



**APPLICATIONS ACCEPTED:** July 25, 2014  
**BOARD OF ZONING APPEALS:** July 22, 2015 @ 9:00 a.m.

# County of Fairfax, Virginia

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July 15, 2015

## STAFF REPORT ADDENDUM

**VARIANCE APPLICATION NO. VC 2014-MV-009**

### MOUNT VERNON DISTRICT

**APPLICANTS/OWNERS:** Louis M. Monroe and Brenda L. Monroe

**SUBDIVISION:** Yacht Haven Estates

**STREET ADDRESS:** 4752 Neptune Drive, Alexandria 22309

**TAX MAP REFERENCE:** 110-3 ((4)) (M) 1

**LOT SIZE:** 21,870 square feet

**ZONING DISTRICT:** R-2

**ZONING ORDINANCE PROVISIONS:** 18-401

**VARIANCE PROPOSAL:** To permit construction of an accessory structure (detached garage) 6.9 ft. from the front lot line, and greater than 25% coverage to remain in the front yard.

### STAFF RECOMMENDATION:

Staff recommends denial of VC 2014-MV-009 for the construction of a detached garage 19.3 feet from the front lot line and greater than 25% coverage to remain in the front yard.

However, if it is the intention of the Board of Zoning Appeals to approve VC 2014-MV-009, staff recommends that such approval be conditioned upon adoption of the proposed development conditions contained in Appendix 1.

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.

*Erin M. Haley*

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).

## **BACKGROUND**

The initial staff report for VC 2014-MV-009 was published on October 1, 2014. The applicants requested the approval of two variances to permit an accessory structure (two story detached garage) approximately 700 square feet in size and 24.4 feet in height to be constructed 6.9 feet from the front lot line and for greater than 25% front yard coverage. A minimum front yard setback of 35 feet is required in the R-2 District; therefore, an encroachment (variance) of 28.1 feet was requested for the detached garage. The existing driveway is proposed to remain, covering 45% of the front yard; therefore, a variance to permit the additional 20% is requested. The applicants have since provided a revised plat dated February 18, 2015 (Attachment 1) showing a larger detached garage measuring 1,251 square feet in gross floor area and 25.6 feet in height, but now located 19.3 feet from the front lot line. Although the new location of the garage is set back further from the front lot line, the structure would still require a significant variance of 15.7 feet from the front yard setback requirement.

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 a garage cannot reasonably be placed on the lot, or that it would present an unnecessary hardship to do so. The applicant also did not provide the necessary justification for an oversized paved driveway which exceeds 25 percent permitted by the Ordinance in the front yard.

This application was most recently scheduled for public hearing on March 18, 2015. The applicants requested a deferral of that hearing 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 as it applies to variances. Attachment 3 of this staff report addendum provides the redline version of the updated Code. These amendments were 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(2) 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 to 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 garage on the property that would comply with the Zoning Ordinance, by locating it at the side of the house. In addition, the only requirement in the Ordinance for the parking of vehicles on residential property is that there is sufficient room for two parking spaces. Also, there is no justification provided for the concrete paver driveway which covers an area in excess of the 25 percent limit in a front yard. Lastly, 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 there does not appear to be anything unique about this property, not also shared by others in the neighborhood, that gives rise to the need for a variance.

### **Criteria for a Variance**

In addition to meeting the definition of variance, an application must satisfy a specific set of criteria in order for the Board to grant a variance. According to the amended code in Sec. 15.2-2309, a variance meeting the definition shall be granted if the following elements 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)*

In staff’s opinion, the strict application of the Zoning Ordinance would not unreasonably restrict the utilization of the subject property because the applicants could install a garage of similar size to what is proposed that complies with the setback requirements of the R-2 district. There is adequate space in the eastern side yard of the property where a garage could be located. This area is currently occupied by a slate patio. The property also has more than sufficient space to accommodate parking for at least two vehicles. The variance request for a detached structure in the front yard arises from the desire of the applicant to have a garage in that particular location rather than from any type of hardship related to the property. Similarly, the request for additional front yard

coverage to keep the oversized driveway is not driven by any physical characteristic of the property. Staff acknowledges the presence of mapped flood plain at the rear of the lot along Dogue Creek; however, that encumbrance does not affect the placement of the garage. As stated, there is adequate space to locate a conforming garage in the side yard. In addition, the other homes along this side of Neptune drive are also encumbered by the same environmental feature. 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 information contained in the applicants' statement of justification. However, the report also concluded that the applicants have not sufficiently demonstrated that a garage cannot reasonably be placed on the lot, or that it would present an unnecessary hardship to do so. Also, the applicants do not provide justification for the paved driveway in excess of 25 percent. Staff believes the applicants fail to satisfy this standard because the applicants created the hardship themselves by installing the driveway 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))*

Staff continues to maintain, as discussed in the original staff report, that locating a large detached garage in a front yard causes a detriment to adjacent properties by creating a visual disruption along Neptune Drive. A large structure measuring more than 25.5' in height and located only 19.3' (to the eave) from the front lot line is out of character with the other houses on the block which are uniformly setback at least 50 feet from the street. While staff acknowledges that the property directly across the street is a corner lot and the home on that parcel faces the opposing street, the garage, as proposed, would nevertheless create a looming presence as viewed from Neptune Drive, despite the presence of vegetation along the front lot line.

*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 desires to permit accessory structures in a front yard or to allow front yard coverage in excess of 25 percent, 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 variance request for a detached garage in a front yard and excess coverage in a front yard would not result in a use that is not otherwise permitted or cause a change in the zoning classification of the property. Both elements are characteristic of residential lots in the vicinity.

*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 mechanism to provide the relief requested.

## **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 a variance and the revised criteria for considering a variance. Using these standards, staff continues to find that the applicants have not sufficiently justified the granting of a variance to allow a detached garage in a front yard and front yard coverage in excess of 25 percent. 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 a conforming garage. While they may prefer not to, that, in staff's opinion is not sufficient justification to grant a variance. Similarly, there is no justification provided for the oversized driveway, other than the applicant prefers it. As such staff concludes that adequate utilization of the property has not been restricted nor does a hardship exist that was not created by the applicants themselves.

Accordingly, staff continues to recommend denial of VC 2014-MV-009. However, if it is the intent of the BZA to approve the Variance application, the BZA should condition its approval by requiring conformance with the conditions set forth in Attachment 1 this report addendum.

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.

**Attachments**

1. Proposed Variance Development Conditions
2. Revised Variance Plat
3. Code of Virginia as amended

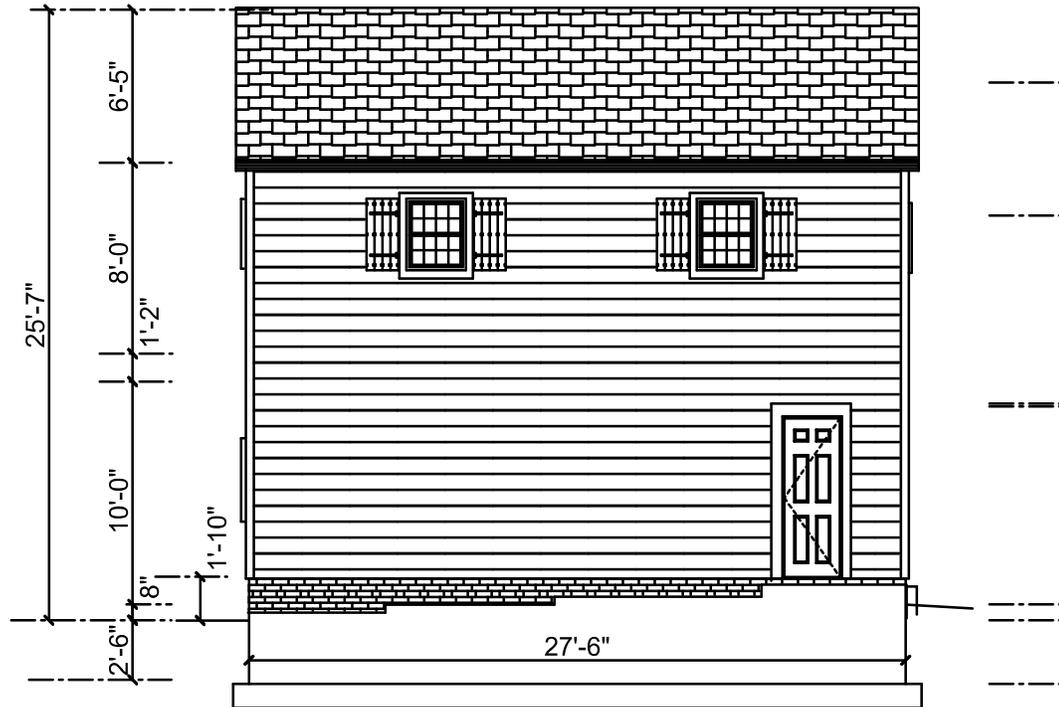
**PROPOSED DEVELOPMENT CONDITIONS**

**VC 2014-MV-009**

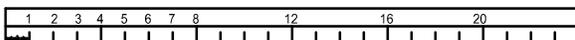
**July 15, 2015**

1. This variance is approved for the accessory structure (detached garage, 1,251 square feet in size and 25.6 feet in height) shown on the plat titled, "Plat Showing the Improvements on Lot 1, Block M, Yacht Haven Estates," prepared by George M. O'Quinn, dated October 28, 2014, as revised through February 18, 2015, as submitted with this application and is not transferable to other land.
2. All applicable building and trade permits shall be obtained for the accessory structure.
3. The detached garage shall be constructed in accordance with the elevations attached to these conditions as Attachment A.
4. The area located on the second floor of the garage shall be used for storage only; no living space shall be permitted.

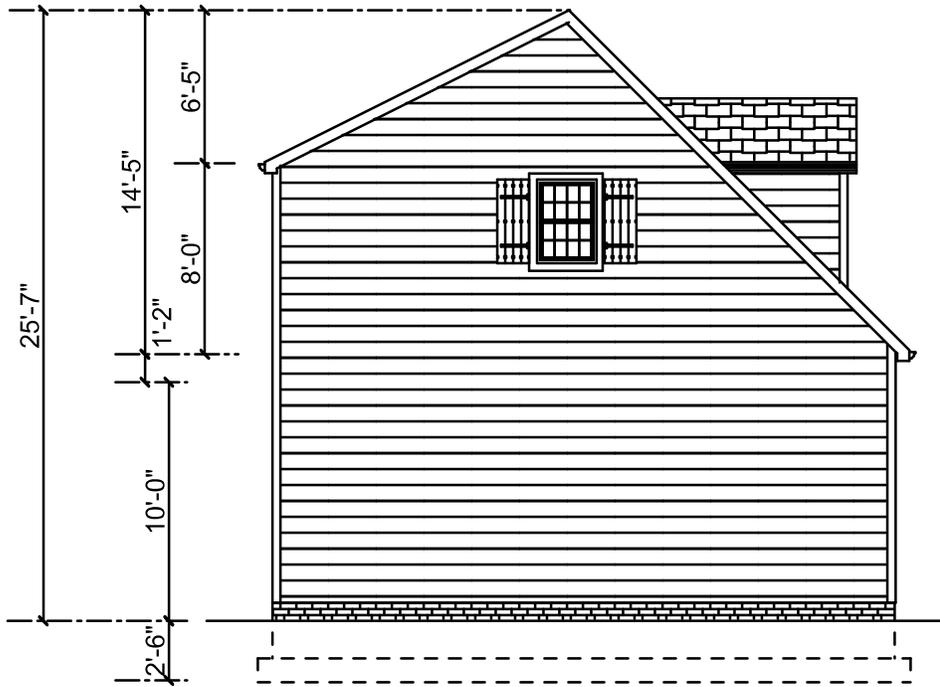
This approval, contingent upon the above-noted conditions, shall not relieve the applicants from compliance with the provisions of any applicable ordinances, regulations or adopted standards including requirements for building permits.



PREPARED BY  
LEPRECHAUN ASSOCIATES  
4508 S WALTER REED DR. ARLINGTON, VA  
(703) 863-3635



MARC & BRINDA MONROE  
4752 NEPTUNE DR.  
ALEXANDRIA, VA 22309

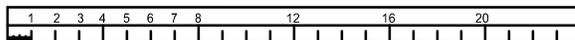


LEFT ELEVATION



RIGHT ELEVATION

PREPARED BY  
LEPRECHAUN ASSOCIATES  
1508 S WALTER REED DR - ARLINGTON, VA  
(703) 863-3635



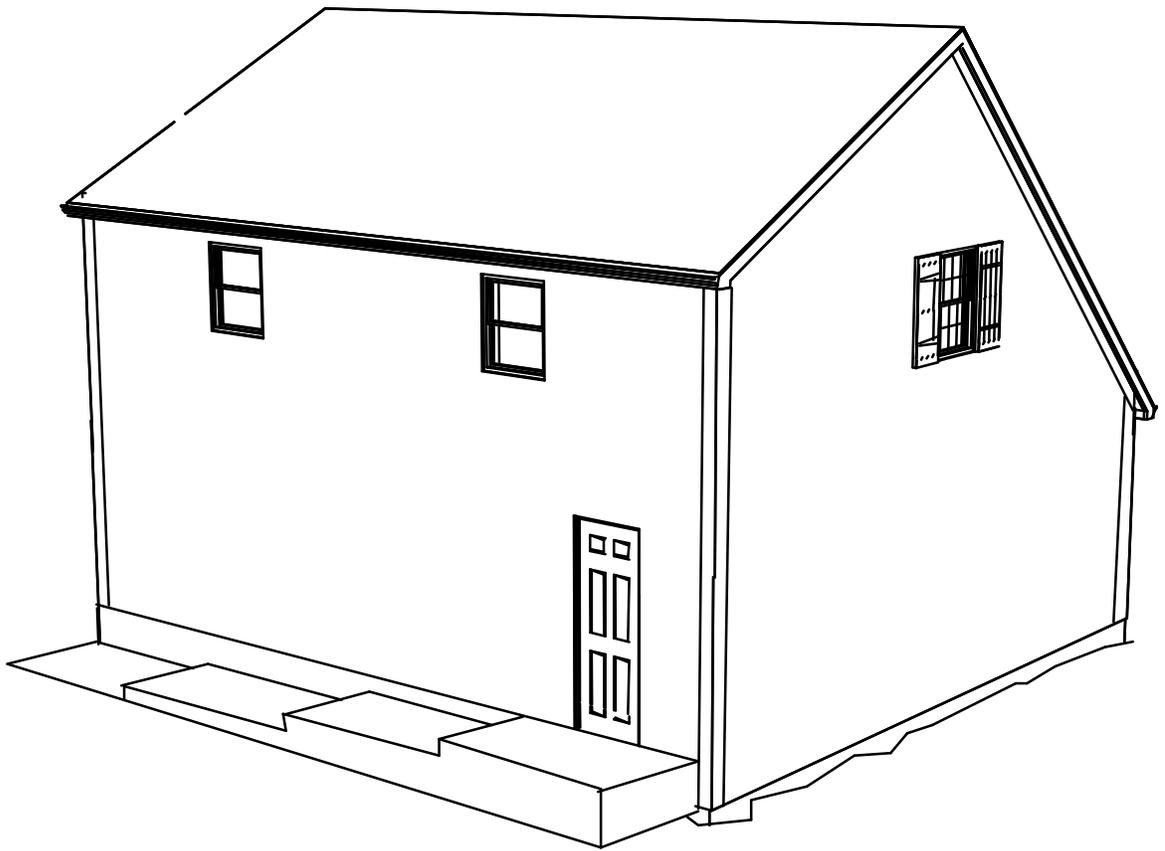
MARC & BRINDA MONROE  
4752 NEPTUNE DR.  
ALEXANDRIA, VA 22309



3/4 FRONT 3-D

PREPARED BY  
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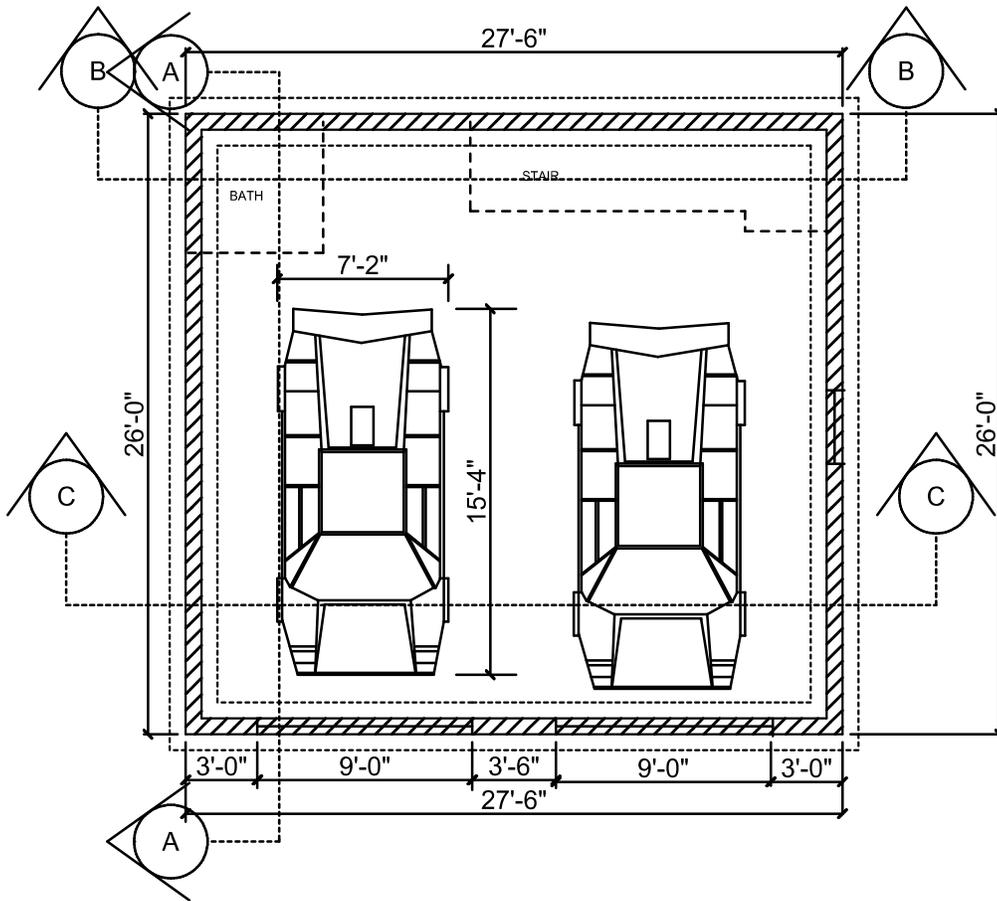
MARC & BRINDA MONROE  
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ALEXANDRIA, VA 22309



3/4 REAR 3-D

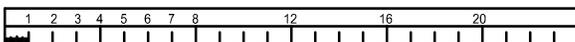
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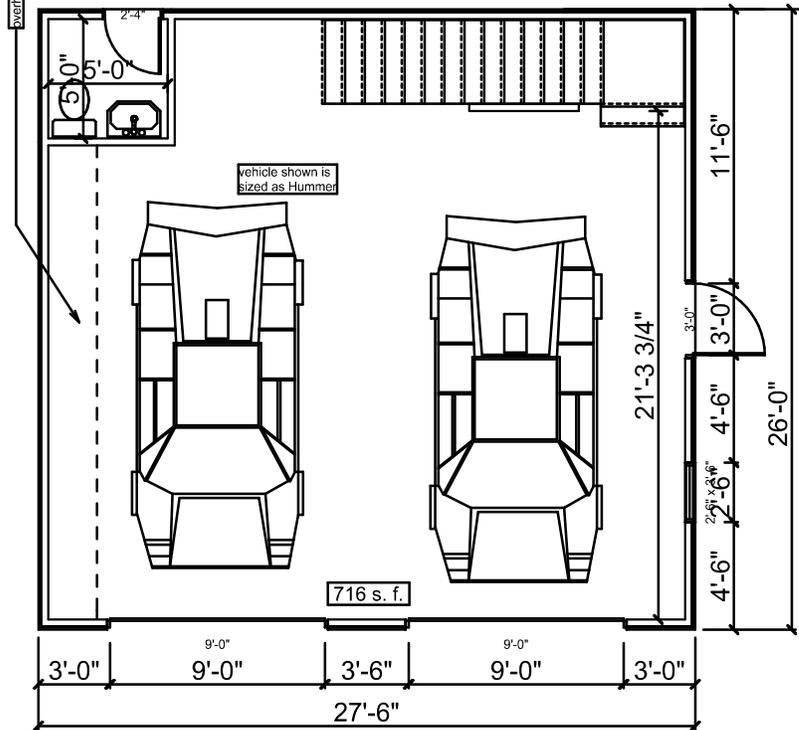
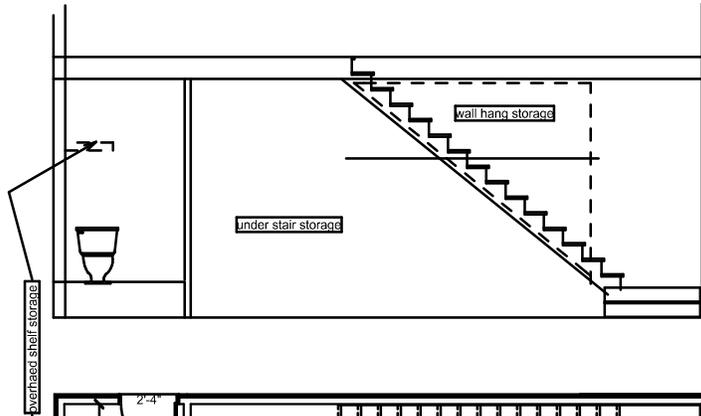
MARC & BRINDA MONROE  
4752 NEPTUNE DR  
ALEXANDRIA, VA 22309



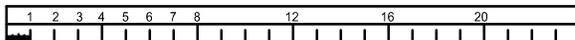
**BELAY TADESSE**  
 for  
**1617 N CAMARON ST**  
**ARLINGTON, VA**

PREPARED BY  
 LEPRECHAUN ASSOCIATES  
 1508 S WALTER REED DR - ARLINGTON, VA  
 (703) 863-3635

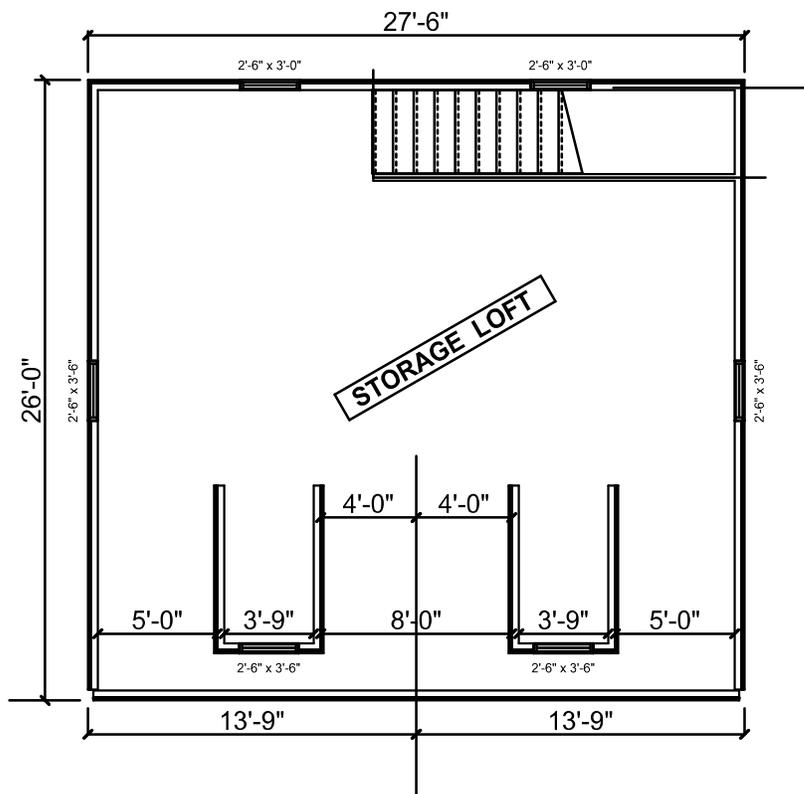




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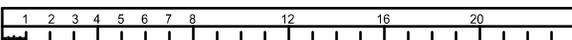


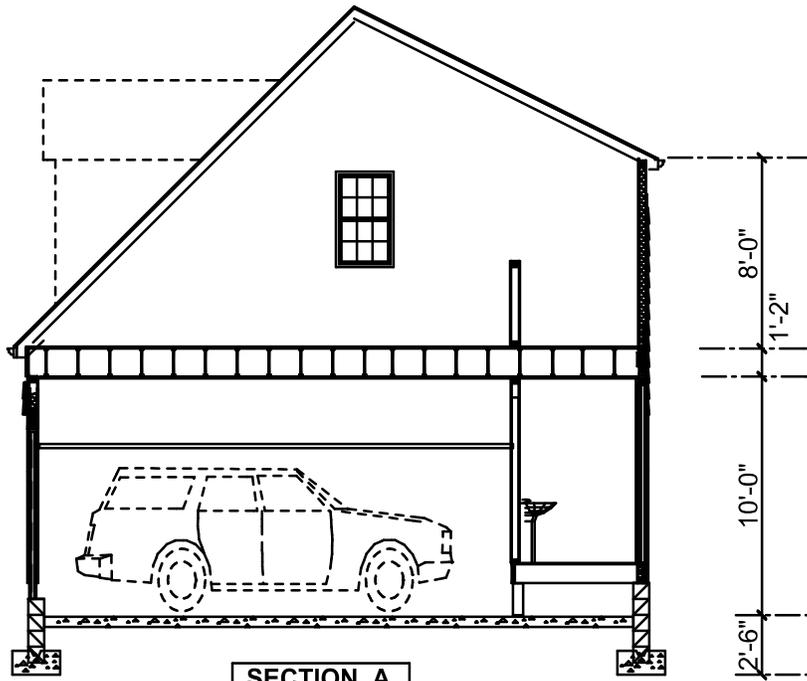
**MARC & BRINDA MONROE**  
4752 NEPTUNE DR  
ALEXANDRIA, VA 22309



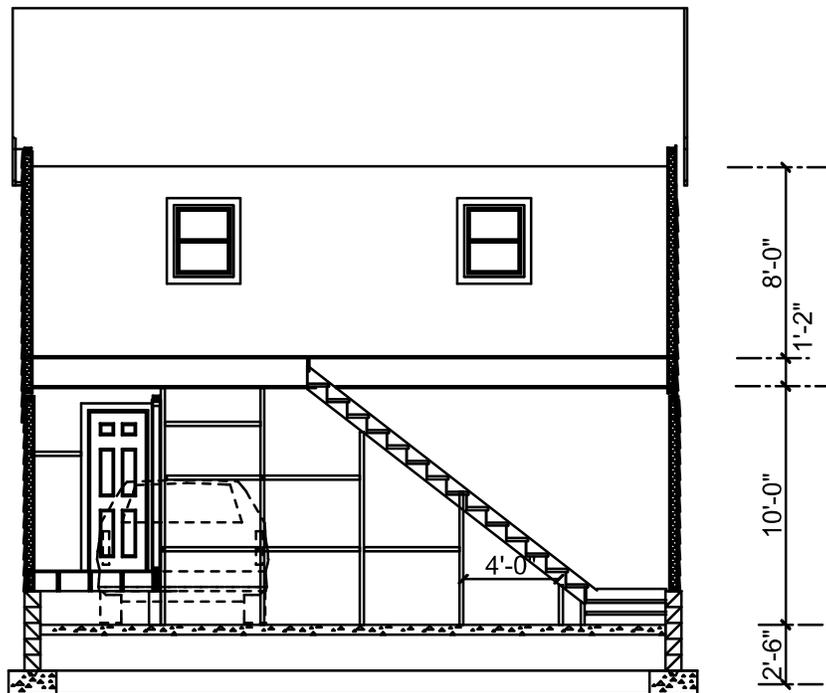
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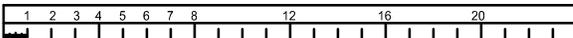
SECTION A



SECTION B

PREPARED BY  
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R.F.

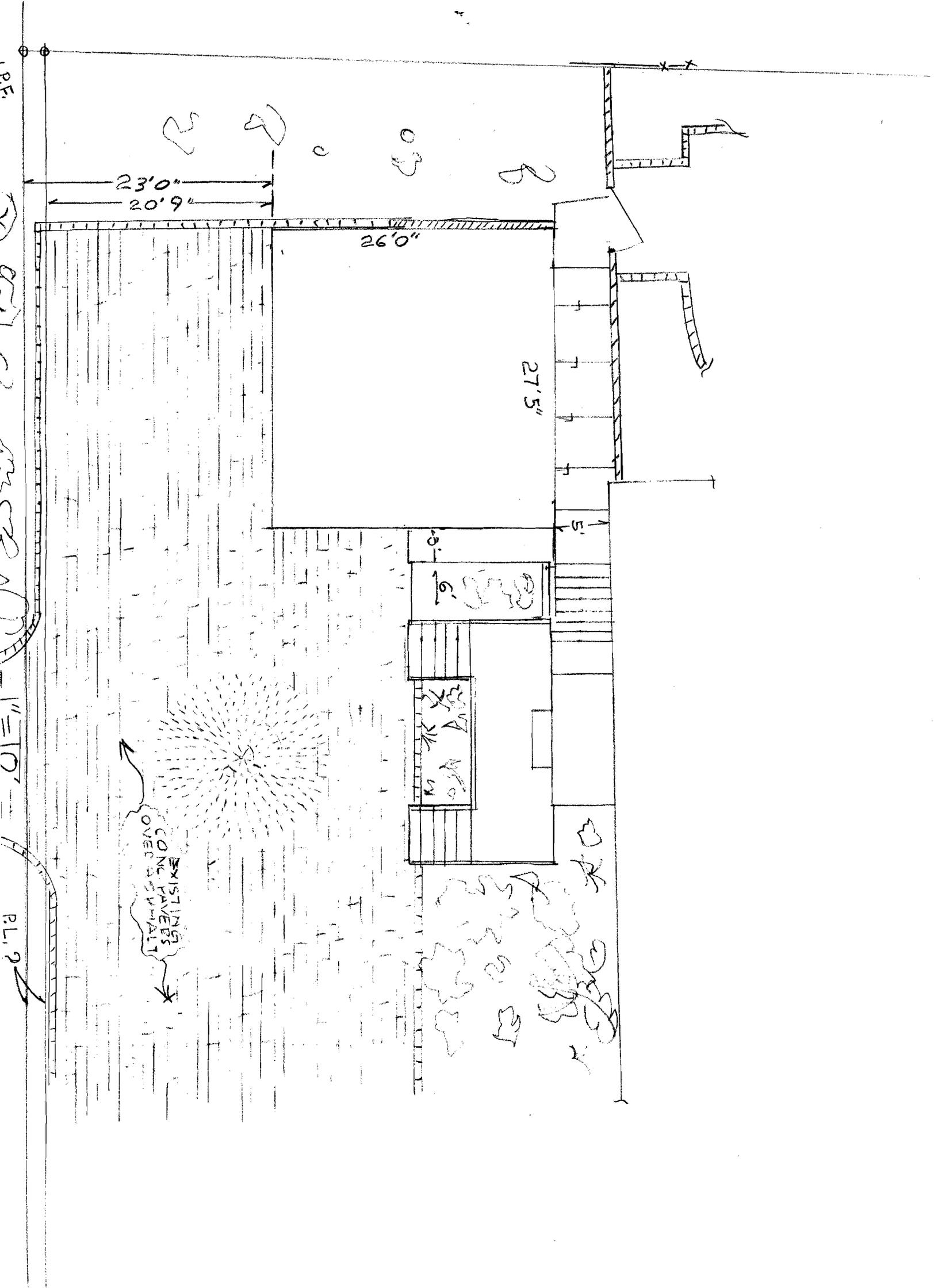
P.L. 2

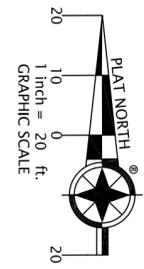
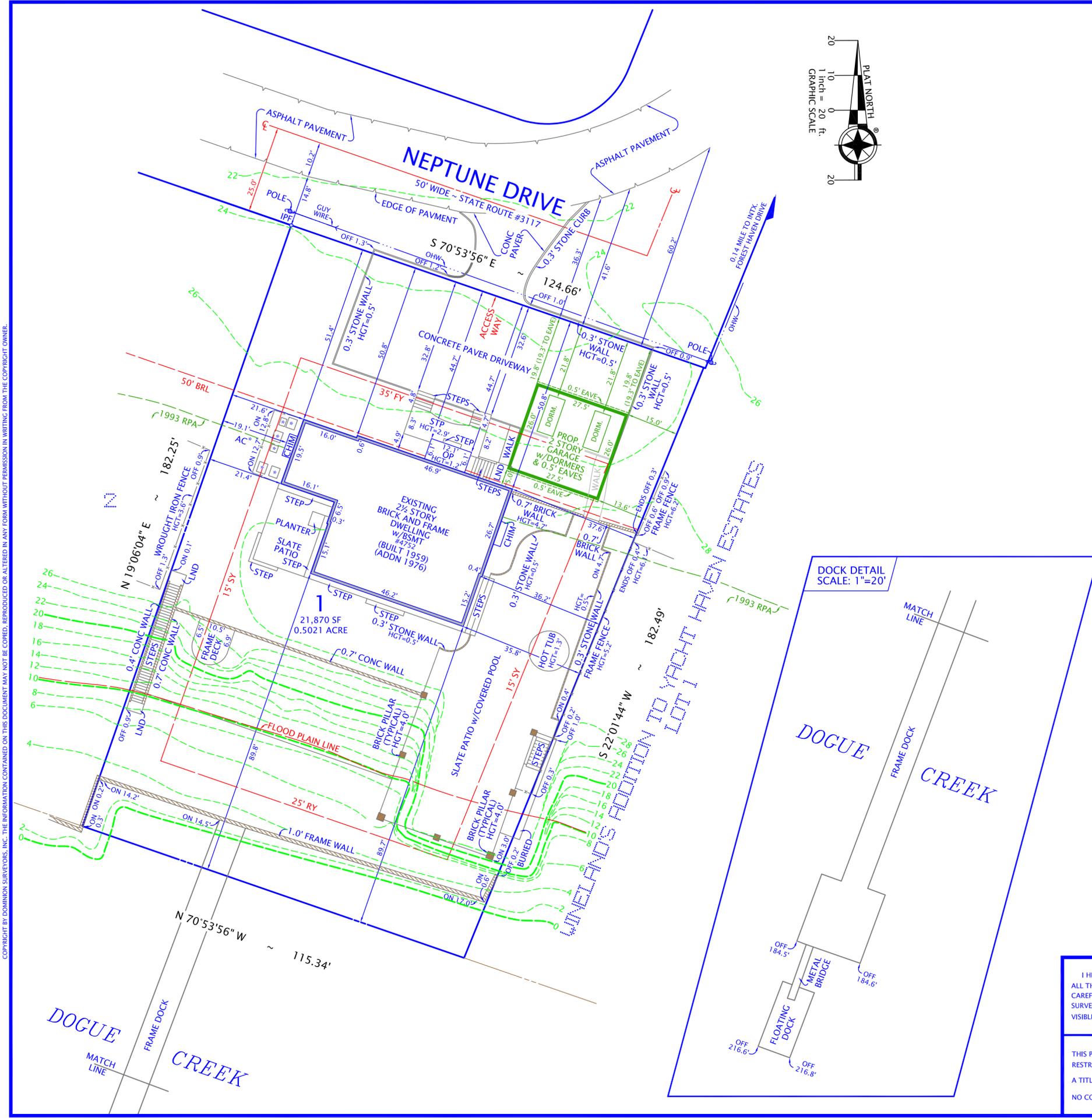
23'0"  
20'9"

26'0"

27'5"

EXISTING  
CONC. PAVED  
OVERS. W/ WALK





- NOTES:
- TAX MAP: 110-3-04M-0001
  - ZONE: R-2 (RESIDENTIAL 2 DU/AC)
  - LOT AREA: 21,870 SQUARE FEET (0.5021 ACRE)
  - REQUIRED YARDS:
 

FRONT:	=	35.0 FEET
SIDE:	=	15.0 FEET
REAR:	=	25.0 FEET
  - HEIGHTS:
 

EX. DWELLING	=	30.2 FEET (MIDLINE OF ROOF)
PROP. GARAGE	=	25.6 FEET (RIDGELINE OF ROOF)
	=	21.2 FEET (MIDLINE OF ROOF)
EX. WALLS	=	AS NOTED
EX. PILLARS	=	AS NOTED
EX. HOT TUB	=	01.3 FEET
EX. FENCES	=	AS NOTED
  - THIS PROPERTY IS SERVED BY PUBLIC WATER AND SEWER.
  - THERE IS NO OBSERVABLE EVIDENCE OF GRAVE SITES OR BURIAL GROUNDS ON THIS PROPERTY.
  - ALL IMPROVEMENTS SHOWN ON THIS PLAT ARE EXISTING UNLESS DENOTED AS PROPOSED.
  - THE SURVEYOR IS NOT AWARE OF ANY UTILITY EASEMENTS 25 FEET IN WIDTH OR GREATER AFFECTING THIS PROPERTY.
  - TOPOGRAPHY DELINEATED HEREON WAS TAKEN FROM AVAILABLE RECORDS, IS SHOWN AT 2' INTERVALS, AND IS AERIAL.
  - THERE ARE FLOODPLAINS AND RESOURCE PROTECTION AREAS ON THIS PROPERTY.
  - AREAS:
 

EX. BASEMENT	=	827 SF
EX. FIRST FLOOR	=	2,264 SF
EX. SECOND FLOOR	=	1,252 SF
EX. THIRD FLOOR	=	939 SF
EX. GROSS FLOOR AREA	=	5,282 SF

EX. FLOOR AREA RATIO: EX. GFA (5282)/LOT AREA (21870) = 0.241

PROP. GARAGE	=	715 SF
PROP. 1ST FLOOR	=	536 SF
PROP. GARAGE FLOOR AREA	=	1,251 SF

PROP. GROSS FLOOR AREA: 1,251 + 5,282 = 6,533 SF

PROP. FLOOR AREA RATIO: PROP. GFA (6533)/LOT AREA (21870) = 0.299
  - THE PROPOSED GARAGE INCREASES THE FRONT YARD IMPERVIOUS COVERAGE BY 282 SQUARE FEET.
  - IMPROVEMENTS DRAWN IN GREY WILL BE REMOVED PRIOR TO CONSTRUCTION.
  - UTILITIES ARE UNDERGROUND.

PLAT  
 SHOWING THE IMPROVEMENTS ON  
 LOT 1, BLOCK M  
**YACHT HAVEN ESTATES**  
 (DEED BOOK 1123, PAGE 103)  
 FAIRFAX COUNTY, VIRGINIA  
 MOUNT VERNON DISTRICT  
 SCALE: 1" = 20'      OCTOBER 28, 2014  
 FEBRUARY 18, 2015 (REV.)

<p>I HEREBY CERTIFY THAT THE POSITIONS OF ALL THE EXISTING IMPROVEMENTS HAVE BEEN CAREFULLY ESTABLISHED BY A CURRENT FIELD SURVEY AND UNLESS SHOWN THERE ARE NO VISIBLE ENCROACHMENTS AS OF THIS DATE:</p>		<p>ORDERED BY:                  LOUIS M. AND BRENDA L. MONROE                  JAMIE TURNER</p>
<p>THIS PLAT IS SUBJECT TO RESTRICTIONS OF RECORD.                  A TITLE REPORT WAS NOT FURNISHED.                  NO CORNER MARKERS SET.</p>		<p>8808-H PEAR TREE VILLAGE COURT                  ALEXANDRIA, VIRGINIA 22309                  703-619-6555                  FAX: 703-799-6412</p>

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## 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.