



CITY OF RICHMOND

DEPARTMENT OF
PLANNING AND DEVELOPMENT REVIEW
BOARD OF ZONING APPEALS

BOARD OF ZONING APPEALS

MEETING MINUTES

WEDNESDAY, NOVEMBER 6, 2019

On Wednesday, November 6, 2019, the Board of Zoning Appeals held a public hearing in the Fifth Floor Conference Room, 900 East Broad Street, at 1:00 p.m.; display notice having been published in the Richmond Legacy Newspaper on October 23 and 30, 2019 and written notice having been sent to interested parties.

Members Present: Burt F. Pinnock, Chair
 Roger H. York, Jr.
 Kenneth R. Samuels, Sr.
 Mary J. Hogue
 Susan Sadid

Staff Present: Roy W. Benbow, Secretary
 William C. Davidson, Zoning Administrator
 Brian P. Mercer, Planner II
 Neil R. Gibson, Assistant City Attorney

The Chairman called the meeting to order and read the Board of Zoning Appeals Introductory Statement, which explains the proceedings of the meeting. The applicant and those appearing in support of an application speak first, followed by those appearing in opposition.

BZA 46-2019

APPLICANT: Stephen C. Nuckolls & Janice H. Nuckolls and William M.
 Massie, Jr. & Alice M. Massie

PREMISES: 1805 MONUMENT AVENUE and 408, 410 & 412 N. ALLEN
 AVENUE

(Tax Parcel Numbers W000-0861/020, W000-0861/028, and W000-0861/031)

SUBJECT: An appeal of Stephen C. Nuckolls & Janice H. Nuckolls and William M. Massie, Jr. & Alice M. Massie from the Zoning Administrator's decision of February 7, 2019 with respect to 1805 Monument Avenue, 408, 410/412 N. Allen Avenue; Richmond Virginia 23220 that the proposed use as a multifamily apartment building would be permitted per Division I of Article VIII of the nonconforming use regulations of the Zoning Ordinance. The specific section numbers of the Zoning Ordinance being appealed are 30-100, 30-412.1 et seq; 30-800 et seq, including 30-800.3.

APPEAL was filed with the Board on September 6, 2019, based on Section 17.20(a) of the City Charter.

APPEARANCES:

For Applicant: Joseph K. Reid, III

Against Applicant: William Davidson
Jennifer Mullen

PLEASE SEE COURT REPORTER TRANSCRIPT AT THE END OF THESE MINUTES FOR COMPLETE DETAILS OF THE CASE.

RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS that an appeal of Stephen C. Nuckolls & Janice H. Nuckolls and William M. Massie, Jr. & Alice M. Massie from the Zoning Administrator's decision of February 7, 2019 with respect to 1805 Monument Avenue, 408, 410/412 N. Allen Avenue; Richmond Virginia 23220 that the proposed use as a multifamily apartment building would be permitted per Division I of Article VIII of the nonconforming use regulations of the Zoning Ordinance be denied based on the record before the Board.

ACTION OF THE BOARD: (3-1-1)

Vote to Deny

affirmative: Pinnock, York, Samuels

negative: Hogue

abstention: Sadid

BZA 43-2019 (CONTINUED FROM THE OCTOBER 2, 2019 MEETING)

APPLICANT: Kyle Johnston

PREMISES: 205 BEAUMONT AVENUE
(Tax Parcel Number W000-1449/022)

SUBJECT: A building permit to construct a new single-family detached dwelling.

DISAPPROVED by the Zoning Administrator on August 14, 2019, based on Sections 30-300, 30-410.5(2), 30-410.6 & 30-710.1(a)(1) of the zoning ordinance for the reason that: In an R-5 (Single-Family Residential District), the side yards (setbacks), lot coverage and the parking requirements are not met. A side yard of three (3') feet is required; 1.19' is proposed along the northern property line and 0.5' is proposed along the southern property line. A maximum lot coverage of 35% of the area of the lot is permitted; 71.9% is proposed. One (1) parking space is required; none is proposed.

APPLICATION was filed with the Board on August 14, 2019, based on Section 1040.3(1) & (11) of the City of Richmond Zoning Ordinance.

APPEARANCES:

For Applicant: Mark Baker

Against Applicant: None

FINDINGS OF FACT: The Board finds from sworn testimony and exhibits offered in this case that the applicant, Kyle Johnson, has requested a special exception to construct a new single-family detached dwelling for property located at 205 Beaumont Avenue. Mr. Mark Baker, representing the applicant, testified that the October meeting was continued in order to allow further consultation with an abutting property owner. Mr. Baker noted that the zoning ordinance requires a three-foot side yard and that the plans call for a 1.19 foot setback along the northern property line and .05 foot setback is proposed along the southern property line. Further a maximum lot coverage of 35% is permitted and a lot coverage of 71.9% is being requested in addition to waiver of the required off-street parking space. Mr. Baker noted that the plans had been revised to eliminate the necessity for a front yard setback waiver. Mr. Baker stated that the property is located along the east side of Beaumont Avenue between Grayland and

Parkwood. Mr. Baker indicated that the lot is vacant and was a legal lot of record with a width of 20.7 feet and variable depth of approximately 50 feet for total of 1060 ft.² of lot area. The lot has existed in its current configuration since 1925. Mr. Baker stated that the proposed single-family detached dwelling will be two stories in height with just over 1400 ft.² of floor area. Mr. Baker referred to the Intent Statement regarding the fact that the lot small with an irregular configuration. Further the yard and lot coverage requirements severely inhibit development of the property permitting a maximum allowable floor area of 370 ft.². Mr. Baker stated that 50% of the existing single-family dwellings in the block do not conform to the current R-5 Zoning Regulations and that the dwelling is in keeping with the development pattern of the neighborhood. Mr. Baker noted that relief is needed to construct a livable dwelling which is consistent with modern-day dwelling needs as per the Intent Statement. Mr. Baker indicated that the proposed dwelling is consistent with dwelling widths, dwelling footprints and dwelling floor areas in the block. Mr. Baker stated that architecturally the proposed dwelling is consistent in form with other dwellings in the vicinity. Mr. Baker explained that the lot is unique in that it is bounded by a 10 foot private alley and an 18 foot public alley giving it the appearance of being a larger lot. Mr. Baker stated that given the size of the lot it was not possible to provide an off-street parking space. Mr. Baker indicated that parking waiver will not result in an inadequate supply of parking or other adverse impact on the neighborhood. Mr. Baker stated that adequate parking to serve the use is provided within reasonable and proximity. Mr. Baker explained that after conducting five on-site inspections there is adequate on-street parking available. Mr. Baker noted that the Carytown Civic Association deferred comment to the immediate neighbors. Mr. Baker stated that no opposition had been expressed regarding the proposed special exceptions.

The Board is satisfied that the property was acquired in good faith and pursuant to Section 114-1040.3(1) of the City Code, the intended purpose and use of the proposed dwelling is consistent with the zoning district regulations; departure from the yard requirements is the minimum necessary to accommodate the intended purpose of the dwelling; the dwelling or similar construction serving the same purpose cannot reasonably be located elsewhere on the lot in compliance with the zoning ordinance; and the dwelling will be in keeping with the architectural character of the dwelling and development within the neighborhood.

The Board is satisfied that the property was acquired in good faith and pursuant to Section 114-1040.3 (11) of the zoning ordinance, the applicant has demonstrated that the exception will not result in an inadequate supply of parking or other adverse impact on the neighborhood; adequate parking to serve the needs of the use is provided within convenient proximity and the number, location and arrangement of parking spaces intended to serve the use is sufficient to provide

for its parking needs based on the nature of the use and the characteristics of its operation.

RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS that a request for a special exception from the side yards (setbacks), lot coverage and the parking requirements be granted to Kyle Johnston for a building permit to construct a new single-family detached dwelling, subject to substantial compliance with the plans submitted to the Board and provision of cementitious siding.

ACTION OF THE BOARD: (5-0)

Vote to Grant Conditionally

affirmative: Pinnock, York, Samuels, Hogue, Sadid

negative: None

BZA 47-2019

APPLICANT: Eleven Eleven 25th LLC

PREMISES: 2318 FAIRMOUNT AVENUE
(Tax Parcel Number E000-0617/012)

SUBJECT: A building permit to construct a new single-family detached dwelling.

DISAPPROVED by the Zoning Administrator on September 16, 2019, based on Sections 30-300, 30-412.5(1)a & 30-630.1(a)(1) of the zoning ordinance for the reason that: In an R-6 (Single-Family Attached Residential District), the front yard (setback) is not met. A front yard of fifteen feet (15') is required; a front yard of five feet (5') is proposed along North 24th Street.

APPLICATION was filed with the Board on September 13, 2019, based on Section 1040.3(1) of the City of Richmond Zoning Ordinance.

APPEARANCES:

For Applicant: Garrett Augustine

Against Applicant: None

FINDINGS OF FACT: The Board finds from sworn testimony and exhibits offered in this case that the applicant, Eleven Eleven 25th LLC, has requested a special exception to construct a new single-family detached dwelling for property located at 2318 Fairmount Avenue. Mr. Garrett Augustine, representing the applicant, testified that the zoning is R-6 Single-Family Attached Residential. Mr. Augustine noted that the lot is located at the corner of Fairmount Avenue and North 24th Street and as such is required to provide two front yards. Mr. Augustine stated that the current front yard requirement is 15 feet and that a 5 foot setback is being requested along the front yard adjacent to North 24th Street. Mr. Augustine indicated that the lot is approximately 36 feet in width and that compliance with the required front yard setback along 24th Street would reduce the house width from approximately 26 feet to 16 feet which would not be in keeping with other dwellings in the vicinity. Mr. Augustine stated that an off-street parking space will be provided at the rear of the lot and accessed by the adjacent alley. Mr. Augustine indicated that Hardy plank siding will be utilized. Mr. Augustine stated that the project was in keeping with the Intent Statement and there was no opposition to the proposed project.

The Board is satisfied that the property was acquired in good faith and pursuant to Section 114-1040.3(1) of the City Code, the intended purpose and use of the proposed dwelling is consistent with the zoning district regulations; departure from the yard requirements is the minimum necessary to accommodate the intended purpose of the dwelling; the dwelling or similar construction serving the same purpose cannot reasonably be located elsewhere on the lot in compliance with the zoning ordinance; and the dwelling will be in keeping with the architectural character of the dwelling and development within the neighborhood.

RESOLUTION: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS that a request for a special exception from the front yard (setback) requirement be granted to Eleven Eleven 25th LLC for a building permit to construct a new single-family detached dwelling, subject to substantial compliance with the plans submitted to the Board and provision of cementitious siding.

ACTION OF THE BOARD: (5-0)

Vote to Grant Conditionally

affirmative: Pinnock, York, Samuels, Hogue, Sadid

negative: None

Upon motion made by Mr. York and seconded by Ms. Sadid, Members voted (3-0) to adopt the Board's October meeting minutes.

Upon motion made by Mr. York and seconded by Mr. Pinnock, Members voted (5-0) to recommend to the Chief Judge of the Richmond Circuit Court that Mr. Rodney Poole, Ms. Mary Jane Hogue, Mr. Kenneth Samuels and Mr. Edward Winks be reappointed to the Richmond Board of Zoning Appeals.

The meeting was adjourned at 2:45 p.m.


Chairman


Secretary

1 VIRGINIA

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CITY OF RICHMOND

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BOARD OF ZONING APPEALS

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CASE NO. 46-2019

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CITY HALL - 900 EAST BROAD STREET

13

5TH FLOOR CONFERENCE ROOM

14

RICHMOND, VIRGINIA 23219

15

NOVEMBER 6, 2019

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1:00 P.M.

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22 REPORTED BY:

23 JACQUELIN O. GREGORY-LONGMIRE, RPR, LSR

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APPEARANCES

Board Members:

Burchell F. Pinnock, Chairman
Mary J. Hogue
Roger H. York, Jr.
Kenneth Samuels
Roy W. Benbow, Secretary

Zoning Administrator:

William C. Davidson
Brian Mercer

Counsel for the Appellants:

Joseph K. Reid, III
Attorney at Law
McGuire Woods
800 East Canal Street
Richmond, Virginia 23219

Counsel for Lee Medical Building, LLC:

Jennifer Mullen
Attorney at Law
Roth Jackson Gibbons Condlin
11 South Twelfth Street
Suite 500
Richmond, Virginia 23219

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P R O C E E D I N G S

MR. PINNOCK: It is the hour.

Good afternoon, ladies and gentlemen. This is a regular monthly meeting of the Board of Zoning Appeals of the City of Richmond.

The Board is comprised of five of your fellow citizens who are appointed by the Circuit Court and serve without compensation. Three affirmative votes are required to approve any variance or grant an appeal. The Board is assisted by its secretary who has no voting power.

The zoning administrator and his assistant are also present but do not vote. The Board's powers are very limited and are set forth in the Code of Virginia, the city charter, and Richmond City Code.

The Board does not have the power to rezone property but may only grant variances from specific zoning requirements as they apply to a particular property or grant appeals from decisions of the zoning administrator or grant certain exceptions to the zoning regulations.

The Board's proceedings are informal, but we do adhere to certain rules. We ask that those persons expecting to testify in each case be sworn in when the case is called. The case will be heard in the

1 order in which they appear on the docket. First we
2 hear the applicant, then others who wish to speak in
3 favor of the case and, finally, from persons in
4 opposition.

5 In the case of a variance or a special exception
6 request, the applicant, proponents, or persons
7 aggrieved under Section 15.2-2314 of the Code of
8 Virginia shall be permitted a total of six minutes
9 each to present their case. The Board will withhold
10 questions until the conclusion of the presentation.

11 Rebuttal may be permitted at the discretion of
12 the Board but shall be limited to correction or
13 clarification of factual testimony already presented
14 and rebuttal shall not exceed five minutes.

15 In the case of an appeal of the decision of the
16 zoning administrator, the zoning administrator and
17 the appellant or appellant's representative shall be
18 permitted a total of ten minutes to present their
19 case in chief and their rebuttal.

20 The zoning administrator and the appellant or
21 the appellant's representative shall be required
22 prior to beginning their presentation to declare to
23 the Board how many of their allotted minutes shall be
24 devoted to their case in chief and their rebuttal.

25 Following the presentations of the zoning

1 administrator and the appellant or appellant's
2 representative, other interested parties shall be
3 permitted a total of ten minutes to present their
4 views.

5 Interested parties are defined as property
6 owner, other than the appellant, whose property is
7 the subject of the appeal and the neighborhood
8 constituency consisting of neighbors and neighborhood
9 associations.

10 After all the cases have been heard, the Board
11 will decide each case. After your case is heard, you
12 are welcome to stay through the remainder of the
13 docket to hear the Board's deliberations or you may
14 leave. If you choose to leave, please do so quietly.

15 The secretary of the Board will notify each
16 applicant in writing as to the decision of the Board.

17 The first case is case number 46-2019. An
18 appeal of Stephen C. Nuckolls and Janice H. Nuckolls
19 and William M. Massie, Jr., and Alice M. Massie
20 from the zoning administrator's decision of
21 February 7, 2019, with respect to
22 1805 Monument Avenue, 408, 410, 412 North Allen
23 Avenue, Richmond, Virginia 23220, that the proposed
24 use as a multifamily apartment building would be
25 permitted per Division 1 of Article VIII of the

1 nonconforming use regulations of the zoning
2 ordinance.

3 The specific section numbers of the zoning
4 ordinance being appealed are 30-100, 30-412.1 and the
5 following, 30-800 and the following, including
6 30-800.3.

7 In this case we will hear first from the zoning
8 administrator. We have heard --

9 MS. SADID: I will be recusing myself from the
10 case --

11 MR. PINNOCK: Okay.

12 MS. SADID: -- due to a conflict.

13 MR. PINNOCK: Okay. Susan Sadid will be
14 recusing herself from this case.

15 First we will hear from the zoning
16 administrator, but, first, we would like to
17 address the issue of the timeliness of this appeal.
18 This Board has heard this case -- this appeal, I
19 believe, in August of this year and is trying to
20 understand the distinction here so, first, I
21 would like to hear from the zoning administrator
22 on the timeliness of this appeal. I won't call it
23 new.

24 (Zoning Administrator sworn.)

25 MR. PINNOCK: Great.

1 **STATEMENT BY MR. WILLIAM DAVIDSON**

2 MR. DAVIDSON: Chairman, members of the Board,
3 my name is William Davidson. I'm the zoning
4 administrator for the City of Richmond.

5 I would like to address the issues of the
6 timeliness and -- and this is an appeal of the
7 February 7th, 2019, letter regarding the conversion
8 of a six-story almost 49,000 square foot office
9 building, medical and general office building, into a
10 nonconforming multifamily dwelling containing
11 63 units.

12 There was a previous appeal of this Board of a
13 determination that I wrote in 2018. Now, I'm going
14 to be talking about a 2018 and a 2019 letter, so just
15 be aware of that. However, the Board ruled in that
16 hearing that the appeal of that 2018 letter was not
17 timely filed. That decision has been appealed to the
18 Circuit Court.

19 So now having not prevailed in that previous
20 appeal of the 2018 letter, we're now fast-forwarding
21 to an appeal of a subsequent letter I wrote in 2019.
22 The 2018 letter and the subsequent 2019 letter are
23 the same determination relative to the ability to
24 convert to the 63 units. They both say the
25 conversion is permitted. They both say it's a more

1 conforming use. They both say the application, the
2 part where -- the requirements allow the conversion.
3 They both say that conversion is allowed under 800.3.

4 When the 2018 letter was written, it reviewed
5 the code sections relative to zoning category, the
6 current use, the nonconforming use, the parking
7 status, both onsite and off premise, including the
8 numbers. It discussed the conversion rights
9 specifically referencing 800.3.

10 Both letters say that conversion is allowable
11 under 800.3, 800.3 in its entirety, not just portions
12 of 800.3. The only difference between the two
13 letters is that the 2019 letter is more specific. It
14 is more specific because there were specific plans.

15 Both letters were prepared and we looked at all
16 the aspects of the nonconforming regulations and took
17 that into account; however, the main difference
18 between the 2018 letter and the 2019 letter is that
19 the 2019 letter indicated that the proposed
20 conversion was prohibited. It was determined that
21 that that proposed conversion, as was shown on
22 construction plans, it was an expansion and it would
23 also include its structural alterations.

24 This 2019 letter contained a 30-day appeal
25 provision in it. Why? Because determination was

1 that the proposed conversion as shown on the plans
2 wasn't allowed. This determination was, obviously,
3 detrimental to the applicant and the proposed
4 conversion.

5 In lieu of an appeal, which they considered, the
6 applicant requested a special exception to allow the
7 expansion and the structural alterations. This
8 request was ultimately denied by this Board. For the
9 same reasons as in the last board case, I do not
10 believe this has been timely filed.

11 The 2019 letter restated the conversion rights
12 only, except for the ability to perform the expansion
13 and structural alterations. For these reasons,
14 determination was a thing decided in 2018, in that
15 letter. An appeal was time-barred. They're now
16 asking to roll back the clock -- forget the 2018
17 letter. They're asking you to allow an appeal of the
18 2018 decision by now using the 2019 letter.

19 MR. PINNOCK: Okay. Are there questions for the
20 administrator at this point?

21 (No response.)

22 MR. PINNOCK: Thank you, sir.

23 So now we would like to hear from the appellant
24 or the appellant's representative on the issue of
25 timeliness of this appeal.

1 (Joseph Reid sworn.)
2

3 **STATEMENT BY JOSEPH K. REID, III, ESQ.**

4 Good afternoon, Mr. Chairman, members of the
5 Board. My name is Joe Reid. I live at
6 1821 Monument Avenue and I represent the appellants.

7 This appeal of the February 7, 2019, decision of
8 the zoning administrator is timely and it is proper
9 under Virginia Code Section 15.2-2311.

10 As Mr. Davidson related, there was a decision of
11 the zoning administrator in May of 2018 and then
12 there was the decision of the zoning administrator in
13 February of 2019, which is the subject of the current
14 appeal.

15 That prior decision was subject to an appeal
16 taken by the same appellants on the issue of whether
17 or not by-right conversion of the Lee Medical
18 Building to multifamily use was permitted. That
19 appeal was taken last fall.

20 Under the explicit language of 15.2-2311,
21 subsection B, and I'm quoting, "An appeal shall stay
22 all proceedings in furtherance of the action appealed
23 from..."

24 Mandatory language that there is an automatic
25 stay of all proceedings in furtherance of the action

1 appealed from once appeal -- an appeal is noted.

2 Now, notwithstanding that language, the zoning
3 administrator issued the February 7 decision, as I
4 said, which is the subject of the current appeal. It
5 included, A, what I would term renewed and modified
6 decision on the issue of by-right conversion.

7 As Mr. Davidson related, he says he then had
8 plans in front of him with respect to the number of
9 proposed units in the building and his explanation --
10 his conclusion was the same as it was in the April
11 decision -- April 2018 decision on the issue of
12 by-right conversion, but his explanation and his
13 rationale for it was expanded or slightly different.
14 I would call it a renewed and modified decision on
15 by-right conversion.

16 It is our position that the zoning administrator
17 should not have issued that decision on February 7 on
18 the question of by-right conversion because of the
19 operation of 15.2-2311(B), because the earlier appeal
20 stayed all proceedings on that issue.

21 So -- and as we pointed out to the Board in
22 April of this year and as Mr. Davidson related again
23 this morning, he also made some determinations and
24 decisions in that February 7 letter on whether or not
25 a special exception would be required in order to

1 alter portions of the property. And the appellants
2 did not dispute that that was not the action appealed
3 from on by-right conversions, so that portion of the
4 decision went forward for review by this Board in
5 April on the special exception request.

6 But as it relates to the by-right conversion
7 issue, at the time, on February 7, the zoning
8 administrator's decision was of no effect because of
9 the automatic stay and the time period for any appeal
10 of that decision was told under the plain language of
11 the code.

12 It was not until this Board on August 7th of
13 this year dismissed the appellants' appeal of the
14 April 2018 decision that that stay -- that mandatory
15 stay was lifted. It was any action -- any appeal
16 right of the February 7, 2019, decision was told
17 until April 7 of this year when the appeal of the
18 earlier decision was denied.

19 And it doesn't matter, ladies and gentlemen, why
20 the appeal was denied. There was a stay in place
21 until August 7. It was lifted on August 7th, and the
22 appeal of the February 7 decision was timely filed
23 within 30 days of that stay being lifted when the
24 Board issued its decision, so it's really as simple
25 as that. This appeal of the February 7 decision is

1 timely.

2 MR. PINNOCK: Questions of Mr. --

3 Yes.

4 MR. YORK: So you're arguing that a related
5 opinion by the zoning administrator, whatever it is,
6 is stayed by this language, no matter what the
7 opinion is?

8 MR. REID: If it is in furtherance of the action
9 appealed from.

10 MR. YORK: And do you think that letter, in
11 fact, is in furtherance?

12 MR. REID: Is the February 7 letter on the
13 question of by-right conversion in furtherance? Yes.
14 Absolutely.

15 MR. PINNOCK: But you would agree with
16 Mr. Davidson that the underlying zoning ordinances
17 and statutes for which he relied upon from the
18 earlier letter were also the same for which he relied
19 upon on the second letter?

20 MR. REID: I think that the -- he examined
21 criteria under 800.3 -- 30-800.3 in both decisions,
22 but they were not precisely the same decision.

23 MR. PINNOCK: Okay.

24 MR. REID: Thank you.

25 MR. PINNOCK: Thank you.

1 Now, is there anyone else who would like to
2 testify on the timeliness of this issue?
3 (Jennifer Mullen sworn.)
4

5 **STATEMENT BY JENNIFER MULLEN, ESQ.**

6 MS. MULLEN: Members of the Board, Mr. Chairman.
7 I'm Jennifer Mullen with Roth Jackson. I represent
8 the owner of the property, Lee Medical Building.

9 And not only is this an untimely appeal, this,
10 again, is the same issue that has been asked and
11 answered already by this Board. It was -- that
12 decision was appealed to the Circuit Court. On
13 October 28th, the Circuit Court dismissed their
14 appeal on this Board's decision.

15 So what -- I just want to be clear what Mr. Reid
16 is asking you is that you can untimely appeal a
17 decision of the zoning administrator and have that
18 stay all proceedings even though that appeal was
19 untimely.

20 So we had a special exception hearing before
21 this body based exactly on that February 7, 2019,
22 letter that Mr. Reid presented on. He presented in
23 opposition. This Board denied it. We did not appeal
24 that decision. He did not appeal that decision.
25 Instead, he supplemented a writing after. He didn't

1 appeal it.

2 And there's been a building permit that has been
3 issued August 19th. So even if you set aside the
4 February, there's a building permit that has been
5 issued August 19th that has not been appealed. So
6 from a timeliness standpoint, that, too, is a thing
7 decided.

8 So this is entirely untimely and should be
9 denied by this Board.

10 MR. PINNOCK: Questions?

11 MS. MULLEN: Yes, sir.

12 MR. YORK: Let's get the timing straight.
13 The building permit was issued when?

14 MS. MULLEN: August 19th.

15 MR. YORK: When was the BZA case?

16 MS. MULLEN: August 6th -- the BZA was
17 August 5th.

18 MR. YORK: And when did they file the second
19 appeal?

20 MS. MULLEN: September 5th, 210 days after the
21 February 9 letter or February 7 letter.

22 MR. YORK: But still after the building permit
23 was issued?

24 MS. MULLEN: That's correct.

25 MR. YORK: And they didn't appeal --

1 MS. MULLEN: They did not appeal the building
2 permit.

3 MR. YORK: -- the initial building permit?

4 MS. MULLEN: Which is a zoning determination as
5 set forth in Campbell v. The City of Richmond.

6 MS. HOGUE: How would they have known that the
7 building permit had been issued?

8 MS. MULLEN: So in Virginia, you cannot sleep on
9 your rights. So you are obligated to stay on top of
10 your rights and they're very aware of the proceedings
11 that are going on as this is the third time that I
12 have been before this Board on this matter.

13 So they have been in touch with the zoning
14 administrator over time and you can follow those
15 permits online. That is a 100 percent open system.

16 MR. YORK: So as of the date that the building
17 permit was issued, the status was that the Board had
18 ruled that the previous appeal was not timely filed.
19 It was pending in court. The Court, apparently,
20 subsequently, has ruled --

21 MS. MULLEN: Dismissed it.

22 MR. YORK: Has dismissed it.

23 MS. MULLEN: And so we're back again for another
24 untimely appeal of a zoning determination letter from
25 February 7, 210 days later, 392 days after the

1 appellants asked the zoning administrator when the
2 next zoning determination letter would be issued so
3 that they could appeal it.

4 MR. YORK: I guess my question is, if someone is
5 trying to argue the stay issue but loses the
6 appeal --

7 MS. MULLEN: Correct.

8 MR. YORK: -- does that make the stay issue go
9 away?

10 MS. MULLEN: The stay issue, that is a -- the
11 zoning determination letter that was issued on the
12 February 7 letter was based on a specific set of
13 plans. There is case law that talks about the
14 difference in your applications before you.

15 So the fact that the appellants were at the
16 hearing that was specifically on the
17 February 7, 2019, letter before this body and did not
18 appeal it -- the first appeal they tried to argue
19 that they didn't have knowledge of that letter, as
20 you recall. It was still determined to be untimely.

21 This letter, they not only had knowledge of it,
22 they were in full force in opposition to that special
23 exception request based on that letter, but they did
24 not appeal it. They did not appeal it in April after
25 that determination. They wrote a letter

1 supplementing their writings to another appeal. They
2 did not appeal that determination at all until
3 September 5th of this year.

4 MR. YORK: Do you think that the stay language
5 only applies to the zoning administrator and the City
6 but not to outside parties?

7 MS. MULLEN: I'm not sure I understand your
8 question.

9 MR. YORK: Well, the State, basically, says that
10 you can't do anything in furtherance of the project.

11 MS. MULLEN: Correct. As you couldn't issue a
12 building permit based on that.

13 MR. YORK: Yeah. It doesn't mean you couldn't
14 apply for one?

15 MS. MULLEN: That's correct.

16 MR. YORK: It doesn't stretch that far?

17 MS. MULLEN: That's correct.

18 MR. YORK: But the building permit was issued?

19 MS. MULLEN: After this body determined the last
20 appeal.

21 MR. YORK: But before the Court ruled --
22 upheld --

23 MS. MULLEN: The Circuit Court does not hold the
24 building permit up.

25 MR. YORK: Yeah, I know.

1 MS. MULLEN: The Circuit, that is separate and
2 apart. That's correct. All I'm saying is that the
3 Circuit Court has also dismissed the case.

4 MR. YORK: Anyway, the bottom line is that the
5 building permit was issued after the stay was lifted?

6 MS. MULLEN: That's correct.

7 MR. YORK: Okay.

8 MR. PINNOCK: Okay. Other questions?

9 Yes, please.

10 Thank you.

11 MR. DAVIDSON: I guess my concern --

12 MR. PINNOCK: How much time?

13 MR. BENBOW: He's got about five minutes left.

14 MR. PINNOCK: Okay. Thanks.

15 MR. BENBOW: He's got plenty of time.

16 MR. PINNOCK: Okay.

17
18 **STATEMENT BY WILLIAM DAVIDSON (REBUTTAL)**

19 MR. DAVIDSON: I guess my concern is, you know,
20 we're talking about we have a stay and the stay is
21 based on an appeal that was filed many, many, many
22 months after the letter. I mean, it didn't even meet
23 the 30 days, so how do you get a stay for an action
24 that you can't appeal anyway?

25 So, you know, that letter was based on the

1 confirmation letter. That confirmation letter
2 specifically says 63 units. The permit revision that
3 they submitted with the plans said 63 units. It's
4 not any different numbers. Everything was looked at
5 in the same way.

6 And that decision in 2018, they didn't meet the
7 timeliness on that. This Board ruled that. The
8 Court has ruled that, apparently, or didn't accept it
9 that day, whenever it was, but now they come back and
10 saying, "Well, oh, forget that one. We want to do
11 the 2019 letter."

12 Well, there was no stay.

13 MR. PINNOCK: Thank you.

14 MR. REID: May I be heard in rebuttal?

15 MR. PINNOCK: Of course.

16 How many?

17 MR. BENBOW: You've got about four minutes.

18 MR. REID: Okay. Great.

19 And I'll make three points in less than four
20 minutes.

21
22 **STATEMENT BY JOSEPH K. REID, III, ESQ. (REBUTTAL)**

23 MR. REID: First is in follow-up to your
24 question, Ms. Hogue, on the question of how would
25 the appellants know that the building permit had

1 issued?

2 The appellants didn't know that the building
3 permit had issued, and back in the summertime given
4 all the various proceedings around this issue, the
5 appellants wrote to planning and zoning -- to the
6 zoning administrator, and asked that they be
7 advised -- specifically asked that they be advised of
8 any actions with respect to this project going
9 forward, such as the issuance of a building permit,
10 and were never notified that the building permit was
11 issued.

12 For that matter, the appellants were unaware
13 that the February 2019 decision had been issued until
14 more than 30 days had passed following its issuance,
15 despite the fact that the stay was in effect. The
16 appellants were never advised that there was a
17 renewed decision on the by-right issue. That's my
18 first point.

19 The second point on the appeal to the Circuit
20 Court of the August 7th decision of this Board,
21 counsel for Lee Medical is correct, that that was
22 dismissed.

23 It was dismissed because of an unfortunate
24 incident where counsel for the appellants did not
25 appear at a hearing and there is a motion to vacate

1 and reinstate that decision, which is now pending
2 before the Circuit Court asking them to reconsider
3 the issuance of that letter on the demurrer.

4 And then, finally, to your question, Mr. York,
5 of whether the stay can go away, the answer to that
6 is, no, as I alluded to before.

7 It doesn't matter why the appeal was dismissed,
8 whether it was dismissed on substantive grounds,
9 whether it was dismissed on procedural grounds or
10 whether the appeal was granted. It doesn't matter.
11 While that appeal was pending, there is a stay.

12 Thank you.

13 MR. PINNOCK: Thank you.

14 Anyone else?

15 Okay. So I would like the Board now to consider
16 the matter of the timeliness of the appeal and
17 whether or not to advance this forward to hear this
18 on the merits or to dismiss it based on the
19 timeliness.

20 MS. HOGUE: I'm going to start with I agree with
21 Mr. Reid. The City and the developer knew this
22 neighborhood had great interest, and even though it's
23 the law that the website is noticed, I find that
24 offensive as a city resident. And the fact that the
25 residents asked for the City to notify them of things

1 that might interest and they didn't, being in the
2 customer service business, I just feel like City Hall
3 needs to be in the customer service business.

4 The neighborhood is here today. They've been
5 here. The staff allowed this to come back on the
6 docket, so there must have been confusion over a very
7 complicated scenario.

8 Usually, this Board holds very strongly
9 developers meeting with the neighborhood in good
10 faith. And for some reason, that has not happened in
11 this particular situation and I feel that we should
12 not pick and choose which developers we're going to
13 choose or -- and that we're going to not hold the
14 neighborhoods and the developers not to have
15 accountability to talk with each other.

16 This area has not been rezoned for 40 years and
17 being a long-time resident, a lot has happened in
18 this neighborhood in the last 40 years. It used to
19 be medical offices and apartments and people have put
20 their sweat equity to make beautiful -- a beautiful
21 neighborhood and maybe, you know, not for this body,
22 but antiquated zoning has made this out of sync.

23 You know, the traffic issues were looked at in
24 the generic way, not with that this is on a busy
25 street within a university confine, and do students

1 have cars. The Fan has controlled traffic and
2 parking things. Doesn't this fall into some of those
3 Fan rules?

4 I just -- I feel like -- and the zoning pieces
5 that you have brought up with 30-100, 30-800.1,
6 30-800.3, all have some validity that I'm not sure if
7 the neighborhood has had ample opportunity to
8 participate in with the developer or even having
9 conversation here so I --

10 And I'm not a lawyer, but does the stay come or
11 does the stay go away? I'm not a lawyer, but I do
12 think that the neighborhood should have been
13 communicated with by all sides, if things had
14 happened, and that they do have a piece of interest
15 in the conversation.

16 MR. YORK: We're not a court. We're -- we're
17 not a political body. We're really more like a
18 court, and most of those are issues that need to be
19 dealt with by a body that takes into fact political
20 considerations.

21 Most of the things that Ms. Hogue just mentioned
22 really apply more to the merits of the appeal rather
23 than the timeliness issue.

24 The only thing that's hanging me up -- I mean,
25 it is, you know, how many bites of an apple do you

1 get? If you allow every action by the zoning
2 administrator to appeal, you can kill a project by
3 simply every time he writes a letter, every time he
4 issues a permit, a partial permit, a certificate of
5 occupancy, a year later another permit, and it goes
6 on and on and on. Clearly, the law does not allow
7 every one of those decisions to be appealed if the
8 circumstances are the same. You can't just simply
9 rehear the same exact circumstances over and over and
10 over and over.

11 So it gets down to the question of whether the
12 stay held up the time issue long enough for the
13 second appeal to have been filed. But even if we get
14 over that hump, it's still a question of the fact
15 that the second appeal really isn't any different
16 than the first appeal that we've already heard.

17 I'm somewhat sympathetic to that argument about
18 the stay, but I don't really see that there's any
19 difference between the actual appeal -- the second
20 appeal and the first appeal, which we've already
21 ruled on. I think that's probably where I come down
22 on this.

23 MR. PINNOCK: So is there a motion based on the
24 timeliness issue to either accept and move forward to
25 the merits or deny the appeal?

1 MR. YORK: You know, I don't have a problem if
2 we decided to go on and hear the merits. That's a
3 separate issue, but I'm still very concerned about
4 setting a precedent about -- regardless of all of the
5 procedural angles to this, in essence, it's the same
6 appeal that we had before.

7 And, yes, it's true that there had been a lot of
8 mistakes made about notice and 30-day provisions and
9 letters and so forth and so on but, nevertheless, the
10 neighborhood did have its day in court once before
11 and now they're having their day in court again now.
12 And I just don't see that there's enough of a
13 difference.

14 MR. PINNOCK: I would agree.

15 So based on that, I will make a motion to deny
16 the appeal based on the testimony we've heard
17 regarding the timeliness of this appeal.

18 I need a second.

19 MR. YORK: I'll second it.

20 MR. PINNOCK: All right.

21 Any further discussion?

22 (No response.)

23 MR. PINNOCK: All those in favor say "aye."

24 (Response of "Aye.")

25 MR. PINNOCK: Opposed?

1 MS. HOGUE: Opposed.

2 MR. PINNOCK: Abstentions, one.

3 MR. BENBOW: It's three to one, with one
4 abstention.

5 MR. PINNOCK: The appeal is denied.

6 Thank you for coming out.

7

8 (This proceeding was concluded at 1:31 p.m.)

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COPY

1 STATE OF VIRGINIA
2 COUNTY OF CHESTERFIELD, TO WIT:
3

4 I, Jacquelin O. Gregory-Longmire, a fully trained,
5 qualified, and certified court reporter, do hereby certify that
6 the proceedings in the herein matter were taken at the time and
7 the place therein stated; that the proceedings were reported by
8 me, Professional Court Reporter and disinterested person, and
9 that the foregoing contains a true and correct verbatim
10 transcription of all portions of the proceedings.

11 I certify that I am not related by either blood or
12 marriage to any of the parties or their representatives; that I
13 have not acted as counsel to or for any of the parties; nor am
14 I otherwise interested in the outcome of this complaint.

15
16 WITNESS my hand this _____ day of _____, 2019.
17 My commission expires September 30, 2021.
18 Notary Registration No. 7275579.
19

20 _____
21 JACQUELIN O. GREGORY-LONGMIRE
22

23

24

25

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