County of Fairfax, Virginia

July 1, 2015

STAFF REPORT ADDENDUM

SPECIAL PERMIT APPLICATION NO. SP 2014-MA-202
CONCURRENT WITH VARIANCE APPLICATION NO. VC 2014-MA-014

MASON DISTRICT

APPLICANTS/OWNERS:	Muhammad Yasin and Muhammad J Ali
SUBDIVISION:	Culmore, Section 4
STREET ADDRESS:	3314 Glenmore Drive, Falls Church, 22041
TAX MAP REFERENCE:	61-2 ((9)) 5
LOT SIZE:	11,550 square feet
ZONING DISTRICT:	R-3, HC
ZONING ORDINANCE PROVISIONS:	8-914, 18-401
SPECIAL PERMIT PROPOSAL:	To permit a reduction to the minimum rear yard requirements based on an error in building location to permit an existing accessory storage structure to remain 7.2 feet from the rear lot line
VARIANCE PROPOSAL:	To permit an existing accessory storage structure greater than 200 square feet to remain

STAFF RECOMMENDATION:

Staff recommends denial of VC 2014-MA-014 for the accessory storage structure. However, if it is the intention of the Board of Zoning Appeals to approve VC 2014-MA-014, staff recommends that such approval be conditioned upon adoption

Megan Duca, AICP

Department of Planning and Zoning
Zoning Evaluation Division
12055 Government Center Parkway, Suite 801
Fairfax, Virginia 22035-5509
Phone 703-324-1290 FAX 703-324-3924
www.fairfaxcounty.gov/dpz/

of the proposed development conditions contained in Appendix 1.

Staff does not make recommendations on error in building location applications. However, if it is the intention of the Board of Zoning Appeals to approve SP 2014-MA-202 for the accessory storage structure, the BZA should condition its approval by requiring conformance with the proposed development conditions contained in Appendix 2.

It should be noted that it is not the intent of staff to recommend that the Board, in adopting any conditions, relieve the applicants/owners from compliance with the provisions of any applicable ordinances, regulations, or adopted standards.

It should be further noted that the content of this report reflects the analysis and recommendations of staff; it does not reflect the position of the Board of Zoning Appeals. A copy of the BZA's Resolution setting forth this decision will be mailed within five days after the decision becomes final.

The approval of this application does not interfere with, abrogate or annul any easements, covenants, or other agreements between parties, as they may apply to the property subject to the application.

For additional information, call Zoning Evaluation Division, Department of Planning and Zoning at 703-324-1280, 12055 Government Center Parkway, Suite 801, Fairfax, Virginia 22035. **Board of Zoning Appeals' meetings are held in the Board Room, Ground Level, Government Center Building, 12000 Government Center Parkway, Fairfax, Virginia 22035-5505**.

Americans with Disabilities Act (ADA): Reasonable accommodation is available upon 48 hours advance notice. For additional information on ADA call (703) 324-1334 or TTY 711 (Virginia Relay Center).

Special Permit

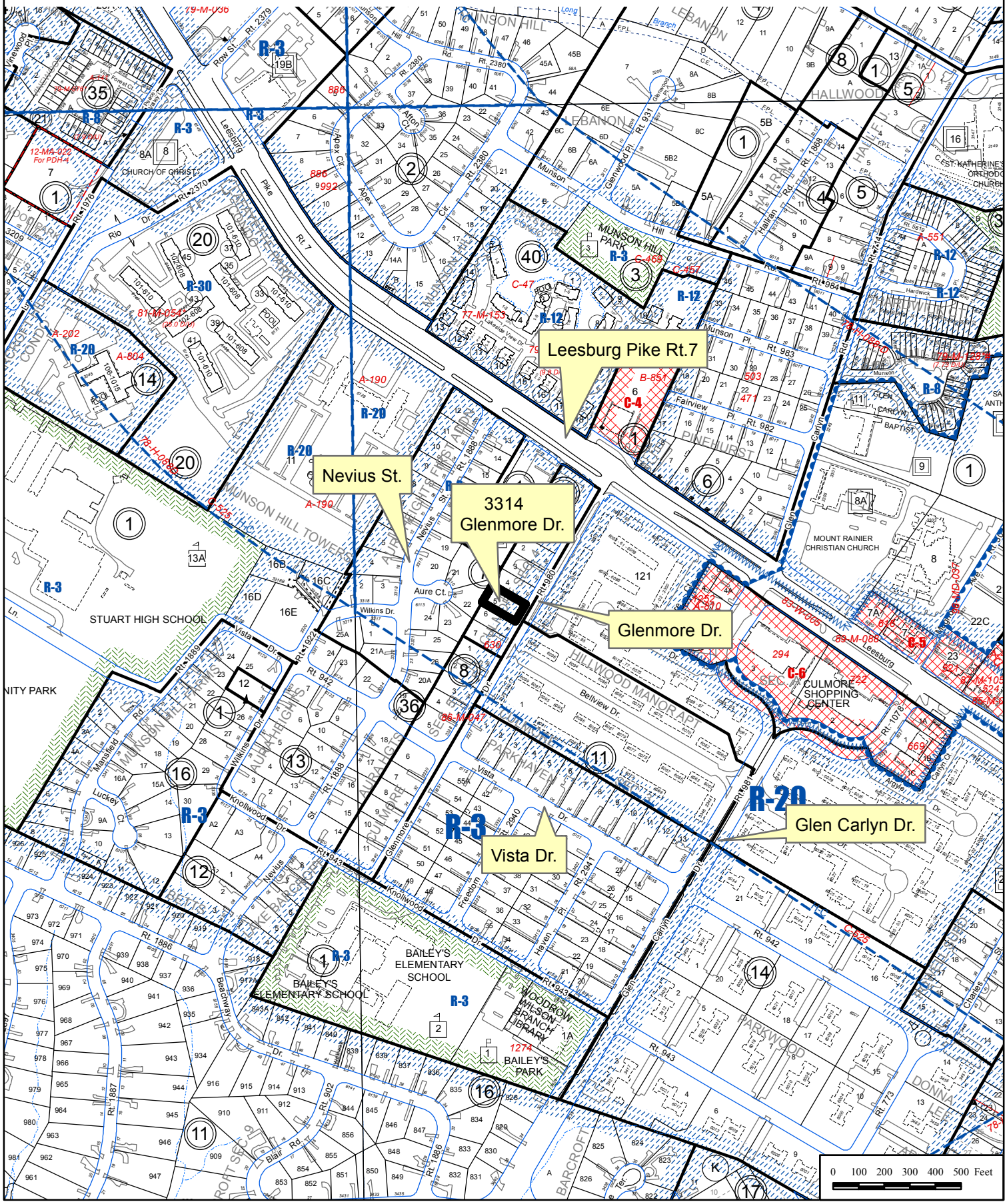
SP 2014-MA-202

MUHAMMAD YASIN AND MUHAMMAD J ALI

Variance Application

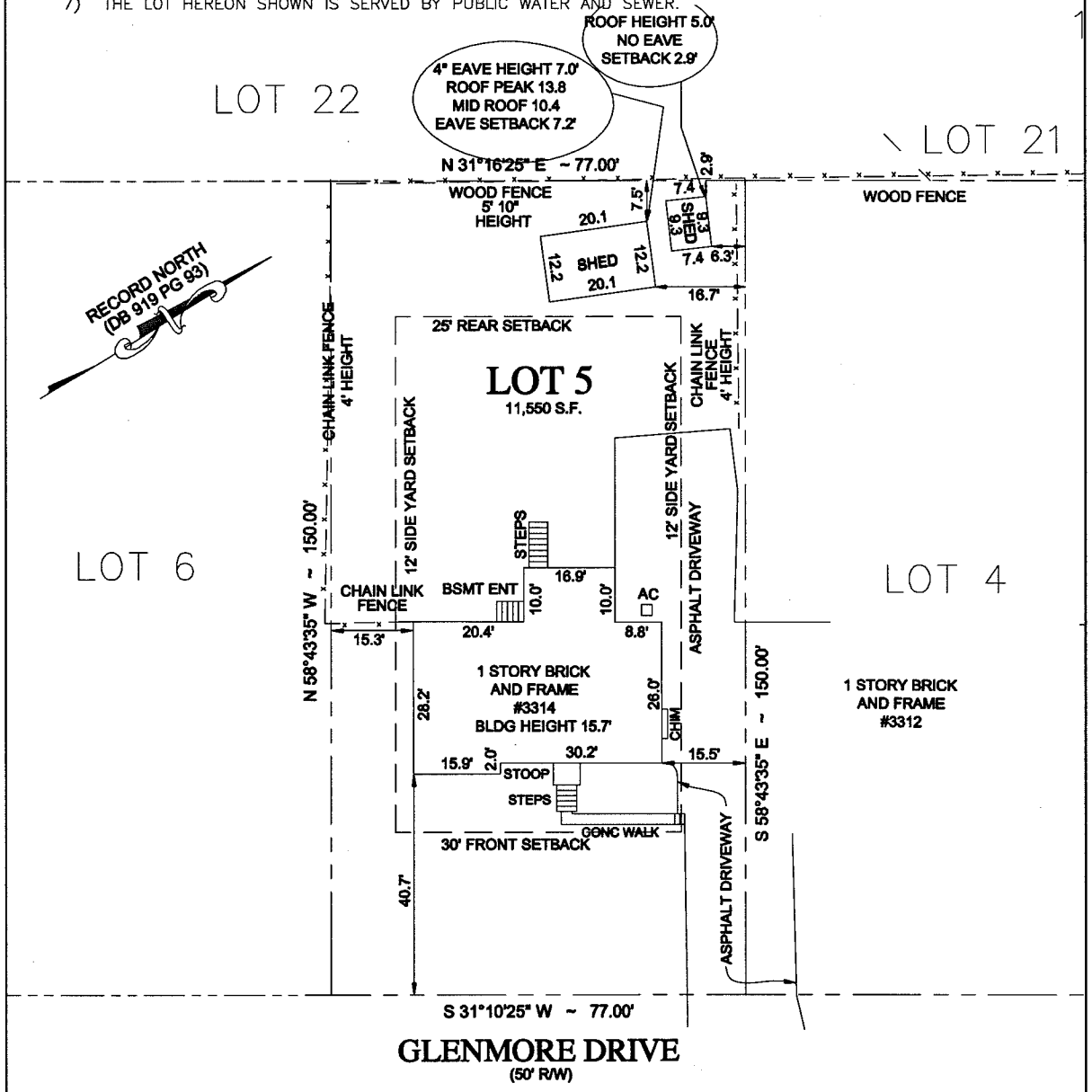
VC 2014-MA-014

MUHAMMAD YASIN AND MUHAMMAD J. ALI



NOTES:

1) NO TITLE REPORT FURNISHED. TO THE BEST OF MY KNOWLEDGE THERE ARE NOT ANY EASEMENTS EFFECTING THE PROPERTY.
2) THE IMPROVEMENTS SHOWN HEREON HAVE BEEN CAREFULLY ESTABLISHED BY MODERN SURVEY METHODS AND UNLESS OTHERWISE SHOWN ,THERE ARE NO VISIBLE ENCROACHMENTS.
3) FENCES SHOWN, IF ANY, ARE FOR INFORMATION ONLY AND DOES NOT REFLECT OWNERSHIP.
4) THIS PROPERTY IS SHOWN ON FAIRFAX COUNTY TAX MAP NO. 0612 09 0005 AND IS ZONED R-3(RESIDENTIAL 3 DU/AC)
5) THIS IS NOT A BOUNDARY SURVEY. CORNER MONUMENTATION THAT MEETS THE STANDARDS FOR A BOUNDARY SURVEY IS NOT INCLUDED WITH A WALL CHECK SURVEY.
6) CURRENT ZONING R-3
7) THE LOT HEREON SHOWN IS SERVED BY PUBLIC WATER AND SEWER.



GRAPHIC SCALE

20 0 10 20 40 80

(IN FEET)
1 inch = 20 ft.

JULY 23, 2013
6/22/14

COMMONWEALTH OF VIRGINIA
WILLARD ROSS DICKERSON
Lic. No.1956
6-22-14
CERTIFIED LAND SURVEYOR

REV: 2-2-14

SPECIAL PERMIT / VARIANCE PLAT

LOT 5 SECTION FOUR

CULMORE

DB 919 PG 93

MASON DISTRICT
FAIRFAX COUNTY, VIRGINIA

ACE ENGINEERING, LLC

2812 Old Lee Hwy
Fairfax, VA 22031

571.276.4252
www.acedgn.com

BACKGROUND

The initial staff report for VC 2014-MA-014 and SP 2014-MA-202 was published on December 31, 2014. The applicants request the approval of a variance to permit an accessory storage structure (shed) approximately 245 square feet in area to remain in the northern corner of the property. The Zoning Ordinance limits accessory storage structures that are accessory to a single family detached dwelling in the R-3 Zoning District to a maximum of 200 square feet in gross floor area. The applicants also request special permit approval for a reduction to the minimum yard requirements based on an error in building location to permit the same shed to remain 7.2 feet from the rear lot line.

Staff recommended denial of the variance application in the initial staff report, noting that the purpose of a variance is to provide a reasonable deviation from the Zoning Ordinance standards when there is a certain exceptional or extraordinary characteristic of the property and the application of such standards would result in an unnecessary or unreasonable hardship to the property owner. Staff concluded that the applicants did not sufficiently demonstrate that an accessory storage structure containing an area of 200 square feet or less cannot reasonably be placed on the lot, or that it would present an unnecessary hardship to do so. Staff does not make recommendations on error in building location applications; therefore, staff did not issue a recommendation on the special permit application in the initial staff report.

These applications were most recently scheduled for public hearings on March 25, 2015. The applicants requested a deferral of the hearings due to forthcoming amendments to the Code of Virginia related to variances. On March 26, 2015, the Governor of Virginia signed H 1849 that amended the Code of Virginia as it applies to variances. Appendix 4 of this staff report addendum provides the redline version of the updated Code. These amendments are effective July 1, 2015. Accordingly, this addendum provides an updated analysis of the variance request pursuant to the new standards.

ANALYSIS

The previously published staff report reviewed the subject variance application against the variance standards contained in the Zoning Ordinance, which was consistent with the former Code section. The amended variance definition and standards in the Code take precedence over the current provisions contained in the County's Zoning Ordinance. The key changes include an amended definition of the term "Variance" as contained in Section 15.2-2201 of the Code and revised standards contained in Section 15.2-2309 of the Code ("Powers and duties of boards of zoning appeals"), which outline the criteria by which a board of zoning appeals shall grant an application for a variance; both of these changes are further explained below as they relate to the subject application.

Amended Definition of Variance

The revised State Code now defines a variance as, “a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land, or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would *unreasonably restrict the utilization of the property*, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance” (emphasis added). Staff believes that the application fails to meet the amended definition of a variance outlined above. In staff’s opinion, the strict application of the ordinance would not unreasonably restrict the utilization of the property because the applicants could have a smaller accessory storage structure on the property that would comply with the Zoning Ordinance’s maximum area of 200 square feet. In addition, the Ordinance does not restrict the number of conforming sheds one can have and thereby allows for adequate accessory storage without the need to exceed size limits for a single structure. Further, as outlined in the initial staff report, staff finds that the subject property is similar to other properties in the neighborhood in terms of shape, width, depth, and area and staff does not believe that the subject property is unique.

Criteria for a Variance

In addition to meeting the definition of variance, an application must meet a specific set of criteria. According to the amended code, a variance shall be granted if the following criteria are met:

The evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance (Sect. 15.2-2309.2)

The strict application of the Zoning Ordinance would not unreasonably restrict or prohibit utilization of the subject property in staff’s opinion because the applicants could install an accessory storage structure that complies with the size requirements outlined in the Zoning Ordinance. There is adequate space in the rear yard of the property where an accessory storage structure containing less than 200 square feet could be located, and the applicants currently have an additional accessory storage structure on the property that contains approximately 68 square feet in area. Staff believes the financial hardship that the applicants may suffer to bring the structure into compliance and the fact that the applicants were not made aware of the Zoning Ordinance requirements by their contractor do not rise to the level of hardship which results from a physical condition of the property, and thus are not considered hardships as that term is applied under State Code and the Zoning Ordinance. In staff’s opinion, the variance request appears to be an accommodation to allow an existing structure to remain without

consideration of the individual characteristics of the lot. Therefore, staff does not believe the application satisfies this standard.

The property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance (Sect. 15.2-2309.2(i))

As discussed in the initial staff report, staff believes the property was acquired in good faith based on the applicants' statement of justification. The initial staff report also concluded that, in staff's opinion, the applicants have not sufficiently demonstrated that an accessory storage structure containing an area of 200 square feet or less cannot reasonably be placed on the lot, or that it would present an unnecessary hardship to do so. Staff believes the applicants fail to satisfy this standard because the applicant created the hardship by installing the accessory storage structure on the property.

The granting of the variance will not be of substantial detriment to the adjacent property and nearby properties in the proximity of that geographical area (Sect. 15.2-2309.2(ii))

The accessory storage structure currently exists on the property and the applicants have received a Notice of Violation for the structure. The structure is located 7.2 feet from the rear lot line and creates a negative visual impact to surrounding properties given its size and proximity to the lot line, as noted in the initial staff report.

The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general reduction to be adopted as an amendment to the ordinance (Sect. 15.2-2309.2(iii))

The residential lots in the vicinity of the subject property are similar in terms of area, width, depth, and shape and contain single family detached dwellings with accessory structures. Therefore, staff finds that the condition or situation of the subject property or the intended use is of a general and recurring nature. If the Board of Supervisors wanted to permit larger accessory storage structures, the Zoning Ordinance could be amended to permit this.

The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property (Sect. 15.2-2309.2(iv))

Staff finds that the granting of this variance for the size of the accessory storage structure would not result in a use that is not otherwise permitted or a change in the zoning classification of the property.

The relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to

subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application (Sect. 15.2-2309.2(v))

The variance application is the only type of zoning application that will provide relief and allow the shed to remain as proposed.

CONCLUSION AND RECOMMENDATION

The purpose of this staff report addendum is to provide staff's revised analysis of the variance application using the Code of Virginia's amended definition of variance and the criteria to be used when considering a variance. Using these standards, staff continues to be of the opinion that the applicants have not sufficiently justified the granting of a variance to allow the existing shed to remain. The purpose of a variance is to provide a reasonable deviation from Zoning Ordinance standards when the application of such standards would unreasonably restrict the utilization of the property or when the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon. The strict application of the Zoning Ordinance would not unreasonably restrict or prohibit utilization of the subject property in staff's opinion because the applicants could install an accessory storage structure or multiple structures that comply with the size requirements outlined in the Zoning Ordinance. Further, staff believes no hardship exists that was not created by the applicant by installing the accessory storage structure on the property.

Based on the findings stated above, staff recommends denial of VC 2014-MA-014. However, if it is the intent of the BZA to approve the Variance and Special Permit applications for the shed, the BZA should condition its approval by requiring conformance with the conditions set forth in Appendix 1 and 2 of this report. Furthermore, if it is the intent of the BZA to approve the Special Permit applications for the accessory structure and the deck, the BZA should condition its approval by requiring conformance with the conditions set forth in Appendix 3 of this report.

It should be further noted that the content of this report reflects the analysis and recommendations of staff; it does not reflect the position of the Board of Zoning Appeals.

The approval of this application does not interfere with, abrogate or annul any easements, covenants, or other agreements between parties, as they may apply to the property subject to the application.

APPENDICES

1. Proposed Variance Development Conditions

2. Proposed Special Permit Development Conditions
3. Applicants' Revised Statement of Justification
4. Code of Virginia as amended

PROPOSED DEVELOPMENT CONDITIONS

VC 2014-MA-014

July 1, 2015

1. This variance is approved for the accessory storage structure (shed) shown on the plat titled, “Special Permit / Variance Plat, Lot 5, Section Four,” prepared by Willard Ross Dickerson, ACE Engineering, LLC, dated July 23, 2013, as revised through June 22, 2014, as submitted with this application and is not transferable to other land.

2. All applicable building permits shall be obtained for the accessory storage structure.

This approval, contingent upon the above-noted conditions, shall not relieve the applicants from compliance with the provisions of any applicable ordinances, regulations or adopted standards including requirements for building permits.

PROPOSED DEVELOPMENT CONDITIONS

SP 2014-MA-202

July 1, 2015

1. This special permit is approved for the height and location of the accessory storage structure (shed) as shown on the plat titled, “Special Permit / Variance Plat, Lot 5, Section Four,” prepared by Willard Ross Dickerson, ACE Engineering, LLC, dated July 23, 2013, as revised through June 22, 2014, as submitted with this application and is not transferable to other land.

2. All applicable building permits shall be obtained for the accessory storage structure.

This approval, contingent upon the above-noted conditions, shall not relieve the applicants from compliance with the provisions of any applicable ordinances, regulations or adopted standards.

THE LAW OFFICE OF
WILLIAM B. LAWSON, P.C.

William B. Lawson, Jr., Esquire
blawson@wblawsonlaw.com

June 10, 2015

Ms. Megan Duca
Staff Coordinator, Zoning Evaluation Division
Department of Planning and Zoning
12055 Government Center Parkway
Fairfax, Virginia 22035

RE: Supplemental statements of support for variance requests based on amendment to the state code: VC 2014-MA-013 and 014

Dear Ms. Duca:

Thanks for the opportunity to update the statement due to the change in law regarding variances. Effective July 1, 2015, the state enabling legislation authorizing variances will be amended to legislatively overturn the Cochran case.

The new standard is that a variance should be granted: " ...if the evidence shows that the strict application of the ordinance would unreasonably restrict the utilization of the property...due to a physical condition relating to the property or improvement thereon..."

Both of these lots are standard lots in the R-3 district. They are directly across the street from garden apartments. Both lots contain small houses in which families are raising children. These homes simply do not have sufficient storage space.

The new legislation then goes on to provide conditions that must be met.

1. That the property was acquired in good faith and that any hardship was not created by the applicant.

When the clients purchased the properties, the houses were their current size.

2. The granting of the variance will not be of substantial detriment to adjacent property.

These two outbuildings are screened from neighboring properties and a significant distance from any residences. The rear of the property to the right of 3312 is a parking lot serving the structure on that lot.

3. The problem is not so recurring as to make practical the amending of the ordinance.

This is a uniquely situated neighborhood. It is a transition from Route 7 and garden apartments. The homes are small and, if there are large families, need extra storage space. In addition, the applicants have agreed to remove existing structures that have fallen into disrepair.

4. It does not create a use that is not permitted.

Accessory storage structures are allowed, the variance is requested due to the size being greater than that allowed.

5. The BZA cannot grant a use permit.

The only route for approval is through the granting of a variance.

For these reasons, we respectfully submit that the request should be granted.

Very truly yours,

William B. Lawson, Jr., Esquire

WBL\L0600.7220

CHAPTER 597

An Act to amend and reenact §§ 15.2-2201, 15.2-2308, 15.2-2309, and 15.2-2314 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 15.2-2308.1, relating to variances.

[H 1849]

Approved March 26, 2015

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-2201, 15.2-2308, 15.2-2309, and 15.2-2314 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 15.2-2308.1 as follows:

§ 15.2-2201. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affordable housing" means, as a guideline, housing that is affordable to households with incomes at or below the area median income, provided that the occupant pays no more than thirty percent of his gross income for gross housing costs, including utilities. For the purpose of administering affordable dwelling unit ordinances authorized by this chapter, local governments may establish individual definitions of affordable housing and affordable dwelling units including determination of the appropriate percent of area median income and percent of gross income.

"Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

"Development" means a tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.

"Historic area" means an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation.

"Incentive zoning" means the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features, design elements, uses, services, or amenities desired by the locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development.

"Local planning commission" means a municipal planning commission or a county planning commission.

"Military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under jurisdiction of the U.S. Department of Defense, including any leased facility, or any land or interest in land owned by the Commonwealth and administered by the Adjutant General of Virginia or the Virginia Department of Military Affairs. "Military installation" does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

"Mixed use development" means property that incorporates two or more different uses, and may include a variety of housing types, within a single development.

"Official map" means a map of legally established and proposed public streets, waterways, and public areas adopted by a locality in accordance with the provisions of Article 4 (§ 15.2-2233 et seq.) hereof.

"Planned unit development" means a form of development characterized by unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses in which project planning and density calculation are performed for the entire development rather than on an individual lot basis.

"Planning district commission" means a regional planning agency chartered under the provisions of Chapter 42 (§ 15.2-4200 et seq.) of this title.

"Plat" or "plat of subdivision" means the schematic representation of land divided or to be divided and information in accordance with the provisions of §§ 15.2-2241, 15.2-2242, 15.2-2258, 15.2-2262, and 15.2-2264, and other applicable statutes.

"Preliminary subdivision plat" means the proposed schematic representation of development or subdivision that establishes how the provisions of §§ 15.2-2241 and 15.2-2242, and other applicable

statutes will be achieved.

"Resident curator" means a person, firm, or corporation that leases or otherwise contracts to manage, preserve, maintain, operate, or reside in a historic property in accordance with the provisions of § 15.2-2306 and other applicable statutes.

"Site plan" means the proposal for a development or a subdivision including all covenants, grants or easements and other conditions relating to use, location and bulk of buildings, density of development, common open space, public facilities and such other information as required by the subdivision ordinance to which the proposed development or subdivision is subject.

"Special exception" 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.

"Street" means highway, street, avenue, boulevard, road, lane, alley, or any public way.

"Subdivision," unless otherwise defined in an ordinance adopted pursuant to § 15.2-2240, means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of land into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.2-2258.

"Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the *shape,* size, or area of a lot or parcel of land~~,~~ or the size, *height,* area, bulk, or location of a building or structure when the strict application of the ordinance would ~~result in unnecessary or unreasonable hardship to the property owner~~ *unreasonably restrict the utilization of the property,* and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the ~~intended spirit and~~ purpose of the ordinance~~, and would result in substantial justice being done~~. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

"Zoning" or "to zone" means the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as "zones," by legislative action and the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.

§ 15.2-2308. Boards of zoning appeals to be created; membership, organization, etc.

A. Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his designated judge or judges in their respective circuit, upon concurrence of such locality. Their terms of office shall be for five years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The secretary of the board shall notify the court at least thirty days in advance of the expiration of any term of office, and shall also notify the court promptly if any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may be reappointed to succeed themselves. Members of the board shall hold no other public office in the locality except that one may be a member of the local planning commission. A member whose term expires shall continue to serve until his successor is appointed and qualifies. The circuit court for the City of Chesapeake and the Circuit Court for the City of Hampton shall appoint at least one but not more than three alternates to the board of zoning appeals. At the request of the local governing body, the circuit court for any other locality may appoint not more than three alternates to the board of zoning appeals. The qualifications, terms and compensation of alternate members shall be the same as those of regular members. A regular member when he knows he will be absent from or will have to abstain from any application at a meeting shall notify the chairman twenty-four hours prior to the meeting of such fact. The chairman shall select an alternate to serve in the absent or abstaining member's place and the records of the board shall so note. Such alternate member may vote on any application in which a regular member abstains.

B. Localities may, by ordinances enacted in each jurisdiction, create a joint board of zoning appeals that shall consist of two members appointed from among the residents of each participating jurisdiction by the circuit court for each county or city, plus one member from the area at large to be appointed by the circuit court or jointly by such courts if more than one, having jurisdiction in the area. The term of office of each member shall be five years except that of the two members first appointed from each jurisdiction, the term of one shall be for two years and of the other, four years. Vacancies shall be filled for the unexpired terms. In other respects, joint boards of zoning appeals shall be governed by all other provisions of this article.

C. With the exception of its secretary and the alternates, the board shall elect from its own membership its officers who shall serve annual terms as such and may succeed themselves. The board

may elect as its secretary either one of its members or a qualified individual who is not a member of the board, excluding the alternate members. A secretary who is not a member of the board shall not be entitled to vote on matters before the board. ~~For~~ *Notwithstanding any other provision of law, general or special, for* the conduct of any hearing, a quorum shall be not less than a majority of all the members of the board *and the board shall offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggrieved under § 15.2-2314, and the staff of the local governing body*. Except for matters governed by § 15.2-2312, no action of the board shall be valid unless authorized by a majority vote of those present and voting. The board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the governing body or bodies at least once each year.

D. Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services. Members of the board may receive such compensation as may be authorized by the respective governing bodies. Any board member or alternate may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the court that appointed him, after a hearing held after at least fifteen days' notice.

E. Notwithstanding any contrary provisions of this section, in the City of Virginia Beach, members of the board shall be appointed by the governing body. The governing body of such city shall also appoint at least one but not more than three alternates to the board.

§ 15.2-2308.1. Boards of zoning appeals, ex parte communications, proceedings.

A. The non-legal staff of the governing body may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform the other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney are all invited.

B. Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under § 15.2-2314, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant or other person aggrieved under § 15.2-2314 requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to § 2.2-3704. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of § 2.2-3707.

C. For the purposes of this section, "non-legal staff of the governing body" means any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to § 15.2-1542. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality.

D. This section shall not apply to cases where an application for a special exception has been filed pursuant to subdivision 6 of § 15.2-2309.

§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. *The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence.* The board shall consider ~~the purpose and intent of~~ any applicable ordinances, laws, and regulations in making its decision. *For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.*

2. ~~To authorize~~ *Notwithstanding any other provision of law, general or special, to grant* upon appeal or original application in specific cases ~~such~~ *a* variance as defined in § 15.2-2201 ~~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 will result in unnecessary hardship;~~, provided that ~~the spirit of the ordinance shall be observed and substantial justice done, as follows:~~ *the burden of proof shall be on the*

applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

~~When a property owner can show that his~~ *Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the* property *interest for which the variance is being requested* was acquired in good faith ~~and where by reason of the exceptional~~ *and any hardship was not created by the applicant for the variance;* ~~narrowness, shallowness, size, or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.~~ *(ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned 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; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.*

~~No such variance shall be authorized by the board unless it finds:~~

~~a. That the strict application of the ordinance would produce undue hardship relating to the property;~~

~~b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and~~

~~c. That the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.~~

No variance shall be ~~authorized~~ *considered* except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

~~No variance shall be authorized unless the board finds that the condition or situation of the property concerned 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.~~

In ~~authorizing~~ *granting* a variance, the board may impose such conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest~~,~~ and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. Notwithstanding any other provision of law, *general or special,* the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

§ 15.2-2314. Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition that shall be styled "In Re: date Decision of the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings *in the circuit court*. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

~~If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.~~ The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, ~~or application for a special exception,~~ the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by ~~showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning~~

~~appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance~~ *proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision.*

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted application for a special exception, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by showing to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong, was in violation of the purpose and intent of the zoning ordinance, and is not fairly debatable.

In the case of an appeal from the board of zoning appeals to the circuit court of a decision of the board, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia.

Costs shall not be allowed against the locality, unless it shall appear to the court that it acted in bad faith or with malice. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the locality may request that the court hear the matter on the question of whether the appeal was frivolous.