NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *Board of Supervisors of Fairfax County, Virginia, et al. v. Board of Zoning Appeals of Fairfax County, Virginia, et al.*
Case No. CL-2017-15190

Dear Counsel:

This case is before the Court for final determination of the merits of a declaratory judgment action brought by the Board of Supervisors and the Zoning Administrator of

Fairfax County ("Plaintiffs") against the Board of Zoning Appeals of Fairfax County ("BZA"), ancillary to the administrative appellate process of a merits decision.[1] For the reasons as more fully stated herein, this Court holds as follows: 1) the BZA may enact by-laws which amount to rules governing its proceedings, as long as they do not conflict with Fairfax County ordinances or the general laws of Virginia; 2) if the BZA enacts valid by-laws governing its substantive procedures, which implicitly amount to notice to the public of the manner the BZA is to conduct itself, such rules must be followed and may not be treated as being merely parliamentary in nature and dispensable upon the whim of the occasion[2]; and 3) the BZA's Article VIII by-law allowing for reconsideration of its decisions upon the filing of a written request within seven days is invalid for it is not in harmony with the Zoning Ordinance, and prescribes neither a continuation of an ongoing proceeding nor is in compliance with legal notice requirements for such public hearings. Consequently, the BZA's action granting reconsideration of its original decision in this cause pursuant to a request filed after the seven-day deadline set by its by-laws, and without implementing the formal notice of proceedings required by the Code of Virginia and the Zoning Ordinance of Fairfax County, was an *ultra vires* act and void *ab initio*. This Court therefore reinstates the original decision of the BZA of June 28, 2017 in favor of the Plaintiffs and against the Landowners, and declares the BZA's by-law allowing for reconsideration of its decisions invalid as currently constituted.

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[1] By previous letter opinion, this Court delineated the reasons the Fairfax County Board of Supervisors and the Zoning Administrator had standing to challenge the legality of the mode of procedure of the Board of Zoning Appeals, thereby overruling the BZA's Demurrer and Plea in Bar. *Bd. of Supervisors v. Bd. of Zoning Appeals, et al.*, No. CL-2017-15190, 2018 Va. Cir. LEXIS 23 (Fairfax Feb. 13, 2018).

[2] By order entered July 20, 2018, the Court granted partial summary judgment in favor of Plaintiffs on this part of its ruling, but includes discussion thereof to more fully detail the reasons therefor in written fashion.

BACKGROUND

The Board of Supervisors of Fairfax County ("Board of Supervisors") and the Zoning Administrator Fairfax County ("Zoning Administrator") brought this suit seeking a declaratory judgment overturning a decision the Board of Zoning Appeals of Fairfax County made on September 27, 2017, in favor of the Landowners, Mr. Waters and Ms. Vasquez. Plaintiffs contend the BZA's initial determination from June 28, 2017, was never appealed and the BZA invalidly reheard and reconsidered the initial application. Plaintiffs challenge the BZA's authority to rehear and reconsider applications, which the BZA alleges is permitted by Article VIII of its by-laws.

The BZA heard the Landowners' application on June 28, 2017, and upheld the Zoning Administrator's determination that the Landowners need obtain a Special Permit to construct a ropes course on their property. On July 6, 2017, the Landowners submitted supplemental materials to the BZA and requested a rehearing via email. The request was submitted beyond the seven-day rehearing application deadline allotted by the BZA's by-laws. On July 10, 2017, the Landowners requested the Clerk to the BZA distribute their rehearing request to the BZA members. On July 12, 2017, the BZA granted the Landowners' application for rehearing without first publishing its intention to reconsider the prior decision of June 28, 2017. The matter was reheard on September 27, 2017, after statutory notice was given to stakeholders and the public. At this third consideration of the merits, the BZA reversed itself and ruled in favor of the Landowners. Plaintiffs filed suit in this Court based on the September 27 decision and simultaneously appealed the said decision. The appealed case was then stayed to first enable determination of this declaratory judgment action.

The BZA argues the County Plaintiffs have no standing to challenge the validity of the BZA's by-laws and the actions the BZA took pursuant to its by-laws. This is because of the BZA's contention that their rules of procedure confer no substantive rights to participants in proceedings before the body. *See* Def.'s Mot. 5 (citing 59 Am. Jur. 2d *Parliamentary Law*, section 4 (1987)). The BZA cited *County of Prince William v. Rau*, to support its position. 239 Va. 616, 391 S.E.2d 291 (1990) (holding failure to conform to parliamentary usage will not invalidate the measure when the required number of members have agreed to the measure). The BZA argues its determination on July 12, 2017, to grant a rehearing was a final decision according to § 19-211 of the Fairfax County Zoning Ordinance. The Plaintiffs failed to appeal this final decision within thirty days. Therefore, the BZA maintains the Plaintiffs are barred from challenging its authority to rehear the initial application.

The Plaintiffs in turn question whether the BZA had the power to hold three hearings. The BZA, they contend, has the power to make procedural rules, but such rules must be consistent with local ordinances and the general laws of the Commonwealth. The Plaintiffs also assert the Code does not allow the BZA to hold a public hearing to consider whether to grant a request for a rehearing without providing notice to the parties, as prescribed by Virginia Code § 15.2-2204. The Plaintiffs emphasize the BZA does not have the power to hold multiple hearings on a single application, and therefore, may not grant itself such authority through its by-laws. Plaintiffs further aver parties, including the Zoning Administrator, which appear before the BZA, have an inherent interest to understand their rights before the BZA, both procedural and substantive. Plaintiffs are seeking guidance on the impact a motion for reconsideration has on the thirty-day appellate clock. This

determination is important for this case because the parties disagree as to which of the three hearing dates constitutes a final decision. Further, the Board of Supervisors avers this determination is important to help guide the parties' future conduct and appellate rights.

ANALYSIS

The Board of Supervisors is the governing body of the County of Fairfax, and it is empowered to make all of the legislative decisions pertaining to land use. Va. Code § 15.2-1400. The Zoning Administrator is an officer appointed by the Board of Supervisors, who administers and enforces the zoning ordinance on behalf of the governing body of the County of Fairfax, i.e., the Board of Supervisors. Va. Code § 15.2-2286(A)(4). The BZA is a public body established pursuant to Virginia Code § 15.2-2308. Therefore, the BZA is a creature of statute and it possesses only those powers expressly conferred by code. *Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Supervisors of Fairfax Cnty.*, 276 Va. 550, 552, 666 S.E.2d 315, 316 (1993). The BZA may reverse or affirm, wholly or partly, or may modify the decision of the Zoning Administrator. Va. Code § 15.2-2312. The BZA, however, is limited to deciding whether the Zoning Administrator's decision was correct. Va. Code § 15.2-2309(1).

According to Virginia Code § 15.2-2314, a person aggrieved by a BZA decision may appeal the decision to the Circuit Court by filing a petition for writ of certiorari. The petition must be filed within thirty days after the final decision of the BZA. A "final decision" is "the decision that resolves the merits of the action pending before that body or effects a dismissal of the case with prejudice." *W. Lewinsville Heights Citizens Ass'n v. Bd. of Supervisors*, 270 Va. 259, 267-268, 618 S.E.2d 311, 315-16 (2005) (holding that Zoning

Ordinance § 19-211 stating all "decisions and findings of the BZA shall be final decisions . . . subject to review" and Va. Code § 15.2-2314, may be harmonized and construed together). The BZA is not a party to the appellate process and the Circuit Court's review is limited to the scope of the BZA proceeding. *Foster v. Geller*, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994). Therefore, the Court is limited in appellate cases to deciding merely whether the appealed decision is correct. The Court may reverse or affirm, wholly or partly, or modify, the BZA's decision. Va. Code § 15.2-2314.

Virginia Code § 15.2-2314 states in part:

> 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 specifying the grounds on which aggrieved within 30 days after the final decision of the board.

Va. Code § 15.2-2314. The Supreme Court of Virginia has determined this Code section to be the applicable statute when determining whether the Board of Supervisors has standing to appeal a BZA decision to the Circuit Court. *See Bd. of Supervisors v. Bd. of Zoning Appeals*, 268 Va. 441, 445, 604 S.E.2d 7, 8 (2004).

This Court found in its first letter opinion granting partial summary judgment to Plaintiffs, that the Board of Supervisors has standing to maintain a separate action for declaratory judgment which supplements, rather than duplicates, the appeal to the Circuit Court of the merits of the BZA's decision. *Bd. of Supervisors*, No. CL-2017-15190, 2018 Va. Cir. LEXIS 23, at *11, *22. Declaratory relief further provided the foundation for this Court's later order of July 20, 2018, finding the process exercised by the BZA invalid. This Court overturned the BZA's decision in favor of the Landowners because the BZA acted in contravention of its by-laws. Such relief did not directly address the merits of the

decision of the BZA rendered in favor of the Landowners, but in effect nullified their victory.[3] To the extent the BZA has the power to enact by-laws, such by-laws constitute notice to the public of the BZA's mode of procedure. As such, when the BZA prescribed a seven-day time limit within which a party may make a motion to reconsider, it could not as matter of due process dispense with this deadline and grant such relief requested after the self-imposed deadline on an *ad hoc* basis. This Court held in its July 20, 2018 order that the BZA violated its own procedures, if they be valid. The Court rejected the BZA's position its by-laws are merely "parliamentary," meaning the by-laws are subject to suspension as the convenience of the moment may dictate. When the BZA choses a substantive mode of procedure it must be applied equally and consistently. For this reason alone, the Court granted partial summary judgment reinstating the original BZA ruling in favor of Plaintiffs, since it is axiomatic that at a minimum the BZA must follow the ground rules it enacts as by-laws.

In the remainder of this declaratory judgment action, now decided under a trial rather than summary judgment standard, the Board of Supervisors is questioning the BZA's authority to adopt by-laws which permit the parties the ability to request reconsideration of a BZA ruling. Compl. ¶ 19(C). The Board of Supervisor's chief concern

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[3] The Court notes dissatisfaction that the effect of its ruling is to leave the Landowners without the right of immediate appeal of the original decision of the BZA. The right to be meaningfully heard within the confines of the applicable procedural law is at the heart of any fair and just legal process. Plaintiffs point out though the Landowners were on notice of Plaintiffs' position that the BZA's reconsidered judgment was *ultra vires* and thus outside the proper margins of legal decision-making, and that in any event, the Landowners retain the option of pursuing a Special Permit for their intended use of their land. The Landowners were thus on notice that if the Plaintiffs prevailed in their view and the Landowners did not preventively appeal the original BZA ruling, their appellate rights would be extinguished. This instance is a cautionary example that where the law is unsettled, every actionable avenue of redress must be sought to preserve procedurally the right to a remedy.

is that the "BZA acted *ultra vires* in adopting By-Laws permitting requests for rehearing and reconsideration. . . ." The Board of Supervisors summarized its concern:

> As a result of the BZA's illegal action on September 27, the Zoning Administrator is left without an appellate remedy: the deadline for filing an appeal of the June 28 decision expired 30 days after that decision. The Zoning Administrator had no cause to appeal a decision in her favor when that clock expired. Though she has, in an abundance of caution, filed an appeal of the September 27 decision, she maintains that this Court does not have jurisdiction to hear the appeal of a BZA action that was void *ab initio*.

Compl. ¶ 17. The Board of Supervisors identified the actual controversy between the parties as being "whether the BZA acted within the scope of its authority in deciding to rehear and reconsider the Appeal, and in adopting its By-Laws permitting rehearing and reconsideration." Compl. ¶ 18.

Plaintiffs take the succinct position that the BZA could not as a matter of law alter its original decision against the Landowners because it lacked the authority to create a reconsideration by-law, and therefore the proceedings of the BZA after the original judgment in favor of Plaintiffs were *ultra vires*. The BZA in response, not only avers it can reconsider any of its decisions by virtue of the inherent powers of such a board, but that its by-laws are parliamentary in nature, that is, that adherence to the by-laws may be dispensed with as the BZA may find appropriate, the latter of which position this Court has already rejected.

In concise fashion the General Assembly has bookended the powers of the BZA to direct its mode of procedure via by-laws. The procedure governing an application or appeal by the Landowners to the BZA is as follows:

> § 15.2-2312. Procedure on appeal. — The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and make its decision within ninety

> days of the filing of the application or appeal. In exercising its powers the board may reverse or affirm, wholly or partly, or may modify, an order, requirement, decision or determination appealed from. The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance. The board shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records. The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses.

Va. Code § 15.2-2312. Virginia Code § 15.2-2309 further requires the BZA not render its decision without "notice and hearing as required by § 15.2-2204." The manner of notice and procedure is prescribed as follows:

> The local planning commission shall not recommend nor the governing body adopt any plan, ordinance or amendment thereof until notice of intention to do so has been published once a week for two successive weeks in some newspaper published or having general circulation in the locality; however, the notice for both the local planning commission and the governing body may be published concurrently. The notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than five days nor more than 21 days after the second advertisement appears in such newspaper. The local planning commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If a joint hearing is held, then public notice as set forth above need be given only by the governing body. The term "two successive weeks" as used in this paragraph shall mean that such notice shall be published at least twice in such newspaper with not less than six days elapsing between the first and second publication. After enactment of any plan, ordinance or amendment, further publication thereof shall not be required.

Virginia Code § 15.2-2204. The aforementioned Code sections do not explicitly state the notice prerequisite for action applies to all public hearings, though implicit in the language is the principle that no decision of substance can be enacted outside the requisite enumerated process due. The mode of procedure is however further governed by the Zoning Ordinance of Fairfax County. Section 1-400 states, "Whenever any provision of

this Ordinance imposes a greater requirement or a higher standard than is required in any state . . . statute, the provision of this Ordinance shall govern." The BZA concedes that it may not ignore "the specific dictates governing the breadth of [its] rulemaking authority." BZA Opp'n at 4 n.5. "By-laws adopted by a board of zoning appeals must be 'consistent with ordinances of the locality and general laws of the Commonwealth.'" *W. Lewinsville Heights Citizens Ass'n*, 270 Va. at 266, 618 S.E.2d at 314 (citing Va. Code § 15.2-2308). Zoning Ordinance § 19-205(6) requires "all public hearings conducted by the BZA shall be in accordance with the provisions of Sect. 18-109. All hearings shall be open to the public, and any person affected may appear and testify at such hearing, either in person or by an authorized agent or attorney." Zoning Ordinance § 18-109(1) directs that "*no* public hearing shall be held unless the required notice for the same has been satisfied in accordance with the provisions of Sect. 110. . . ." (Emphasis added). That section sets forth rigorous notice requirements inconsistent with the by-law of the BZA purporting to allow for reconsideration of its decisions. The section also affords the BZA flexibility to "continue or defer a hearing" or "defer action until a future date" without further "formal notice as set forth in Sect. 110." Zoning Ordinance § 18-109(4). The BZA already has the structure in place to contemplate the merits of its decision-making for a period of time when unsure of the soundness of a proposed un-finalized decision or for the purpose of gathering additional information.

By-laws for an adjudicative body like the BZA that does not enact legislation, are a form of rules of procedure. A plain and ordinary reading of the applicable statutory scheme directs the BZA may enact some by-laws, restricted however, by the norm that they not conflict with applicable zoning ordinances or statutes. Here the by-law allowing

for reconsideration of final decisions conflicts with the statutory and zoning scheme in two respects. First, allowing of the reopening of a final decision by means of reconsideration motions filed within seven days amounts to the temporary, substantive vacation of BZA rulings, and is inconsistent with the notice requirements of the Zoning Ordinance. It is clear the reconsideration by-law bypasses the required publication notice of a hearing at which it will consider, even if only of temporary effect, suspending a prior decision. Second, the reconsidered proceeding is not a permissible continuation of a hearing requiring final resolution, so the question arises whether the BZA has the authority to review or vacate its final decisions, assuming for the sake of argument the requisite notice provisions are met in practice. The Supreme Court of Virginia held in *West Lewinsville* "that a 'final decision' of the BZA is the decision that resolves the merits of the action pending before that body or effects a dismissal of the case with prejudice." *W. Lewinsville Heights Citizens Ass'n*, 270 Va. at 267-68, 618 S.E.2d at 315. In *West Lewinsville,* the Supreme Court ruled an appeal by the Board of Supervisors was untimely because although it was within thirty days of the time the BZA's clerk noted filing of the final decision by notice to the parties, the appeal was not within thirty days of the date of the vote determining such decision. *Id.*, 270 Va. at 267, 618 S.E.2d at 315. The Supreme Court explained:

> In amending Code § 15.2-2314, the General Assembly changed the focal point for the commencement of the appeal period from the date the BZA's final decision was filed to the date of the final decision itself. This change was a substantive one, reflecting a legislative determination to achieve uniformity throughout the Commonwealth by measuring the appeal period from the actual final decision date, rather than from the different dates that various local boards had identified as their "official filing date." Therefore, we hold that the "official filing date" provisions of the BZA by-law are inconsistent with the present text of Code § 15.2-2314 and are no longer

> valid for determining when the appeal period begins to run from a final decision of the BZA.

Id., 270 Va. at 267, 618 S.E.2d at 315. Thus, the BZA's initial decision in the instant case was by law its final decision. The Plaintiffs' right of appeal attached from the date of the first BZA decision, and not at subsequent hearings held after the matter was already finalized.

Unanswered nevertheless is whether finality under the *West Lewinsville* test alone forecloses the BZA's right to reconsider its decisions. The Supreme Court of Virginia may have left open the possibility that under properly drafted ordinances or by-laws the BZA might be able to reconsider its decisions. In the *West Lewinsville* opinion the Supreme Court stated, "The vote taken on that date *was not changed in any respect on a later date*." *Id.*, 270 Va. at 267, 618 S.E.2d at 315 (emphasis added). It is uncertain from such dicta whether the Supreme Court meant thereby to impart the BZA *could* change its decision, or whether it merely noted the absence of a continuation of the initial vote for reconsideration at a later hearing. The dicta hints at the possibility there might be a mechanism whereby the Supreme Court would permit a BZA vote to be revised at a later date, or at least deem such earlier vote not final for purposes of reconsideration. The BZA's by-law asserting the right to reconsider its decisions within seven days could thus potentially be read to infer that the BZA's vote was not final until the passage of the time for reconsideration. However, that is not how the by-law is structured nor how the BZA made its decision to reconsider in the instant case. The interim decision to reopen the matter was prompted after the seven-day deadline had passed and was ratified without compliance with applicable public notice requirements.

In the aftermath of the decision in *West Lewinsville,* Plaintiffs question the continued validity of the language of Zoning Ordinance § 18-109(6), which permits reconsideration of decisions but "*only upon motion of a member* voting with the prevailing side on the original vote" of the BZA "made at the same or immediately subsequent regular meeting," and if "seconded by any member," provided this is accomplished "prior to the filing of the original decision in the office of the BZA." (Emphasis added). Plaintiffs assert § 18-109(6) can no longer be read to authorize reconsideration of BZA decisions after a final vote is taken. This contention, however, remains untested, for in *West Lewinsville* there was no second vote taken at which time a motion to reconsider was entertained. The Supreme Court was therefore not called upon to decide whether such a subsequent vote would have been valid and under what circumstances reconsideration of the first vote would have been permitted. It is thus possible that § 18-109(6) could yet be harmonized with the decision as to finality in *West Lewinsville* and the statutory public notice requirements attendant to any hearing conducted on the merits.

Irrespective of whether Plaintiffs are correct, the BZA's reconsideration by-law is not currently in compliance with the language of Zoning Ordinance § 18-109(6), assuming for the sake of argument the ordinance's continued validity and application. The BZA's by-law is in conflict with § 18-109(6) in that it permits *parties* to *initiate* the reconsideration process by written motion. *See* BZA By-Laws, Article VIII(1). Section 18-109(6) directs by its plain language that reconsideration actions must be commenced by voting BZA members from the prevailing side "at the same or immediately subsequent regular meeting," with no mention of allowance of a written reconsideration motion by a party. The BZA's reconsideration by-law in contrast creates a right for parties to make written

requests to rehear a decision although no such authority is conferred by the Zoning Ordinance. The reconsideration by-law is further in contravention of § 18-109(6) in that conversely, reconsideration is not allowed at the same meeting where a final decision has been rendered even though the ordinance section contains no such stricture.[4] In sum, the by-law fails to harmonize its language with that of § 18-109(6), straying beyond the authority set forth by the ordinance in the two aforementioned respects.

There is reason why appeals of decisions of the Zoning Administrator require adherence to predictable notice and finality provisions, namely, in order to enable competing parties to participate on a level playing field in adjudicating their rights. The by-law allowing reconsideration of BZA decisions as currently constituted conflicts with the notice provisions of the statutory and zoning ordinance structure, and improperly allows for the disturbance of the finality of BZA rulings without a process harmonized with such scheme. This places the enacted reconsideration by-law outside the legal authority afforded the BZA.

It is not for this Court, in contemplation of dicta from the Supreme Court, to provide an advisory opinion as to how, if at all, the BZA could enact a valid by-law enabling it to reconsider its decisions. *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970) (explaining, in the context of a declaratory judgment, that "the rendering of advisory opinions is not a part of the function of the judiciary in Virginia" (citations omitted)). Suffice it to say the current by-law allowing reconsideration of final BZA decisions is invalid as not being in compliance with the legal notice and finality strictures

[4] Presumably, the BZA enacted this condition to prevent having to address contentious verbal reconsideration motions from aggrieved parties at every hearing where it renders a final decision. Nevertheless, the BZA cannot assert it has the right to reconsider and then implement that right in a manner more restrictive than permitted by the Zoning Ordinance.

as already discussed. For all the foregoing reasons, the reconsideration by-law, Article VIII of the by-laws of the BZA, is invalid, and the action of the BZA reversing its June 28, 2017 decision against the Landowners and ruling against Plaintiffs, is void *ab initio*.

CONCLUSION

The Court has considered the final determination of the merits of a declaratory judgment action brought by the Board of Supervisors and the Zoning Administrator of Fairfax County against the Board of Zoning Appeals of Fairfax County, ancillary to the administrative appellate process of a merits decision. For the reasons as more fully stated herein, this Court holds as follows: 1) the BZA may enact by-laws which amount to rules governing its proceedings, as long as they do not conflict with Fairfax County ordinances or the general laws of Virginia; 2) if the BZA enacts valid by-laws governing its substantive procedures, which implicitly amount to notice to the public of the manner the BZA is to conduct itself, such rules must be followed and may not be treated as being merely parliamentary in nature and dispensable upon the whim of the occasion; and 3) the BZA's Article VIII by-law allowing for reconsideration of its decisions upon the filing of a written request within seven days is invalid for it is not in harmony with the Zoning Ordinance, and prescribes neither a continuation of an ongoing proceeding nor is in compliance with legal notice requirements for such public hearings. Consequently, the BZA's action granting reconsideration of its original decision in this cause pursuant to a request filed after the seven-day deadline set by its by-laws, and without implementing the formal notice of proceedings required by the Code of Virginia and the Zoning Ordinance of Fairfax County, was an *ultra vires* act and void *ab initio*. This Court therefore reinstates the original decision of the BZA of June 28, 2017 in favor of the Plaintiffs and against the

Landowners, and declares the BZA's by-law allowing for reconsideration of its decisions invalid as currently constituted.

The Court directs the parties circulate a final order incorporating by reference the Court's two letter opinions and grant of partial summary judgment to Plaintiffs in the prior order of July 20, 2018, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER