211 Va 733

Record No. 7395

In the Supreme Court of Appeals of Virginia at Richmond

LAKE GEORGE CORPORATION

v.

PATRICK L. STANDING, DIRECTOR, ETC., ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

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HOWARD G. TURNER, Clerk.

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held MAR 1971

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7395

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

LAKE GEORGE CORPORATION, Plaintiff in error,

against

PATRICK L. STANDING, DIRECTOR OF PLANNING OF THE CITY OF VIRGINIA BEACH, AND 121 REAL PROPERTY OWNERS AND TAXPAYERS OF THE CITY OF VIRGINIA BEACH, VIRGINIA,
Defendants in error.

From the Circuit Court of the City of Virginia Beach
Robert S. Wahab, Jr., Judge

Upon the petition of Lake George Corporation a writ of error is awarded it to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 25th day of July, 1969, in a certain proceeding then therein depending, wherein Patrick L. Standing, Director, etc., *et al.*, were plaintiffs and the Board of Zoning Appeals of the City of Virginia Beach, Virginia, and the petitioner were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

* * * * *

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* * * * *

PETITION FOR WRIT OF *CERTIORARI* TO REVIEW DECISION OF BOARD OF ZONING APPEALS OF CITY OF VIRGINIA BEACH, VIRGINIA, ON APPLICATION FOR VARIANCE BY LAKE GEORGE CORP. RENDERED AND FILED IN THE OFFICE OF THE BOARD ON MAY 7, 1969, AND APPLICATION FOR RESTRAINING ORDER STAYING PROCEEDINGS UPON THE BOARD'S DECISION HEREBY APPEALED FROM

To the Honorable Judges of the Circuit Court of the City of Virginia Beach:

NOW COME the petitioners named in the caption hereof and, pursuant to the authority therefor contained in Code of Virginia, §15.1-497, present to the Court the following petition representing to the Court the following:

1. The petitioner, Patrick L. Standing, is Director of Planning and an officer and department head of the City of Virginia Beach, Virginia, and the other petitioners are taxpayers of the City of Virginia Beach, Virginia, owning real property in Section D, Cape Henry, Virginia Beach, Virginia, as shown on a plat thereof duly recorded in the Clerk's Office of this Honorable Court in Map Book 1, page 8B, said real property lying immediately adjacent to the property hereinafter described claimed by Lake George Corp. and within the same RD-2 zoning district; and all the petitioners are persons jointly and severally ag-

page 3 } grieved by a decision by the Board of Zoning Appeals of the City of Virginia Beach, Virginia, hereinafter called the Board, rendered by the Board and filed in its office on May 7, 1969, by which decision the Board granted to Lake George Corporation (formerly Peachtree Corporation, formerly Linds Corporation) a variance as to all property claimed by it in Section D, Cape Henry, Virginia Beach, Virginia (*i. e.,* a strip of land 100 feet wide and running from 76th Street to 89th Street and being Holly Avenue as

shown on said plat) from the 75 foot minimum lot front and 10,000 square foot minimum lot size required by the applicable over-all master zoning plan or ordinance of the City of Virginia Beach, Virginia, in the residence duplex district (R-D 2) as set forth in the Code of the County of Princess Anne, Va., Appendix B, Section 3, paragraph 5 B 2, said variance permitting by the decision of the Board a 50 foot minimum lot front and 7500 square foot minimum lot size.

2. The *gounds* on which the petitioners are *agrieved* are specified as follows:

A. The Board did not have the power or jurisdiction to hear and decide this matter as it involved no appeal from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of Code of Virginia, #15.1-486 through 15.1-498 or of any ordinance of the City of Virginia Beach adopted pursuant thereto or pursuant to similar prior enabling legislation.

B. The Board did not have the power to hear and decide this matter as it involved no appeal from the decision of the Zoning Administrator nor did it involve an application for special exceptions authorized in the applicable zoning ordinances.

C. The Board did not have the power to authorize the variance granted in this matter from the terms of the zoning ordinance as it was not before the Board upon an appeal in a specific case.

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D. The Board did not have the power to hear and decide this application as it did not involve the interpretation of the district map because of any alleged uncertainty as to the location of a district boundary.

E. The Board applied erroneous principles of law in making its decision and its decision is plainly wrong and violative of the purpose and intent of the zoning ordinance of the City of Virginia Beach, Virginia; therefore, the variance granted by the Board was contrary to law and the Board's decision was plainly wrong under the evidence.

F. The applicant did not show any of the several situations contemplated in the State and City zoning law which would unreasonably restrict the use of its property nor did the applicant show that the strict application of the ordinances would produce undue hardship nor that such hardship was not shared generally by other property owners in the same zoning district and the same vicinity nor that the authorization of such variance would not be of substantial detriment to adjacent property nor that the character of the district would not be changed by the granting of the variance.

G. The applicant did not show that it acquired its property in good faith.

H. The variance authorized by the Board was granted despite the fact that the condition or situation of the property concerned or the intended use of the property was shown to be of general or recurring nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance in violation of Code of Virginia, §15.1-495.

I. The decision of the Board amounted to a rezoning of the property and a substantial change in the location
page 5 } of the residential duplex district boundary established by the ordinance of the City of Virginia Beach in Appendix B contrary to Code of Virginia, §15.1495 (d).

J. The applicant is attempting to make use of Holly Avenue as shown on Exhibit A attached hereto for purposes other than a right of way contrary to law, and the applicant does not have title to the property and the property is subject to an easement for public passage as a street.

K. The variance authorized by the Board in this case permits use of property in a manner forbidden by the zoning law which is not necessary in order to alleviate any conditions peculiar to the particular property. The effect of the granting of this variance is solely to serve the private interest of the applicant and represents and arbitrary and capricious exercise of power constituting spot zoning and in contravention of a proper purpose which should be to further the welfare of the entire city as part of the over-all zoning plan. The decision of the Board constitutes an abandonment of the City's over-all master zoning plan.

L. The applicant pleaded before the Board financial loss as establishing extraordinary or exceptional situation or hardship approaching confiscation sufficient to justify the granting of the variance of the zoning regulation as a factor or element to be taken into consideration and in the face of such plea the evidence showed that the applicant paid $8,000.00 for conveyance to it of what was described vaguely as "all of the assets owned by Cape Henry Syndicate in the City of Virginia Beach, Virginia" and further showed that the property subject to the application was only a portion of said property and that the applicant proposed to make forty-eight lots out of the subject property with an average fair market value of $8,000.00 per lot. A finding of financial loss based on such evidence is clearly contrary to the evidence. The deeds by which the subject property was purportedly acquired are recorded in the Clerk's Office of this Court in Deed
page 6 } Book 979, at page 456, and the Court is requested

to take judicial notice of said deed and the state tax paid thereon reflecting a consideration of $8,000.00.

3. The petitioners hired a professional notary public and court reporter to take down and transcribe the proceedings and a true certified record thereof is available to the Court from the petitioners and the petitioners request permission to file same with the Court as a part of the papers in this proceeding.

4. The petitioners will suffer irreparable injury unless a restraining order is granted to stay proceedings upon the decision of the Board appealed from and notice to the Board of this application therefor has been given.

5. The decision of this Honorable Court rendered April 11, 1969, in a proceeding between the same parties, involving the same issues, Law No. 11534, constitutes *res adjudicata,* and those issues ought not to be again litigated. The petitioners hereby vouch in the record of said action and pray that the Court take judicial notice and knowledge thereof.

WHEREFORE, your petitioners pray that upon presentation of this petition to the Circuit Court of the City of Virginia Beach, Virginia, the Court allow a writ of *certiorari* to review the decision of the Board and prescribe therein the time (not less than 10 days) within which a return thereto must be made and served upon the relator's attorney and that the allowance of the writ stay proceedings upon the decision appealed from and that the Court grant a restraining order to stay proceedings upon the decision of the Board appealed from; that the Board be required to return certified or sworn copies of the original papers acted upon by it; and that the Court set the matter for hearing and that the record referred to hereinabove prepared at the expense of the petitioners constitute a part of the proceeding upon which the Court's determination be made; and that thereupon the Court reverse wholly the decision brought up for review.

page 7 }

Patrick L. Standing, Director of
Planning of the City of Virginia Beach,
et al, as set forth in the caption hereof.

By Counsel

* * * * *

Filed in the Clerk's Office the 9th day of May, 1969.
Teste: John V. Fentress, Clerk
Richard R. Garrett, D. C.

* * * * *

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* * * * *

ORDER

THIS MATTER came on for hearing the 18 day of July, 1969, by agreement and stipulation of the parties as to the time and place thereof, and was argued by counsel.

ON CONSIDERATION WHEREOF, and it appearing to the Court upon the hearing of this matter and from the stipulation of the parties that testimony is not necessary for the proper disposition of the matter and that the Court's determination should be made upon the petition, upon the return to the Court of the papers acted upon by the Board of Zoning Appeals of the City of Virginia Beach, Virginia, and the exhibits filed herein this day by the applicant, Lake George Corp., and the Court having heard argument of counsel is of opinion, for the reasons stated by the Court in an oral opinion on July 18, 1969, that the Board of Zoning Ap-

page 22-B } peals of the City of Virginia Beach, Virginia, did not have the power or jurisdiction to make the decision appealed from in this proceeding on an original application for a variance, it is ORDERED that the decision of the Board of Zoning Appeals of the City of Virginia Beach, Virginia, brought up for review herein made by it on May 7, 1969, on the application of Lake George Corp. for a variance, be, and the same is hereby, reversed and annulled and that proceedings upon the said decision be, and the same are hereby, reversed in their entirety, to which action of the Court in reversing said decision, the defendant applicant, Lake George Corp., did object and except.

ENTER: 7/25/69

Robert S. Wahab, Jr., Judge

Seen:

Grover C. Wright, Jr., p. q.

Seen and objected to as set forth hereinabove:

Frank E. Butler, III, p. d.
Counsel for Lake George Corp.

* * * * *

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* * * * *

OPINION

Rendered from the bench on the 18th day of July, 1969, showing corrections and changes, for clarity, of the transcript.

The court has spent some time in chambers researching the meaning of the word "appeal" as used in the law, and discussing the matter with counsel. The court has already indicated it did not appear to the court that the Board of Zoning Appeals had original jurisdiction to hear an application for a variance under paragraph (b) of 15.1-495, for the reason that under paragraph (b) the Board has authority to hear and decide specific cases for a variance only *"upon appeal."* It says nothing about an original application. The only place where the word "application" is used is in connection with the powers and authority of the Board, is in paragraph (c) of Sec. 15.1-495, which the court previously indicated was authority for the Board's jurisdiction to hear applications for such "special exceptions" as may be authorized by ordinance. However, we now find that the

page 25 } term "special exceptions" apparently is limited by the definition found in Sec. 15.1-430 (i), where it is said that "special exceptions" "means a special use, that is a use not permitted in a particular district except by a special use permit granted under the provision of this chapter and any zoning ordinances adopted herewith." It does not appear that there is any authority granted by state law for including in a local zoning ordinance a provision for the Board to hear an original application for a variance, as distinguished from a special use.

Therefore, the court concludes the Board of Zoning Appeals had no jurisdiction to hear and decide an original application for a variance, and holds that the decision of the Board of Zoning Appeals in this matter rendered on the 7th day of May, 1969, is null and void.

R. S. Wahab, Jr.
Judge

July 29, 1969.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The defendant, Lake George Corporation, give notice of appeal from the judgment of the Court rendered herein on July 25th, 1969, and assigns the following error:

1. The Court erred in holding that The Board of Zoning Appeals did not have jurisdiction to hear the application for a variance filed by the defendant, Lake George Corporation.

Lake George Corporation

By Frank E. Butler, III
Counsel

* * * * *

Filed Aug 11 1969

John V. Fentress, Clerk.
By R. Garrett, D. C.

* * * * *

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ORDER

THIS ACTION came on the 8th day of August, 1969, after notice to all parties, on the motion of the applicant, Lake George Corp., by counsel, to modify, vacate or set aside the judgment rendered herein on the 25th day of July, 1969, and was argued by counsel.

ON CONSIDERATION WHEREOF, for the reasons stated by the Court from the bench and in a written opinion filed herein, it is ORDERED and ADJUDGED that said motion be, and the same is hereby OVERRULED, to which action of the Court, Lake George Corp., by counsel, did object and except.

Enter: 8/12/69

RSW
Robert S. Wahab, Jr., Judge

* * * * *

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OPINION OF THE COURT

Corrected and Supplemented From Court Reporter's Transcript of the Hearing on the 8th day of August, 1969.

Gentlemen, it seems to the court that following the law as to the interpretation of statutes, the court is required to give to words their usual and common meaning. When we last heard the matter, we spent considerable time in looking up the definition of the word "appeal". In the law it has a very specific meaning. It refers to the taking of a prior decision or judgment or action of a court, an officer, or administrative body, to a judicial or quasi-judicial body having superior authority. Black's Law Dictionary, 4th Edition, defines the word "appeal" as follows:

" . . . may be used to denote the review by a court of the action of some board or administrative officer."

page 31 } "The complaint to a superior court of an injustice done or error committed by an inferior one whose judgment or decision the court above is called upon to correct or reverse."

"The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial."

"In general terms a resort to an upper court or tribunal."

To give to paragraph (b) of Section 15.1-495 the construction urged by the appellee in this case, namely, that it confers original jurisdiction upon the Board of Zoning Appeals to grant variances from the terms of ordinances upon an original application, would require that the word "appeal" be construed as meaning "application". The two words are not synonymous, either in their legal or common meaning.

Furthermore, the view that the word "appeal" in that paragraph refers to an appeal from the terms of the ordinance would be an interpretation contrary to grammatical construction. As written, the portion of the paragraph we are concerned with reads:

"To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, etc."

To read this paragraph as conferring upon the Board of Zoning Appeals the authority to hear original applications for a variance from the terms of the ordinance is erroneous construction or interpretation of the paragraph. There is no way these words can be changed around so that the prepositional phrase "from the terms of the ordinance"
page 32 } refers to the word "appeal" in that paragraph, so as to construe it as meaning "upon appeal from the terms of the ordinance." The phrase "from the terms of the ordinance" refers to the word "variance" which immediately precedes it, and does not relate back to the word "appeal" from which it is separated by five words in the sentence structure. It is a variance from the terms of the ordinance which the Board is authorized to grant upon appeal. The clear and plain interpretation of the words as they appear in the sentence structure is that they mean "a *variance* from the terms of the ordinance," not "an *appeal* from the terms of the ordinance."

The use of the words "upon appeal" show a clear intent that a request for a variance from the terms of an ordinance must come to the Board by an appeal from a prior adverse action or decision of the Building Inspector or Zoning Department Officer. If the Legislature meant to confer original jurisdiction upon the Board to grant a variance from the terms of an ordinance, the words "upon application" and not "upon appeal" should have been used.

With regard to the question of counsel for the appellee as to why the matter now before the court cannot be considered as a valid appeal on the basis of the Building Inspector's refusal to issue a permit, the court has previously held that the appellee did not commence these proceedings in that manner but by an original application to the Board.

The Building Inspector cannot grant any permit until something is regularly and properly presented to
page 33 } him upon which he could grant a building permit. There must be something in proper form presented to him on which he is authorized to take action. That has never been done in this case.

R. S. Wahab, Jr.
Judge

August 14, 1969

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Following is stenographic transcript of proceedings had on the above-entitled cause on the 18th day of July, 1969 at 1:00 P.M. before the Honorable Robert S. Wahab.

PRESENT:

Grover C. Wright, Jr., Esq.
Counsel for the Plaintiffs

Frank E. Butler, III, Esq.
Counsel for Lake George Corporation

7/18/69
page 2 } The Court: Any testimony?
Mr. Wright: No sir.
Mr. Butler: No sir. Your Honor, Mr. Wright has advised me—
The Court: Swear in the reporter.

(Court reporter sworn.)

Mr. Butler: Mr. Wright and I agreed on today as the date to hear the matter and he advised me he had discussed it with you, and I would assume you have read the transcript of the appeal before the Board of Zoning Appeals at the last hearing. If the Court feels such additional testimony may be taken, we feel what was presented—
The Court: I told Mr. Wright I read this. This is another appeal? Not the one I heard previously?
Mr. Butler: It is a subsequent appeal.
The Court: I have not read it. I shall be glad to do so, gentlemen, I am sorry. Suppose we go to lunch and come back about 2:30?
Mr. Butler: Will that give you enough time?
The Court: I think so.

(Court recessed and reconvened at 3:45 P. M.)

The Court: I would like to apologize to counsel and all

parties interested in the matter for the delay. It was necessary to do more than to read the transcript of the record before the Board of Zoning Appeals. Gentlemen, I am going to give both sides adequate opportunity to argue the matter, but first I would like to say this. In reading the transcript of the proceedings before the Board of Zoning Appeals on the 7th of May, 1969, it seems to the Court it was first necessary to determine whether or not there was any basis upon which the Board of Zoning Appeals had original jurisdiction to hear an application for a variance such as was filed in this case apparently on April 17, 1969. In that connection I noticed a letter from the Attorney General, dated May 6, 1969, in which he stated that in his opinion original jurisdiction is conferred upon a Board of Zoning Appeals created as prescribed in Chapter 11, Title 15.1 of the Code of Virginia and acting in accordance with paragraph (b), Section 15.1-495, upon an application for variance from a zoning ordinance enacted by a county or municipality pursuant to such chapter.

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My examination of this paragraph which is referred to by the Attorney General, I could find nothing whatsoever that would give the Board of Zoning Appeals authority to hear an original application, for in that section it specifically says: "Boards of zoning appeals shall have the following powers and duties:" and skipping to the particular paragraph specified in the opinion of the Attorney General it says, "To authorize upon appeal" it says nothing about upon application, so it is very clear to me that in the wording of this paragraph that there is nothing which would give the Board of Zoning Appeals the right to hear any requests for a variance upon application. It says "upon appeal". It does not say upon application. The Attorney General uses the words "upon application" in his opinion, but in my view that is erroneous. I noticed the application said the request was made under Section 15.1-495 or Section 9, Appendix B of the Code of Princess Anne County. Actually, Appendix B of the 1958 Code of Princess Anne County is the master zoning plan ordinance now in effect in the City of Virginia Beach by virtue of the language used in the charter granted by the legislature under which the former Princess Anne County was consolidated with the City of Virginia Beach. Paragraph 9—go back—under the State Code, paragraph C of 15.1-495 says that the Board shall have the power "To hear and decide appeals from the decision of the zoning administrator or applications for such special exceptions as may be authorized in the ordinance.", referring to master zoning ordinances which are enacted pur-

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suant to the enabling powers conferred in this article of the Code. Now, Section 9 of the Zoning Ordinance under which the City is now operating, paragraph B provides that the Board of Zoning Appeals shall have the following powers and it shall be its duty—"to grant a variation in the regulations when a property owner can show . . ." It is not necessary to read the requirements of an applicant in order to obtain a variance. So the Court is of the opinion that the—that under the State law granting the Board of Zoning Appeals authority to hear and decide applications for such special exceptions as may be authorized by the ordinance, and the City ordinance containing this provision,

7/18/69 page 5 } that the Board of Zoning Appeals did have jurisdiction to hear an application for a variance such as was filed in this case. To me that much of it is clear, as I see it. I am not precluding argument on other aspects of the matter as far as counsel is concerned. The question is, in essence, whether or not this is a variance as contemplated by the State Code and the master zoning ordinance of the City or is it in effect a change of zoning. Bearing in mind, as the Court indicated in the previous appeal matter that no variance—I am reading from 15.1-495 paragraph b, subsection 3, in the third paragraph under that subsection. "No variance shall be authorized unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance." I am referring again to Section 9 of the City master zoning ordinance, same paragraph B, the last several clauses which state, "provided, however, that all variances granted under this clause shall be in harmony with the intended spirit and purpose of the ordinance" and so forth. If you did not follow me, I will be glad to repeat. To me, this is the essence of the case. Do you wish to argue other matters—if so you are free to do so. That is the Court's view of the issue.

Mr. Butler: What copy of the transcript do you have there with you?

7/18/69 page 6 } The Court: I have the one by Virginia A. Woolridge, Court reporter. Is anything inconsistent?

Mr. Butler: I don't think there would be any material one.

The Court: Is this the official one? This is the one filed by the Board.

Mr. John Gibbs: That was probably the only one I had at that time.

Mr. Butler: We will stipulate that is a satisfactory transcript. I am sure there appear to be no material differences between the two but I think in view of the transcript and the Attorney General's letter are the only exhibits furnished by the Board of Zoning Appeals—

The Court; we have your application, your map, we have the letter from the Attorney General dated May 6, 1969 and a copy of a letter dated May 5 addressed to Mr. Saunders and a letter from Garrett, Garrett and Garrett to Mr. Gibbs dated April 14. There is a Lawyer's Title Insurance Company Owner's Title Policy dated September 18, 1968 in the name of Peachtree Corporation as insured. And then there is another plat showing the proposed subdivision of the property West of Cape Henry Section D by Harold C. Warren, Jr., Certified Land Surveyor, and a copy of—

Mr. Butler: The official minutes.

The Court: I presume the minutes of the May 7 meeting.

Mr. Butler: We have agreed to introduce the copy of the City Code, Appendix B, showing the RD-2 regula-
7/18/68 tion in the 10,000 square feet zoning and it would
page 7 } be appropriate to introduce Section 9, which your Honor has been reading. We will put these into the record.

The Court: All right, sir.

Mr. Wright: If that is all of Section 9.

Mr. Butler: This is.

Mr. Wright: If we both ask the Court to take judicial notice—

The Court: Let the record show the Court has before it a bound copy of the Code of the County of Princess Anne, Virginia, 1958 which includes the master zoning ordinance under which the City of Virginia Beach is now operating and Appendix B of that Code.

Mr. Butler: This is all.

The Court: I don't know about the amendment. I don't know that Section 9 has been amended. I assume it has not.

Mr. Butler: No sir, but if Mr. Wright has a question, I will be happy to show this is all of Section 9. It ends on that page.

The Court: That is correct. For ready reference we will mark it Appellee—

Mr. Butler: Applicant.

The Court: It would be appellee. I think we will refer to it as if it were before the Board of Zoning Appeals. I will mark it Applicant's Exhibit 1, this date.

Mr. Butler: For Exhibit 2, I would like to introduce the Section of the Code that sets out the RD-2 require-

7/18/69 page 8 ments which is 10,000 square feet and 75 feet frontage on the street.

The Court: Applicant's Exhibit No. 2 this date.

Mr. Butler: At the Board of Zoning Appeals, in my copy of the transcript at page 21, I held up a plat and asked Mr. Gibbs—I had—Mr. Gibbs and I went over this before the meeting and I had him circle in red all the lots in North Virginia Beach unbuilt on at the present time, on which he would issue building permits for—but somehow this did not get in the record. I have Mr. Gibbs here to identify this plat and again introduce it in the record.

Mr. Wright: I don't see that it is material at all but I don't have any objections.

The Court: Applicant's Exhibit 3 this date.

Mr. Wright: Let the record show I make no stipulation as to its accuracy or anything of that nature.

The Court: It is just to identify it. Has anyone been sworn but the court reporter?

(Mr. John Gibbs was sworn in.)

The Court: Are you familiar with the plat to which Mr. Butler has referred?

Mr. Gibbs: Yes sir.

The Court: Is the plat as represented by Mr. Butler, that is the lots outlined in red were so outlined by you and indicated as lots in the North Virginia Beach area on which improvements have not been made or were not at the time of the hearing?

7/18/69 page 9 Mr. Gibbs: I don't think I outlined them but I did testify I would issue permits on these lots, for building permits.

The Court: Do you know—

Mr. Gibbs: I could not say whether they have not been built on since then.

The Court: At that time they were unimproved lots?

Mr. Gibbs: Yes sir.

Mr. Wright: The point of it is—and I will stipulate it—that any lots that were platted 20 years ago or 50 years ago as 50 foot lots, Mr. Gibbs would have to issue a building permit on those lots. I don't think there is any question about that. That is the point. There has never been a question about that if a non-conforming plat is there.

The Court: This is referred to.

Mr. Butler: I just want it in the record. I believe your Honor mentioned you had one of these small plats.

The Court: That is part of the record certified by the Board of Zoning Appeals.

Mr. Butler: At several points during the proceedings, a zoning map was brought out and identified again by Mr. Gibbs as a zoning map as applicable to the property under the application but this zoning map also did not get into the record. I don't believe your Honor referred to it.

The Court: I believe that is the one you brought in awhile ago.

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Mr. Butler: Yes sir.

The Court: All right, it is Exhibit 4.

Mr. Wright: There is no question, it is stipulated if property is within the RD-2 zoning.

The Court: All right.

Mr. Butler: Then, I am not sure, you may have a copy of this plat with Cape Henry Section D in the record. If you do, it won't be necessary for us to introduce it.

The Court: I believe you attached it to your application. It is now, at any rate. Is this the one referred to?

Mr. Butler: Yes sir, dated 1925. Since I believe Mr. Wright has the burden, perhaps he should speak first and then I will make my arguments.

Mr. Wright: I will be brief because every argument I have, I made before the Board of Zoning Appeals, including the two points that you brought out in the introduction. I do take issue with one portion of the Court's analysis of jurisdiction. When the Court referred to applications for special exceptions. Special exceptions is defined in the Code.

The Court: Mr. Wright, I am not sure you understood what I said. I referred to paragraph C. It says to hear and decide applications for such special exceptions as may be authorized in the ordinance. I left out appeals and decisions. Now the ordinance, Section 9 says to grant a variation to the property owner, and so forth. Certainly variation is the exception.

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Mr. Wright: No sir, that is where I differ with the Court, because special exception is defined in the Code, Section 15.1-431 as, "a special use—

The Court: What—431?

Mr. Wright: 431 (i).

The Court: Under Definitions?

Mr. Wright. It is defined under 15.1-431 (i).

The Court: It is 430 (i), isn't it?

Mr. Wright: Yes sir. As "a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." We have no special exception provision in our zoning ordinance.

The Court: That is one I hadn't considered, frankly. I

didn't realize it had been defined within it.

Mr. Wright: It is specifically defined and the Code of Virginia—

The Court: The planning and subdivision of land and zoning.

Mr. Wright: Chapter 11 of the Code. Throughout the Code of Virginia and our zoning ordinance it is clear to me that we are talking about appeals. And it is significant there has never been a case that has gone to the Court of Appeals that didn't involve an appeal from the opinion of a building inspector or other similar official.

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The Court: Mr. Butler, what have you to say?

Mr. Butler: Mr. Wright and I throughout this disagree with a lot of things, but the facts are rather simple. In 15.1-495, it provides that the Board of Zoning Appeals, under Section B shall hear "upon appeal in specific cases such variance from the terms of the ordinance". *Our position is not only are we appealing from the building inspector's ruling, but the terms of the zoning ordinance itself.* Our appeal is based on hardship. We feel the Attorney General's opinion, Robert Y. Button's opinion, is not binding upon the Court.

Court: Why doesn't it say upon application as it does here?

Mr. Butler: If you go into the case law through the U. S. and also in Virginia, there is a Virginia case to the effect that if you enact a general zoning law you have to provide for variances, otherwise the law may discriminate against property owners and as such is invalid. It is an unconstitutional taking of property. If I may quote from the *Board* v. *Fowler,* "The plain intent and purpose of the ordinance" (this is the old ordinance 35-68(b), this is a good statement of intent) "is to permit through the Board of Zoning Appeals the amelioration of the rigors of necessarily general zoning statutes by eliminating the necessity for a slavish adherence to the precise letter of the ordinance where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement." We take the position that all of these zoning ordinances that have ever been enacted in the United States have to provide for variances. If they do not so provide, the necessarily general zoning ordinance would force a slavish adherence to the general zoning ordinance upon a land owner who, because of hardship, or size or shallowness or depth of property could not conform. For this reason, the Code section was enacted to allow in a hardship case a personal appeal from the zoning ordinance or, in this case, the building inspector testified he would not issue a per-

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mit on 7500 square foot size—it would have to meet 10,000 square foot.

The Court: I was trying to settle the procedural aspects. Certainly there is a procedure. There must be a procedure for persons peculiarly pressed by rigid enforcement of a master zoning plan.

Mr. Butler: This Code section allows the municipalities to set—

The Court: When you read the Attorney General's opinion I don't see how he could overlook the use of the words "upon appeal". Does that simply mean this is a statute. It has to be construed in its statutory sense? What are you appealing if you proceed under subparagraph (b)?

Mr. Butler: We are appealing from the terms of RD-2 requirements of zoning which requires us to have the 10,000 square feet *plus the building inspector.*

The Court: Why does it say "upon application", why didn't it say "upon appeal"? This is a stumbling block as far as I am concerned. I thought I found the answer to your problem.

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Mr. Wright: The problem is that they have got no plat to go by. That is the whole problem. This property is not divided into lots. That is the whole situation. Why they won't go to the Planning Commission and get a plat is beyond me.

The Court: That was my initial impression when we were here on the appeal before. It was clear to me the Board of Zoning Appeals had no right to hear the matter as an appeal from the decision of the Planning Commission. Now we are back here again taking the same action on original application for variance. I was looking authority for them to do so and reading the transcript of the proceedings. There was much argument pro and con and I looked at the letter from the Attorney General and I can't go along with his interpretation of paragraph (b). I noticed Appendix B and Section B says to grant variation when the property owner can show the property was acquired in good faith. It says nothing about an appeal. I am talking about the Zoning Ordinance. I am talking about the City, not the Statute.

Mr. Wright: In the beginning it does, your Honor.

The Court: Let's see. Any person, etc., may appeal as a matter of right to the Zoning Board of Appeals. In Section 15, the Board of Zoning Appeals may vary the application of the terms of this ordinance with its general purpose and in accordance with general rules herein contained.

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Mr. Wright: It is subject to the one before. First you appeal.

The Court: Wait a second. There are a lot of

questions in my mind—one I thought I settled. But I am not convinced in my own mind I have the answer. The next paragraph says the Board of Zoning Appeals shall have the following powers and it shall be its duty, (a) To hear, etc. determinations made by the Zoning Administrator, or enforcement of the provisions of this ordinance. (b) To grant variation in the regulations when a property owner can show and so forth. Doesn't that give the property owner the right to file an original application for a variance with the Board of Zoning Appeals. Your answer is going to be 15.1-495 says only in special exceptions as may be authorized by the ordinance and if the ordinance succeeds the enabling authorities in the State law.

Mr. Wright: I think it is clear that paragraph 9 of our local zoning ordinance is intended to parallel 15.1-495 which says what boards of zoning appeals have the power and duty to do and they can hear appeals and to authorize on appeal in specific cases of variance. I think our zoning ordinance should clearly be interpreted to parallel and not exceed the power granted by the state. Our ordinance says in the introduction there—any person aggrieved by the decision of the building inspector may appeal. Then it further states that on appeal—I think that is definitely implied—on such appeal the board may grant a variance if there is a hardship case. But the whole thing we are talking about is a board
7/18/69 of zoning appeals. We are talking about a body
page 16 } constituted by the legislation, appointed by this Court to hear appeals. They have no legislative powers.

The Court: True, but certainly it does have some original jurisdiction. They certainly have in paragraph C which you have referred to—to hear applications for such special exceptions as defined in the Code. They have that power and under paragraph D, to hear and decide applications for interpretation of the district map and so forth.

Mr. Wright: Prior to the amendment of C, they apparently had misspelled a word where it said on application, and changed it to 'or'. So appeal applied to the whole thing before they changed the word "on" to "or".

The Court: That is the reason for changing it?

Mr. Wright: Those are the only limited areas of original jurisdiction when you are not appealing something.

The Court: As a practical matter, the situation you have here—as I see it—the only way to get before the board on appeal is by appealing from the decision of the building inspector or any administrative officer in the administration and enforcement of this article.

Mr. Wright: If they had a plat, they could get it that way, but they don't have one.

The Court: If they don't have one, how is he going to get a formal decision from the building inspector?

Mr. Wright: He's got to get a plat approved. It's an obvious route.

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The Court: It clearly seems to me that if you would take a plat, have it approved by the Director of Planning—I presume what is going on he is indicating he would not approve. If he doesn't you have your right of appeal.

Mr. Butler: That is right—it is to the Circuit Court.

The Court: Right here, and there wouldn't be any question about it.

Mr. Wright: Or he could appeal to the Planning Commission and if he needs a variance the Planning Commission can give it.

The Court: Then if the Planning Commission doesn't give it?

Mr. Wright: He can come here.

The Court: This is the second time and I think the matter ought to be resolved on the merits once and for all without further procedure problems.

Mr. Wright: If I could consent to jurisdiction I would do it, but I don't think I can consent to jurisdiction. I would like to get it heard on the merits today, too.

The Court: I am not shutting the door now because I am now undecided. I don't agree with your interpretation of the master zoning ordinance of the City, that it refers only to appeals because clearly this is a separate paragraph. It empowers the Board of Zoning Appeals to grant a variance when the property owner can show, and so forth. I think it is clear the property owner has the right to file the original petition. The only thing that concerns me, does this—because it exceeds the limited power of jurisdiction granted by State statute—render this particular procedure invalid. This I am not certain of. Apparently it was taken that the section which the court referred to, paragraph C in 15.1-495, providing the Board could hear and decide applications for such special exceptions as may be authorized in the ordinance, as the authority, but as you pointed out special exceptions has a limited restricted meaning.

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Mr. Butler: Where is that definition section?

The Court: 15.1-430, page 504. Last subsection (i), where it defines special exceptions. Right at the top of the page. "Special exception" means a special use, that is a use not per-

mitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." It refers to the use you are going to make of the property, not its size or the setback. Why it should be restricted that way I don't know. It doesn't seem to be reasonable to grant special exceptions as far as use is concerned. Why shouldn't the Board be able to grant exceptions as far as set back or shape or frontage or lot size is concerned. Special uses would be more obnoxious than lot size.

Mr. Wright: Your Honor, in that section, rather in that connection, the Code sets out different procedures for an application for special exceptions from the procedures set out for appeal. 15.1-496 tells how to make application for special exceptions whereas on appeals they are taken by the person aggrieved by the decision of the zoning administrator. The whole idea of the appeal presupposes a grievance from a rule the building inspector made.

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The Court: Ordinarily, that is true. That is the reason I arrived at my conclusion, all due deference to their standing and the Attorney General's opinion being entitled to a great deal of weight.

Mr. Wright: His opinion is rendered with no facts given to him at all and means no more than saying—does the Court have jurisdiction to hear divorces.

The Court: He uses the term appeal. It means simply by appealing the provisions of the statute for the first time to the Board of Zoning Appeals.

Mr. Butler: Look at Statute 495-b and in the first sentence it says to authorize upon appeal from the terms of the ordinance.

The Court: It says variance from the terms.

Mr. Butler: We are asking appeal from the terms of the ordinance.

The Court: This presupposes a situation where the administrative officer because of the terms of the ordinance has refused to issue a building permit or something of that sort.

Mr. Butler: That would be covered in paragraph A, your Honor.

The Court: Maybe issue a cease and desist order.

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Mr. Butler: I believe that would be covered in A and to go along with that reasoning it would be duplication.

Mr. Wright: No, A covers a situation when he is wrong. When the building inspector made a wrong decision. B is

when he is right, but if you comply with the letter of the ordinance it imposes hardship—that is the difference.

Mr. Butler: There is some question about it but the presumption is that the Board of Zoning Appeals had the power to decide.

The Court: What did you say?

Mr. Butler: The presumption is the Board of Zoning Appeals had the power to decide these matters.

Mr. Wright: No, your Honor, the presumption is they acted properly on the merits—not that they had jurisdiction.

The Court: Do you have any cases?

Mr. Wright: The law is their decision comes to the Court presumptively correct, not that they have jurisdiction.

Mr. Butler: In the *Board* v. *Fowler,* 201 Va. 942, I have a copy for you. There is a *prima facie* presumption that the power and discretion of the Board of Zoning Appeals have been properly exercised.

The Court: Power—if they have it.

Mr. Butler: The presumption is—

The Court: No presumption of jurisdiction.

7/18/69 page 21 Mr. Butler: Of course they wouldn't have the power unless they have the jurisdiction, but the presumption is they have the power. We feel if you read Section B, the first sentence: To authorize upon appeal —if you leave out the words 'in specific cases such variance' it reads—from the terms of the ordinance. In effect you are appealing from the terms of the ordinance. This interpretation would conform to the City ordinance which provides that the City has the power to grant variation in the regulations when the property owner can show—

The Court: Why do they use the terms 'upon appeal' or 'application'? The attorney general says "upon application'. Appeal has a very definite legal connotation.

Mr. Butler: Appeal means a good many things to us through the centuries, if you look at Webster's Dictionary. If you read this 'to appeal from the ordinance'—

The Court: Let's recess.

(The Court, Mr. Butler and Mr. Wright retired to chambers.)

Court reconvened at 5:10 P. M.

The Court: The Court has spent some time in chambers researching the meaning of the word "appeal' as used in the law, and discussing the matter with counsel. The Court has already indicated it did not appear to the Court the Board of Zoning Appeals had original jurisdiction to hear

7/18/69 page 22 an application for a variance under paragraph B of 15.1-495. The reason it specifies it only has

authority to hear and decide specific cases for variance upon appeal. It says nothing about application. The only place where the word 'application' is used is in connection with the powers and authority of the Board. Paragraph B is not pertinent to our inquiry here today. Paragraph C, which the Court previously indicated was authority for the Board's jurisdiction to hear applications for such special exceptions as may be authorized by the ordinances, apparently is limited by the definition contained in Section 15.1-430 (i). Special exceptions is defined, "means a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." It doesn't appear there is any authority of the local zoning ordinance for hearing an original application for a variance. The Court cannot find any authority for its conferring jurisdiction upon the Board of Zoning Appeals to hear and decide an application for a variance. The application is for the first time originally filed with the Board. For those reasons, the decision of the Board of Zoning Appeals in this matter on the 7th day of May, 1969, is found by the Court to be null and void.

Mr. Wright, if you will prepare the Order and Mr. Butler endorse it, and I presume in the Order you should note the exception of the Appellee to the decision of the Court.

Mr. Wright: Yes sir.

7/18/69 page 23 } The Court: You may note an appeal in the prescribed time.

Mr. Butler: May I have the Court's permission to note my exception for the purpose of the record?

The Court: Yes.

Mr. Butler: The applicant, Lake George Corporation, notes its exception to the court's ruling on the ground that Section 15.1-495, subsection (b) provides that the Boards of Zoning Appeals shall have the power to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest. The Applicant's interpretation of the word 'appeal' is the non-technical sense of the word appeal, which would mean to apply for or to ask, and therefore, we feel that the Court erred in its dismissing and overruling the Board of Zoning Appeals.

* * * * *

8/8/69
page 1 }

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Following is stenographic transcript of proceedings had on the above-entitled cause on the 8th day of August, 1969 at 4:45 P. M., before the Honorable Robert S. Wahab.

PRESENT:

Grover C. Wright, Jr., Esq.
Counsel for the Plaintiffs

Frank E. Butler, III, Esq.
Counsel for Lake George Corporation

8/8/69
page 2 } Mr. Butler: Your Honor, this matter comes on to be heard on my motion to modify or set aside the Court's decision in holding that the Board of Zoning Appeals did not have jurisdiction to hear the application of Lake George Corporation for a variance from the terms of RD-2 zoning in the North Virginia Beach area of the City of Virginia Beach. I know your Honor is familiar with the case—

Mr. Wright: I'm not sure I understand why we are here. All we have is a notice that Mr. Butler is going to move the Court here today to modify or set aside the judgment. We are not talking about a jury verdict. We are talking about a judgment of the Court and I don't know what the grounds for it are. No petition is for it. I don't know if there is some clerical error in the judgment order or what, but I don't think it proper for the Court to rehear the matter and listen to the same material it heard before. I don't think the litigant is entitled to but one day in court. If there is some error in the face of the judgment order or a compelling reason to set aside the Court's judgment we ought to know what it is but I don't think it should be *nerely* used as a way to get a second bite at the same apple.

8/8/69 The Court: This notice was filed on July 28th and
page 3 } I think we had the hearing on July 18th. It is within the 21 day period. I don't know what it is either until we hear from Mr. Butler, but he's got a right to make the motion to vacate, I presume would be the proper designation. Of course the Court's rule from the bench—incidentally I suppose you got a copy of the Court's opinion which I tried to correct and change so it would be a little clearer as to what the court intended to say.

Mr. Wright: I don't think it should be used as a guise to reargue the same things as before.

The Court: Tell us what it is, Mr. Butler.

Mr. Butler: I'm going to be brief, Judge. I have mentioned

to you I wanted to reserve the right to argue this. I discussed it with you and attempted to set up a meeting to argue. I'm not going to be long. First, I have basically three opinions to the effect that there is authority. These three opinions are to the effect that the original application may be made in hardship cases. First of all, Mr. Bernard Levin, who has been associated in the case, secured an additional opinion from the Attorney General. I have a copy for Mr. Wright.

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Mr. Wright: I think this is reargument. It is just reargument of the same thing. Mr. Levin testified as a witness in the case. He is not associated in it and never has been associated in the case.

Mr. Butler: That is not correct.

Mr. Wright: A letter in the file states he appeared as a witness and on no other basis. He is not counsel.

Mr. Butler: He said in the first transcript that he appeared on behalf of Mr. Lindsley.

The Court: You have introduced one opinion—now you have two more?

Mr. Butler: I have two more.

Mr. Wright: From the same source—the Attorney General?

Mr. Butler: If you will give me a chance I would love to put my side on.

Mr. Wright: It's like calling the jury back and saying, "Wait, I forgot to say something."

The Court: Probably so, but if an appeal is taken and any time the Court finds it wrong it can enter the judgment it should have entered. This is within a 21 day period. I'm delighted to have all the help I can get. If you can show me I'm wrong at any time—

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Mr. Butler: The reason for an additional opinion from the Attorney General was because of several statements made by the Court to the effect you didn't understand the basis on which the Attorney General made the opinion. This was the reason for the additional opinion, but in addition to this opinion, your Honor, I checked with the State Bureau of Research and Drafting and obtained a copy of the old Code of Virginia, the code section 15.870, which was in effect in 1958 when our City Code was written and this code section again provided in the same language that the Board of Zoning Appeals shall have the following powers: "To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest when owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship . . ."

The Court: Why didn't they put that in there when they revised it?

Mr. Butler: This says to authorize upon appeal in specific cases. This is virtually the same language.

The Court: This is the old statute?

Mr. Butler: Exactly right. Now this second opinion which I mentioned I think perhaps will be your Honor's opinion. In drafting Appendix B to the Princess Anne County Code, in the Princess Anne County Code it was provided when a property owner can show his property was acquired in good faith and by reason of narrowness or shape of the property—so forth. In other words the County Code Section was drafted in reliance upon the State Code and your Honor interpreted it did provide a basis for original jurisdiction of the Board of Zoning Appeals. The third opinion would be Mr. Wright's himself. I have no quarrel with Mr. Wright, but this morning I checked at the building inspector's office and I have made a copy of his application for a variance at Princess Anne Hills.

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Mr. Wright: You are putting in evidence something I have done, personally?

Mr. Butler: Yes sir.

Mr. Wright: I think it is immaterial and highly irregular.

Mr. Butler: Let me read from his application.

The Court: Let me rule on his objection.

Mr. Wright: I certainly do object and I think it speaks for itself, the type of tactics it represents. I applied for a building permit and was denied it because I needed a variance, and the Board of Zoning Appeals granted a variance. He wants to use that against me in this case.

Mr. Butler: I think Mr. Wright was correct.

Mr. Wright: It hasn't got a thing to do with this case.

Mr. Butler: I think it was correct, but there are three opinions, and, of course, mine would be the fourth opinion that there would be original jurisdiction here.

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The Court: Isn't this an appeal from the decision of the building inspector?

Mr. Butler: Isn't what an appeal?

The Court: This application?

Mr. Butler: It is submitted because of exceptional shallowness of the lot makes exceptional hardship. Apparently it is his signature. This is proper.

The Court: This was an appeal from the refusal of the building inspector to issue a building permit?

Mr. Wright: There is nothing on the form about it, but that is exactly what the case was.

Mr. Butler: You have the proposition, if this Court holds

there is no jurisdiction, that every—or virtually every—variance granted by the Board of Zoning Appeals is void. Jurisdiction is a matter that can be raised at any time as we all well know. There has been no variance, to my knowledge—I am sure there may be some in the files—but to my knowledge no variance because the building inspector refused a building permit. Mr. Gibbs is here to testify there is no formal application or formal denial form in his office. You ask him for one and he tells you yes or no. In my copy of the transcript on page 50 before the Board of Zoning Appeals I asked, "Did you refuse to grant a building permit to Mr. Lindsley?"

The Court: We have been through it before.

8/8/69 page 8 ⟩ Mr. Wright: All we are doing is going through all of it. Before, the Court ruled it was an original application. The Court ruled specifically on that point.

Mr. Butler: If you would permit me to put Mr. Gibbs on the stand, I believe at the time I mentioned this, we did not have a court reporter present and you stated to me that Lake George Corporation did not make a formal application for a building permit, and it was one reason for you saying the Board of Zoning Appeals had no jurisdiction. We have done what Mr. Wright did, what Patrick Standing did when he applied for a variance in Princess Anne Hills. I have a lot there, too, and it may be I have got to apply for a variance, and to be honest, I don't know how to go about doing it. The question is, is there original jurisdiction before the Board of Zoning Appeals? Frankly, I think there is, in view of the Attorney General's opinion, in view of the old code section and construction of the County Code based on the old code section. It was interpreted at that time to give original jurisdiction. We applied the best and only way we could. We asked Mr. Gibbs for one and he denied it. I don't know what more we can do. The City Code and old Princess Anne

8/8/69 page 9 ⟩ Code allows us to appeal the decision of the building inspector.

The Court: Let me get the sections out here. 15.495 and 496. I will examine these sections just a little closer. You gentlemen may come in chambers if you wish. We will recess.

(Court reconvened.)

The Court: Gentlemen, it seems to the Court that following the law as to the interpretation of statutes, the Court is required to give to words their usual and common meaning. When we last heard the matter, we spent considerable time in

looking up the definition of the word "appeal". In the law it has a very specific meaning. It refers to the taking of a prior decision or judgment or action of an officer or body, administrative body, to a judicial body having superior authority. To give to paragraph B, Section 15.1-495 the meaning urged by the appellee, in this case the Board of Zoning Appeals, namely that it confers original jurisdiction upon the Board of Zoning Appeals to grant variances from the terms of ordinances upon an original application, would require that the word "appeal" be construed as meaning "application". The two words are not synonymous, either in the legal meaning or the common meaning. The view that the word
8/8/69 "appeal" in that paragraph refers to an appeal
page 10 } from the terms of the ordinance would be an interpretation contrary to grammatical construction. As written, the portion of the paragraph we are concerned with reads, "to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, so forth". Its plain and simple meaning in the opinion of this Court is that paragraph has to be construed as a matter of law, is what the Court is called upon to rule upon. That the variance from the terms of the ordinance must come to the Board of Zoning Appeals upon appeal from an inferior administrative officer charged with the administration or enforcement of this particular article which we find in this Section 15.1-495, or any ordinance adopted pursuant thereto. To read this paragraph as conferring upon the Board of Zoning Appeals the authority to hear applications upon appeal from the terms of the ordinance is erroneous construction or interpretation of the paragraph. There is no way these words can be changed around so that the prepositional phrase "from the terms of the ordinance" refers to the word "appeal" in that paragraph, so as to construe it as meaning "upon appeal from the terms of the ordinance." That phrase "from the terms
8/8/69 of the ordinance" refers to and modifies the word
page 11 } "variance". It is a variance from the terms of the ordinance which the Board is authorized to grant upon appeal. That is the meaning of the paragraph as this Court reads it and understands it and must construe it.

Mr. Butler: Your Honor, I won't belabor that any further, except to note my exception; but as your Honor himself has commented, the Board of Zoning Appeals is now at the point they don't know when they have jurisdiction or not.

The Court: There's no question when they have jurisdiction. All they have to do is hear appeals from any action of an officer charged with administration of the zoning laws or the building inspector.

Mr. Butler: Explain to me why we do not have a valid appeal on the basis of Mr. Gibbs' refusal to issue a building permit.

The Court: Because you have never proceeded in that manner.

Mr. Butler: If we proceed in that manner—

The Court: I have held twice that you have not proceeded in that manner. In the first place—I don't know where Mr. Gibbs is now—

Mr. Butler: He left.

The Court: He cannot grant any permit until something is presented to him. Whether he has forms for refusing or denying a permit or not, I do not know. You say he
8/8/69 does not and I accept your statement, but there
page 12 } must be something presented to him on which he could grant a permit if he would do so. That has never been done in this case.

Mr. Butler: If that would be done, a proper appeal would be in order?

The Court: I would think so.

Mr. Wright: I have an Order and I'll get Mr. Butler to endorse it and I will return it to you.

The Court: I would like the Order to show for the reasons stated by the Court from the bench, and I will ask you to type it up. To say the word "appeal" refers to "the terms of the ordinance" is to completely disregard the rules of grammatical constructions and the clear and plain meaning of the words, because it is "a variance from the terms of the ordinance" not appeal from the terms of the ordinance, both in proximity to the phrase it modifies and its clear meaning. I don't see how it could be construed that way.

Mr. Butler: With regard to the Attorney General's opinion, should we enter it as an exhibit?

The Court: I will be glad to enter it. You have two of them here.

Mr. Butler: If your Honor would mark the original.

The Court: I will mark the original Respondent's Exhibit 1, this date. I might add, if the legislature meant the word "appeal" to mean "application," they should have
8/8/69 used the correct word.
page 13 } Mr. Butler: With regard to the Virginia Section 15.870, I wonder if you should also have that entered as an exhibit?

The Court: This is the old code section you referred to?

Mr. Butler: The old Virginia code section under which the County ordinance was granted, 15.870, I believe it is subsection 3. "To authorize upon appeal in specific cases such

variance from the terms of the ordinance as will not be contrary to the public interest . . . "

The Court: This will be Respondent's Exhibit 2, this date.

Mr. Butler: I believe I had a certification from the Bureau of Research and Drafting that it was the applicable statute.

Mr. Wright: It is pretty clear it is the same as today. I have no objection.

The Court: Mr. Butler, as long as you brought the matter up, I want you to know I didn't draft the master zoning ordinance originally. I made modifications and changes. It was drafted before I became Commonwealth's Attorney of the old County of Princess Anne. This was included in the ordinance as it was when I came in office. Mr. Wright, would you type that up and you can note Mr. Butler's exception.

Mr. Wright: It is right in there.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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