of the Zoning Administrator, so on and so forth,
20 the fault, if there be any, must be with the ordinance and
21 statutory schemes governing this consideration.

22 Judge Bach of this Court has realized -- has
23 recognized this same thing in his decision in Rucker Realty



1 versus Town of Herndon, Board of Zoning Appeals.

2 The same sort of thing, you had two successor
3 zoning administrators in that case, but the same sort of
4 situation, where the Zoning Administrator reversed an
5 earlier decision outside of the thirty days, and the Court
6 said, whether that is right, wrong, indifferent, it does not
7 matter because the decision was not appealed.

8 And 496.1 clearly says that a decision not
9 appealed is final and subject -- not subject to attack.

10 The policy behind this obviously is that the
11 legislature has determined that correctness, if you will, is
12 certainly important, but a finality and a certainty in the
13 reading of these decisions is also important consideration
14 to be made.

15 Moreover, a look at the ordinance, or, I am
16 sorry, the Statute 496.1, shows clearly that since the
17 board, bureau, agency, what have you, of the County is given
18 a right to appeal, certainly it would be of no sense to --
19 for the County to argue that only correct decisions can be
20 appealed.

21 That is essentially what the argument would
22 be here, that the board, bureau, agency does not have to
23 appeal an incorrect decision.

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1 It begs the question, what sort of decision
2 they would appeal. If it is a correct decision, then the
3 appeal would be frivolous.

4 THE COURT: Well, that is a good point.

5 MR. HYLAND: As to the various estoppel
6 cases, the Court will note that all of them were decided
7 prior to Gwinn versus Collier, or, I am sorry, Gwinn v.
8 Alward.

9 This finality rule that attaches to 496.1, if
10 you will, was not established at that point.

11 Whether they should have argued that or not,
12 is another question. Estoppel was raised in every single
13 one of these cases with the exception of, I am sorry, one
14 which was a vested right's case, that is Price.

15 We have not raised estoppel. We have not
16 raised vested rights. This is purely a claim to the benefit
17 of the statute that gives us a sense of finality after
18 thirty days.

19 We have not claimed the estoppel. And the
20 legislature has not determined otherwise. These cases have
21 come down -- there are three cases, two out of this
22 circuit, and one of out Fauquier which I cited to you
23 earlier which have decided this.



1 And the legislature is aware -- the
2 legislature has not seen fit to change the statute and
3 whether that is -- whether that is a positive outcome or a
4 negative outcome, the bottom line is that the County did not
5 appeal the decision.

6 It is final. It is certain. It was the
7 first decision.

8 THE COURT: Okay.

9 MR. HYLAND: Thank you.

10 MS. BRODIE: Just in closing, Your Honor, the
11 cases that were cited by the opposing counsel, for the most
12 part, from what I can glean, do not deal with an error on
13 the part of the Zoning Administrator, an error which from
14 its very essence is void ab initio.

15 The permit is non-existent because of this
16 error in awarding the permit contrary to law. And those
17 cases still stand, Segaloff, the whole long line of cases,
18 that you would be requiring the Zoning Administrator to an
19 appeal when the permit itself is void already in that case.

20 Furthermore, he -- opposing counsel mentioned
21 that they have not claimed estoppel, but in a sense this is
22 an issue that is raised in an estoppel manner in that this
23 defendant is claiming that we are estopped by failing to



1 appeal at that level, and estoppel issue does not apply to
2 the County, nor does the doctrine of laches.

3 And, finally, the practical matter of this,
4 Your Honor, is that if we are saying that the Zoning
5 Administrator would have to appeal every time she thought
6 she had made an error, there would be no immediate means for
7 the Zoning Administrator to correct errors.

8 THE COURT: Well, what about --

9 MS. BRODIE: It would be without correction.

10 THE COURT: He quoted a case where the judge
11 said, yes, I am aware of the practical problems this
12 presents, but looking at it from a practical point of view,
13 what is wrong with saying that the County Attorney, or
14 somebody over there in the office, in the tower building,
15 keeps an eye on what the Zoning Administrator does.

16 And when they see something that the Zoning
17 Administrator does that they think is an error or they do
18 not like, why -- what is wrong with saying that it is up to
19 them to let the County Attorney know or the board know and
20 let them appeal it?

21 MS. BRODIE: Well, I think there are several
22 individuals who try to watch all these things. The practical
23 matter is it is an enormous County, Your Honor, and there



1 are going to be some errors made and in this case, there was
2 an error in judgment made basing the non-conforming use on
3 affidavits that clearly do not support the non-conforming
4 use.

5 THE COURT: Yes, well let us take that up for
6 a moment. Let us assume, just for the sake of our
7 discussion, that those affidavits were false.

8 It is your position that if someone
9 perpetrates a fraud on a body, on a decision-making body,
10 that the public must forever pay the price of the fraud
11 because they did not catch it quick enough?

12 MR. HYLAND: I would agree that if they were
13 fraudulent, I think that would certainly be grounds to --

14 THE COURT: Well, if you concede that, then
15 why wouldn't you also concede that if the Zoning
16 Administrator did not have the authority do what the Zoning
17 Administrator did, that it would void ab initio and that
18 that too ought to be able to be corrected?

19 What is the difference between conceding that
20 if it were fraudulently obtained, it also could be set aside
21 if it were void ab initio because of lack of authority to do
22 it?

23 MR. HYLAND: I would argue, Your Honor, that



1 the decision of the Zoning Administrator requires that 496.1
2 certainly is not a -- that the whole concept of decision is
3 undercut by the fact that full disclosure or a fraudulent
4 act was perpetrated on the Zoning Administrator to induce
5 that decision to be made.

6 Here there is no allegation and I would -- I
7 would proffer to the Court that there is no -- there is no
8 basis for a claim that these were fraudulently --

9 THE COURT: True. At this stage there
10 certainly is not.

11 MR. HYLAND: These affidavits were absolutely
12 true. So, I do not even know that we need to get into that.
13 And there is no dispute over whether they are true as far as
14 I am aware.

15 MS. BRODIE: Perhaps I need to clarify for
16 Your Honor the error in here is not just that the -- I am
17 just saying that they based them alone on the affidavits.

18 The Zoning Administrator was supposed to look closer and
19 find out if that use was ever really lawfully created.

20 Looking at the time frame, the fact that from
21 1941, that use was never lawfully allowed and then even
22 putting in the affidavits, it only mentioned twenty or
23 fifteen years which would put it back to the sixties.



1 I believe Mr. Collier got the property in
2 '77. Those facts alone, and I do not think that is
3 controverted, that the zoning ordinance did not provide for
4 that.

5 Those facts alone would support the fact that
6 this was an illegally issued non-RUP.

7 In closing, Your Honor, 15.1-496.1 was not
8 intended to preclude the Zoning Administrator from changing
9 a decision made in error. It does preclude others from
10 coming in and challenging the decision, but it was not meant
11 to estop the Zoning Administrator from correction of an
12 error.

13 THE COURT: Anything else?

14 MR. HYLAND: I would only point out, first of
15 all, that all of these common law estoppel cases are trumped
16 by the statute. I do not need to go into that, I do not
17 believe, in any more detail.

18 The statute points out that it is any
19 decision, not just a correct decision, any decision. It is
20 as broad as it could possibly be, and it gives the County
21 and its various departments, officers, agencies, bureaus,
22 the right of an appeal specifically.

23 So it is not just any person who is



1 aggrieved. It is the County also, and therefore, the County
2 is -- having had the right of appeal and not exercised it,
3 it cannot be heard now, to come and attack the decision to
4 grant the non-RUP.

5 That would be all I have, Your Honor. Thank
6 you.

7 THE COURT: Okay. It is a good argument. I
8 will be in touch with you. You do not have a hearing date,
9 or anything that we are pushing?

10 MS. BRODIE: January 22nd, I believe.

11 THE COURT: Okay. That is fine. I will have
12 it way, way in plenty of time.

13 MS. BRODIE: Thank you, Your Honor.

14 MR. HYLAND: Thank you, Your Honor.

15 (Whereupon, at approximately 3:00 o'clock p.m., the
16 hearing in this matter was concluded.)
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20
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23



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----- x	
JANE W. GWINN,	:
	:
Plaintiff,	:
	:
vs.	: LAW NO. 120132
	:
ORVILLE N. COLLIER, et al.,	:
	:
Defendants.	:
----- x	:

Fairfax, Virginia

Friday, December 13, 1991

The motion commenced at 10:00 o'clock, a.m.

BEFORE:

The Honorable Richard J. Jamborsky, Judge

APPEARANCES:

FOR THE PLAINTIFF:

JAN L. BRODIE, ESQ.
J. PATRICK TAVES, ESQ.
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030

Reported by: Mindy Belcher

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FOR THE DEFENDANT:

TIMOTHY HYLAND, ESQ.
Of: Odin, Feldman, & Pittleman, PC
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P R O C E E D I N G S

THE COURT: I want to tell you the question that's been going through my mind for weeks, but articulate it better today than I did on Tuesday in another case, where these issues came up.

Is there any time that a statute of limitations applies to the county? And if there is, why then doesn't the statute of limitations that would relate to an appeal from the zoning administrator apply to the county? And if that be true, then doesn't that take away the whole issue of estoppel, that we're not talking about estoppel, we're talking about a statute of limitations?

MR. TAVES: Well, I don't think so in this situation, Your Honor, for this reason. First of all, the statute that Your Honor is referring to I believe is ^{15-1-496.1} ~~15-1-496.1~~, which says that a party can appeal to the Board of Zoning Appeals within 30 days.

That statute would apply if a party sought to appeal to the Board of Zoning Appeals after the 30-day period. That is not this case. The zoning administrator did not seek to appeal anything to the Board of Zoning Appeals.

So that particular statute, that 30-day period, is not dispositive, because it's not an appeal to the Board

1 of Zoning Appeals. It goes to the question of whether or
2 not, after the original decision is made, whether the zoning
3 administrator or any zoning official has the authority, has
4 the power -- it's really a power question -- the authority
5 to correct an incorrect decision.

6 If estoppel does not apply to the actions of the
7 government in a governmental function, if laches do not
8 apply, then the zoning administrator has that authority. And
9 that authority is again, and again, and again shown in the
10 cases that we've cited to the Court.

11 If it were true that the zoning official, upon
12 signing on the dotted line, took away his or her authority
13 to correct that decision the minute they signed it, in
14 effect, what Your Honor has said is that once you make that
15 decision, you can't correct it, you can't change it. The
16 only way you can deal with it is if you file an appeal within
17 30 days to the Board of Zoning Appeals.

18 There has been no Virginia case from the Supreme
19 Court of Virginia which has ever held that the zoning
20 administrator lacks that authority, or as a corollary, that
21 the county government is bound by that decision, to the
22 extent that it cannot be changed or corrected. In fact, all
23 of the cases, the ^{Segaloff}~~Segaloff~~ line of cases, basically say that

1 the county has that authority.

2 ~~Secaloff~~ ~~9997777~~ for example, dealt with the issuance of
3 the building permit. The structure was constructed, and then
4 the error was realized. The county brought suit to enjoin
5 that violation. And the Supreme Court said that they have
6 the authority to revoke the permit.

7 THE COURT: Okay. I haven't read this yet, but
8 I looked at the case that opposing counsel has just cited to
9 me, Occoquan Land Development Corporation versus Cross
10 Cooper, et al. Are you familiar with that case?

11 MR. TAVES: Yes. In fact, at the court of
12 appeals, I was counsel for the board.

13 THE COURT: Good. Well, tell me then what that
14 case says, and how that relates to the issue.

15 MR. TAVES: That case, I do not believe -- and I
16 don't think counsel is citing it for the proposition that
17 496.1 was involved. That statute was not involved in that
18 case.

19 What that deals with is Rule 2(a)(2), I believe,
20 of the Supreme Court Rules, and notices of appeal, and, in
21 particular, whether or not a notice of appeal was filed
22 timely.

23 But that really doesn't have anything to do with

1 this case, where inferentially it is being argued that
2 failing to appeal to the Board of Zoning Appeals somehow
3 precludes the exercise of the governmental action, the
4 governmental function.

5 I think the real defect there is: If the ruling
6 is that any zoning official makes a decision, and the whole
7 county government is bound by that decision, that one zoning
8 official, whomever it is, has now been empowered to change
9 the ordinance. I don't think that's the law of Virginia,
10 Your Honor.

11 In this case, in particular, the decision that is
12 cited is the issuance of^a permit. And I have an affidavit to
13 give the Court regarding that permit. But that happened in
14 1981.

15 In 1983 and thereafter, on four or five occasions,
16 the property owner was given notices of violations, and there
17 was no appeal by the property owner. There is a significant
18 and fundamental difference between the private rights of the
19 property owner -- and that person is the only person that has
20 the standing, the authority, the power to assert their
21 private rights -- and the exercise of the governmental
22 functions.

23 And in all of the cases that we've cited, in terms

1 of the estoppel issue, they say that you do not lose that
 2 power. In ~~Segaloff~~^{Segaloff}, it is long after that 30-day period had
 3 expired.

4 The essence of this Court's ruling is that it has
 5 to go to the Board of Zoning Appeals under the law of
 6 Virginia the minute it is decided. I think for landowners
 7 that is not a good decision either. It may be in the case
 8 of Collier, but not for landowners in general.

9 Let's say, for example, Your Honor, that an
 10 adverse decision is issued by the zoning administrator as to
 11 a permit. The permit is denied. Thirty days passes, and the
 12 landowner doesn't appeal. Under the law of Virginia, that
 13 property owner would be barred from challenging that
 14 decision. However -- and that's ~~Gwinn v. Alward~~^{Gwinn v. Alward}. That is
 15 ~~Gwinn v. Alward~~^{Gwinn v. Alward}.

16 Let's say, for example, on the 31st day, the
 17 property owner convinces the zoning administrator that he or
 18 she was wrong. They can't correct it. They cannot correct
 19 it to resolve that problem, whether it's 31 days, or two
 20 years, or whatever.

21 THE COURT: Okay. How about that? What's your
 22 response to that?

23 MR. HYLAND: The response to that argument would

1 be several-fold, actually, Your Honor. First of all, that's
2 true. That's how finality works. It happens every day in
3 the courtroom. It happens every day everywhere.

4 If you don't exercise your right to appeal within
5 the time period, you're stuck. If they've wrongfully denied
6 your permit, and you waived, by coming outside of the 30
7 days, your right to appeal, then you're stuck.

8 THE COURT: Yes. But we have a saving provision
9 in the code that if we have a clerical error, some clerical
10 mistake in the judgment, that that can be corrected.

11 MR. TAVES: That's correct. But as Your Honor
12 pointed out in a letter opinion, that's also superseded, to
13 some extent, by 496.1, which requires the 30-day appeal.

14 On the other hand, from a more practical
15 standpoint, let's face it, since the zoning administrator is
16 the person who is responsible in this county for enforcement
17 of the zoning ordinance, and the zoning administrator said
18 31 days later, "Hey, I made a mistake. Sorry," from a
19 practical standpoint, the landowner could probably go in and
20 do it, despite the decision, under the threat that they could
21 later pull that right, because they are not estopped.

22 But since the zoning -- if the zoning
23 administrator believes that she was in error in the first

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1 place, and, therefore, says, "You can do it. I'm not going
2 to enforce my decision, however binding it might be," then
3 there is really no harm involved, as far as the landowner is
4 concerned. So that would be how it would work on both sides.

5 THE COURT: Go ahead with your argument.

6 MR. HYLAND: As to what Mr. Taves has addressed
7 so far, I think Your Honor had hit the nail on the head at
8 the very beginning. This is not an issue of estoppel, or
9 vested rights, or anything else, other than finality, period.
10 If the county does not come up and make its appeal within the
11 30-day period, then it's stuck, and the estoppel rules and
12 other sorts of rules of that type are irrelevant.

13 Mr. Taves also addressed the idea that there is
14 a personal right here, and that it only affects the property
15 owner. However, a clear look at the statute says that any
16 person aggrieved may appeal or any officer, department,
17 board, or bureau.

18 The county has its chance. And it's not an
19 amendment to the zoning ordinance. It's simply a final
20 decision as to this one piece of property, this one property
21 owner. And that's it. It's not an all-out amendment of the
22 zoning ordinance. That's a doomsday scenario that just
23 doesn't apply to this situation.

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1 The zoning administrator's argument would seem to
2 be asking that that language, requiring an appeal by the
3 various officers, departments, bureaus of the county, as
4 surplusage. It has no meaning, given the interpretation the
5 county would like the Court to give to the statute.

6 The other issues that I would address that are in
7 their motion, I don't imagine that they're -- are you
8 carrying forward with those other issues?

9 THE COURT: He probably is, but I haven't --

10 MR. TAVES: Yes.

11 THE COURT: -- given him a chance.

12 MR. HYLAND: Okay. I will just go through them
13 very quickly. Estoppel, once again it's not estoppel --

14 THE COURT: Wait just a second before you
15 do -- okay. Go ahead.

16 MR. HYLAND: I'll breeze through it. The argument
17 that the decision was not made by the zoning administrator,
18 simply paragraph two of the request for admissions, which
19 came with the original motion for summary judgment, it's
20 admitted that the decision was made by the zoning
21 administrator.

22 In the hearing itself, in direct response to Your
23 Honor's question of who issued the permit, the answer was the

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1 zoning administrator. It's basic rules of agency. I needn't
2 go into that, I don't believe. Moreover, the affidavit that
3 they're putting into that is not permissible under summary
4 judgment.

5 The argument that the Rucker decision shouldn't
6 be relied on, it's merely persuasive authority, and that's
7 -- again, I don't know that that can be an issue.

8 The fifth argument they raise, they say that there
9 is no allegation of an unlawful motive. The motive is
10 irrelevant. Once again it's merely a finality question.

11 Moreover, the zoning administrator complains that
12 that could not be the intent of the Supreme Court. The
13 Supreme Court's intent in all of these estoppel cases, once
14 again, is irrelevant. It's the legislature's intent in
15 enacting 496.1.

16 The sixth argument, regarding the non-
17 discontinuance of the non-conforming use, there are several
18 reasons. First of all, it's never been pleaded. Secondly,
19 they have said, over the years, affirmatively, that the use
20 is continuum.

21 If we just trace down through the letters -- and
22 I won't belabor the point, because it's all in the pleading
23 -- the various letters, most of which are within two years

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1 of each other, complain that there is a violation of this
2 motor vehicle service establishment. That's being attached
3 to their pleadings as an exhibit. It's incorporated therein
4 as an admission within their pleadings that the use is there.

5 For those ones that were beyond two years apart,
6 in each one, they refer to either a continued operation of
7 a motor vehicle service establishment, or a continuing --
8 continue to operate a motor vehicle service establishment,
9 once again, continuing from what: -- from the letter
10 immediately preceding the one in question. Thus, they
11 admitted that the operation has continued on in these
12 increments of less than two years.

13 Moreover, the typographical error in the permit,
14 they have admitted in their request for admissions that the
15 structure on the property is 1,200 square feet. The permit
16 says that the use is for the entire floor of that building,
17 and then it says 120 square feet.

18 A zero has obviously been dropped. The word
19 "entire" being a more specific description, is the actual
20 extent of the use. And once again, my memorandum to the
21 Court, I think, explains that adequately.

22 Number eight, I would withdraw my response -- it's
23 contained in the memorandum -- regarding not having pled for

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1 that relief. That was an error on my part. I apologize.

2 However, now in Section 8, they are addressing
3 that ²⁻³⁰²⁽⁵⁾~~123025~~ is the section under which this alleged violation
4 of the storage ordinance comes, and that has never been
5 pleaded. I'm not entirely certain from where that comes.
6 That would be all I have, Your Honor.

7 MR. TAVES: Your Honor, I have this affidavit for
8 the Court. I would like to present that, and ask that it be
9 admitted for the purposes of this motion.

10 MR. HYLAND: Just for the record, may I object to
11 the admission of that for the record in this hearing, in that
12 it's an affidavit in what is fundamentally in support of a
13 motion for summary judgment?

14 THE COURT: I would agree. I sustain the
15 objection.

16 MR. TAVES: Your Honor, as to ^{15.1-496.1}~~151A96/1~~, the
17 statute does not say that the board or county employees shall
18 appeal, or the decision shall be final and can never be
19 changed. What that statute says is that an aggrieved party
20 and a board, or an employee, et cetera, may appeal, may
21 appeal, ^{15.1-496.1}~~151A96/1~~.

22 Counsel speaks of the finality provisions of that
23 statute. There is no finality provision in that statute.

1 There is no language saying that a decision shall be final,
2 if you don't appeal.

3 15.1-496.3
~~15.1-496.1~~ points out a strange dichotomy. In this
4 case, what this property owner was allowed to do under the,
5 we claim the erroneously issued permit, was to continue using
6 a structure that already existed.

7 15.1-496.3
~~15.1-496.1~~ allows a neighboring property owner, if
8 a building permit is issued, to challenge within 15 days of
9 the start of construction the issuance of that building
10 permit, if they didn't have knowledge of the issuance of the
11 building permit.

12 Well, the problem there is, a party who is going
13 to be building -- let's say you get a permit for a garage,
14 and you build that garage within 15 days, and on the 15th day
15 a neighbor files suit, and you have to take it down because
16 it's illegal.

17 In that situation, that party had relied on the
18 decision much more than a property owner who is simply being
19 able to use a building that already exists. So 15.1-496.3
~~15.1-496.1~~
20 wouldn't apply, but it's inconsistent with the whole motion,
21 and inconsistent with all of the cases.

22 In terms of the zoning ordinance, and the
23 amendment to the ordinance, counsel argues that this

1 amendment isn't an overall amendment. Well, Your Honor, as
2 to this particular piece of property, and the uses permitted
3 on this particular piece of property, it would be an
4 amendment.

5 It is, in effect, saying that this property owner
6 has a right to continue that use, and the county can't stop
7 that. That would abridge the rights of all the people who
8 live in that area, and I would respectfully submit, abridge
9 the governmental rights of the county to correct the
10 incorrect decision.

11 THE COURT: Okay. Have you heard about my other
12 case that I --

13 MR. HYLAND: I just became aware of it this
14 morning, and I haven't had a chance to look at any other, no.

15 THE COURT: Okay. The issues are the same. But
16 we haven't been discussing your case ex parte, except that
17 I drew a case that had the same kind of an issue.

18 MR. HYLAND: That's my understanding.

19 THE COURT: And I found out in the middle of that
20 case that the county was moving that I reconsider this
21 decision that I made here. So I will certainly be
22 consistent.

23 MR. TAVES: We would hope so. Thank you, Your

1 Honor.

2 THE COURT: If nothing more, it will be
3 consistent.

4 MR. HYLAND: I would ask, though, is there any
5 way I can get that file -- I assume that's still up in
6 chambers -- and just take a look at the arguments made there?

7 THE COURT: Yes, if you come up and ask -- well,
8 she's not here right now, but Ms. Robbins will give it to
9 you, or anyone. Feel free to go through it.

10 MR. HYLAND: That's very kind of you. Thank you.

11 MR. TAVES: Your Honor, we have a packet of cases
12 that we can present to the Court. Does the Court wish those?
13 These are all the cases cited in the memo.

14 THE COURT: Yes, if you have them.

15 MR. TAVES: I think I have them back at the
16 office.

17 THE COURT: Okay.

18 MR. TAVES: I'll send it over. Thank you very
19 much.

20 (Thereupon, at 12:30, o'clock, p.m., the
21 hearing in the above-entitled matter was
22 concluded.)
23