

**In the Matter of:**

**Hilary Kozikowski, et al**

**v.**

**Monroe RE, LLC, et al**

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**Hearing**

November 7, 2022

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*Casamo*

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Videography  
Videoconferencing**

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V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

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HILARY KOZIKOWSKI, ET AL,

Plaintiffs,

-vs-

Case No. CL22-2838

MONROE RE, LLC, ET AL,

Defendants.

- - - - - x

November 7, 2022

The hearing held in the above-captioned matter,  
which convened, pursuant to notice, at the Loudoun  
County courthouse, 18 East Market Street, Leesburg,  
Virginia, commencing at 10:05 a.m., before the HONORABLE  
PAUL F. SHERIDAN, judge of said court, when there were  
present on behalf of the respective parties:

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1	C O N T E N T S	
2		
3	Proceedings:	p5
4		
5		
6		
7		
8		
9		
10	E X H I B I T S	
11	EXHIBIT	PAGE
12		
13	Petitioners' Exhibit #4	27
14		
15		
16		
17		
18		
19		
20		
21		
22		

<p style="text-align: right;">Page 5</p> <p>1 PROCEEDINGS</p> <p>2 THE CLERK: CL22-2838, Kozikowski versus Monroe</p> <p>3 RE, LLC.</p> <p>4 MR. BARTOLOMUCCI: Good morning.</p> <p>5 THE COURT: Good morning.</p> <p>6 MR. WILBURN: Good morning, Your Honor.</p> <p>7 THE COURT: We had several good things happen</p> <p>8 this morning. Number one, a half hour ago, I thought I</p> <p>9 had four cases to deal with. We were going to have to</p> <p>10 delay you.</p> <p>11 But through the leadership of counsel and</p> <p>12 everything else, those cases have disappeared. So we</p> <p>13 are at least time wise starting.</p> <p>14 What's your best guess as to the duration of</p> <p>15 today?</p> <p>16 MR. WILBURN: I think we planned on not more</p> <p>17 than an hour. And I think it may even be quicker than</p> <p>18 that depending on any questions Your Honor may have.</p> <p>19 THE COURT: It's a case where you've educated me</p> <p>20 well in the first place.</p> <p>21 And secondarily, I've reread everything in the</p> <p>22 papers here.</p>	<p style="text-align: right;">Page 7</p> <p>1 And so we have a few points to make about that.</p> <p>2 THE COURT: Number one, I made the ruling I did</p> <p>3 last time which was a non-ruling as to the gist of the</p> <p>4 case and only that one possibility that the ruling by</p> <p>5 the state agency might render it a somewhat indifferent</p> <p>6 situation vaguely.</p> <p>7 That proves to be not true. So now we need to</p> <p>8 look at the general merits.</p> <p>9 MR. HAMPSHIRE: Yes, sir.</p> <p>10 THE COURT: Who goes first?</p> <p>11 MR. HAMPSHIRE: I believe I would go first, Your</p> <p>12 Honor, given that I'm the petitioner so --</p> <p>13 THE COURT: Go ahead.</p> <p>14 MR. HAMPSHIRE: Your Honor, as you see here, I</p> <p>15 have a few handouts. They're really the same handouts I</p> <p>16 handed out before with -- that is at our last hearing</p> <p>17 with a couple of -- with one exception, I believe.</p> <p>18 And as Your Honor just mentioned, again, a</p> <p>19 different handout from the petitioners.</p> <p>20 Since we were here in September, the Virginia</p> <p>21 Department of Behavioral Health and Developmental</p> <p>22 Services issued its conditional license for this</p>
<p style="text-align: right;">Page 6</p> <p>1 It is a case with exotic appeal for the Supreme</p> <p>2 Court. They're very sophisticated legal issues well</p> <p>3 briefed both ways so --</p> <p>4 MR. HAMPSHIRE: And we are -- Your Honor, we</p> <p>5 were not -- first of all, Gifford Hampshire for the</p> <p>6 petitioners.</p> <p>7 We were not planning on introducing any</p> <p>8 additional evidence but responding to the Court's</p> <p>9 questions and adding any clarification.</p> <p>10 But also, at least on our side, we have several</p> <p>11 points to make in the fullness of time since -- about</p> <p>12 the fullness of time since we met last that are legal</p> <p>13 points that do not depend upon any evidence.</p> <p>14 THE COURT: Are there factual developments that</p> <p>15 occurred, such like a state agency taking a position?</p> <p>16 MR. HAMPSHIRE: Yes, sir. The Virginia</p> <p>17 Department of Behavioral Health and Developmental</p> <p>18 Services has, in fact, issued its conditional permit.</p> <p>19 And that was presented to the Court through a precipe, I</p> <p>20 believe. So that's in the Court's file.</p> <p>21 And at the same time, the County is reviewing</p> <p>22 the zoning permit we discussed last time.</p>	<p style="text-align: right;">Page 8</p> <p>1 facility. And that has been presented to the Court.</p> <p>2 The -- and at the same time, as I said a second</p> <p>3 ago, the zoning permit is in the breast of the County's</p> <p>4 review right now.</p> <p>5 And so it may be instructive to review a couple</p> <p>6 of the provisions that we talked about last time.</p> <p>7 And let me see here. The first one here is --</p> <p>8 and you should have that in your file, I hope. It's</p> <p>9 Section 6-401, which is the powers that we talked about</p> <p>10 last time of the zoning administrator.</p> <p>11 The zoning administrator is given broad powers</p> <p>12 to do all sorts of things with respect to the zoning</p> <p>13 ordinance.</p> <p>14 And significantly, in Section 6-401(C), the</p> <p>15 zoning administrator is given the authority to issue</p> <p>16 interpretations of this ordinance upon proper</p> <p>17 application. Such interpretation shall be binding to</p> <p>18 the applicant and as to the specific facts presented for</p> <p>19 interpretation after the completion of a 30-day appeal</p> <p>20 period.</p> <p>21 So that is one of many things that the zoning</p> <p>22 administrator can do.</p>

<p style="text-align: right;">Page 9</p> <p>1 Another thing that the zoning administrator can 2 do is under Subsection B, just above it. And it says to 3 issue zoning permits where the requirements of this 4 ordinance have been met. 5 So as the Court knows, and as we discussed last 6 time, the primary issue here -- or the preliminary issue 7 is was the Board of Zoning Appeals correct in 8 determining that the zoning determination in this case 9 was not an appealable order -- was not an appealable 10 decision because they used the word may in it. 11 And that's basically what the Court focused on 12 last time as well. 13 When you look at section -- and also a part of 14 the Board of Zoning opinion -- Zoning Appeals rationale 15 was don't worry, petitioners, because you're going to 16 get another bite at the apple when the zoning -- when 17 Newport comes back for a zoning permit. And that's when 18 you're going to have a chance. 19 But if you look at Section 6-401(C), that is 20 separate and apart -- it's a distinct subset of the 21 powers of the zoning administrator to issue these 22 interpretations.</p>	<p style="text-align: right;">Page 11</p> <p>1 not going to be a decision under the state code enabling 2 legislation. It is a decision Newport asked for. 3 THE COURT: Say that again. 4 MR. HAMPSHIRE: Loudoun County does not get to 5 say -- because after all, Loudoun County Zoning 6 authority is enabled by the General Assembly under 7 15.2-2311 and 2309 -- does not get to say in other 8 sections within that -- Article 7 of the zoning does not 9 get to say we're going to -- we're going to avoid any 10 appeal here by calling this an interpretation and not a 11 decision. 12 Because if you look at this, this is the only 13 place in the code of -- in the zoning code of Loudoun 14 County where the zoning administrator is empowered to 15 make determinations, interpretations, whatever you want 16 to call them about what the zoning ordinance means. 17 So Loudoun County does not get to say it's an 18 interpretation and, therefore, it's not a decision and, 19 therefore, it's not appealable. 20 That's in violation of supremacy principles in 21 the Virginia code. 22 It's also in contradiction to the reality of the</p>
<p style="text-align: right;">Page 10</p> <p>1 And that zoning -- that provision is enabled and 2 codified by Loudoun County pursuant to enabling 3 legislation, found in the Virginia Code at Virginia Code 4 Section 15.2-2309, which says that -- that the Board of 5 Zoning Appeals was also found in other places -- but 6 with respect to the Board of Zoning Appeals, it says 7 that the Board of Zoning Appeals has jurisdiction over 8 any determination of the zoning administrator or other 9 administrative officer in the interpretation and 10 enforcement of the zoning ordinance. 11 And so Loudoun County enacts Section 6-401, 12 Subsection C for precisely that reason. 13 Now, you've heard the argument from Assistant 14 County Attorney Nick Lawrence here last time that 15 somehow, an interpretation of the zoning ordinance is 16 not a decision of the zoning -- about the zoning 17 ordinance under the Virginia state code section. 18 And I beg to differ respectfully with that 19 analysis. 20 As I said last time, Loudoun County does not get 21 to say under this enabling legislation we're going to 22 call something an interpretation and, therefore, it's</p>	<p style="text-align: right;">Page 12</p> <p>1 situation. 2 Newport, the facts show in the record, asked for 3 this zoning determination. 4 They did so precisely because they wanted some 5 certainty about what would be allowed on the property 6 before they purchased the property. That was a very 7 prudent thing for them to do. 8 And the other thing to keep in mind about the 9 decision under Section 6-401, Subsection C is it's a 10 discretionary decision. Because there are close calls 11 in the zoning ordinance. There are issues that require 12 expertise and experience. 13 And that's why it's not an administrative 14 decision. It's a discretionary decision. 15 And therefore, Newport, very prudently asked for 16 that determination. It got a favorable determination. 17 Now, true, that determination did use the word 18 may. But as I argued last time, the word may is 19 significant. 20 And you can see it not only in logic, but you 21 can see it in the way the determination was structured. 22 Because if you'll recall, Your Honor, that</p>

<p style="text-align: right;">Page 13</p> <p>1 opinion -- the first part of it says that the use is not 2 allowed under the zoning ordinance because it's a 3 congregate care facility. 4 New paragraph. However, it may be allowed if X 5 and Y happens. X being get your license from the state 6 agency that has nothing to do with zoning; and Y, get 7 your zoning permit. 8 And therefore, it was a significant decision. 9 Because when you get back to Section 6-401, you 10 will see that Subsection B is the zoning permit. But it 11 has to be evaluated in light of Section C, which is the 12 discretionary determination. 13 Now, Newport had a choice to make. And Newport 14 made the right choice, I would submit. 15 Newport could have said we're going to take our 16 chances. We feel confident that after we buy these 17 properties for \$3 million or so, and after we spend a 18 lot of money renovating them, we're going to be just 19 fine, and we're going to get our zoning permit. 20 They could have done that. And they could have 21 waited and submitted their zoning permit application 22 afterward.</p>	<p style="text-align: right;">Page 15</p> <p>1 occupied, et cetera, unless you get a zoning permit. 2 Now, that's -- so that's an important permit. 3 And when you get down to Section 6-1001, it 4 talks about the application of zoning permit. And it 5 talks about things that have to fall into place. And 6 there's Sections A through H there. 7 And I would submit to you if we go through these 8 subsections, there are only a couple of them that have 9 anything to do with zoning. 10 And we have to get away from this term zoning 11 permit, because it's somewhat misleading. It is a 12 zoning permit. 13 But there are admissions in this case that this 14 permit is issued administratively, not by the zoning 15 administrator but by the Department of Building and Code 16 Development. I think that's the correct name of the 17 agency -- the Building Department in Loudoun County. 18 And there are no public hearings. There are 19 no -- this is another admission. There are no public 20 hearings. There is no notice to the property owners. 21 There's nothing. It's an administrative permit. 22 And so when you go through these factors, you</p>
<p style="text-align: right;">Page 14</p> <p>1 But that would have been a very risky thing for 2 them to do. Because they would have spent all that 3 money. They would have been committed to the property. 4 And they would have submitted their administrative 5 zoning permit request, taking a chance that the zoning 6 administrator would have, in her discretion or his 7 discretion, decide under Subsection C, it's not a use 8 that's allowed in the zoning ordinance. 9 We also see that discretion that's reflected in 10 the zoning permit itself. And this is under 6-1000. 11 And I do have copies of that here for Court if 12 the Court no longer has copies in its file. 13 THE COURT: I welcome that. 14 MR. HAMPSHIRE: Thank you. 15 Section 6-1000 is the zoning permit section. 16 And again, that's what's going on right now. 17 Since we -- since we were here in September, right now, 18 the zoning -- Loudoun County is looking at the zoning 19 permit. 20 Section 6-1001 -- well, first of all, let's 21 start with 6-1000. It says no permit or certificate of 22 occupancy can be issued, building or structure of record</p>	<p style="text-align: right;">Page 16</p> <p>1 will see an A through H. Subsection A has nothing to do 2 with zoning. It's a certificate that's issued by the 3 health official with respect to septic. 4 And right now, what's going on is Loudoun County 5 is looking at the sufficiency of the septic system out 6 there. 7 Because it's a commercial use in a residential 8 zone, we submit anyway. 9 But it's going to have a lot more people there 10 than that septic system is designed for. And there's 11 some discussions going on about that. 12 Subsection B is a grading permit. Again, it has 13 nothing to do with zoning. It's a grading permit that's 14 issued by the director of Building and Development. 15 Subsection C, intended use, that has something 16 to do with zoning. But that plays into Section 6-1002 I 17 will talk about in a minute. 18 Subsection D, a dwelling, the number of 19 families, that has something to do with zoning. But 20 again, that one has been addressed in Subsection 6-1002. 21 THE COURT: Let me pause you a second. 22 MR. HAMPSHIRE: Yes, sir.</p>

<p style="text-align: right;">Page 17</p> <p>1 THE COURT: The word families, does that include 2 unrelated people who are there resident -- resident for 3 treatment? 4 MR. HAMPSHIRE: Under the -- under the evidence 5 in this case and the law, yes, sir, it does. 6 Under -- under section -- Virginia Code Section 7 2291, the code section that we're talking about and 8 under the zoning determination that has been issued, 9 that determination about whether the number of families 10 that are there has been made by the subject zoning 11 determination. 12 THE COURT: Go ahead. 13 MR. HAMPSHIRE: And the Subsection E is an 14 approved site plan or plot plan designed by the 15 applicant drawn to scale. Nothing to do with zoning. 16 Except that the zoning administrator might look at that. 17 But that has to do with the details of where the 18 structures are in relation to the property lines, et 19 cetera, that sort of thing. 20 Subsection F is the locational clearance for the 21 property located in the river and stream or the overlay 22 districts.</p>	<p style="text-align: right;">Page 19</p> <p>1 of the provisions of this ordinance or any other 2 applicable county law, ordinance or regulation. 3 And then you skip down to the last sentence 4 which says the issuance of said zoning permit, however, 5 shall not afford protection to any owner who is found to 6 be violating this or any other applicable law or instant 7 regulation. 8 So we get back to why is it that Newport asked 9 for the zoning determination in the first place. 10 Again, to avoid submitting for a zoning permit 11 after having bought the property for \$3 million and 12 after having spent lots of money renovating it, only to 13 find out under Subsection 6-102, the use isn't allowed 14 in the first place. 15 So that is why the determination in this case is 16 a significant determination. 17 The word may was used because some other things 18 had to fall into place. 19 But the zoning determination -- that is the 20 entitlement determination, the determination -- the 21 basic determination as to whether the use could be 22 allowed under the zoning ordinance was a significant</p>
<p style="text-align: right;">Page 18</p> <p>1 That's a determination that is important, I 2 would suspect. 3 But it doesn't have -- it doesn't go to the 4 basic determination in this case whether the use is 5 allowed in the first place under the zoning ordinance. 6 Subsection G, number and size in lighting and 7 designs, details. 8 It doesn't -- again, does not go to the nature 9 of the use, the very idea of whether the use is allowed 10 in the first place. 11 Number, size and location of off street parking. 12 Again, an administrative determination having to do with 13 details, not with respect to whether the use is allowed 14 in the first place. 15 So then in that context, we look at Subsection 16 6-1002, which is the critical section in this zoning -- 17 this decision. 18 What anyway are the standards for issuance of 19 zoning permits? 20 Standards for issuance: It says that no zoning 21 permit shall be issued where the structure to be 22 constructed or the use contemplated will be in violation</p>	<p style="text-align: right;">Page 20</p> <p>1 determination under 6-1002. 2 And Newport had the opportunity to -- or the 3 choice to wait -- take its chances and wait and get it 4 later or get it on the front end. 5 And any prudent purchaser who's going to get it 6 on the front end, make sure that they have that. 7 The only little catch is if you do that, it's 8 subject to appeal. It's subject to appeal by those who 9 are aggrieved. 10 Newport could have appealed it if it were 11 denied, if it came back unfavorably. 12 But since it came back favorably towards them, 13 and the neighbors found out about it, and this Court has 14 ruled that they had standing, they have an opportunity 15 to appeal it. 16 And that's what led to our appeal to the Board 17 of Zoning Appeals. 18 And we suggest that the Board of Zoning Appeals 19 did not appreciate these distinctions between 20 administrative zoning permits and the basic question 21 under the state enabled legislation and the county code 22 that I've mentioned that the zoning permit is --</p>

<p style="text-align: right;">Page 21</p> <p>1 presupposes that the use is allowed in the first place, 2 which is a discretionary -- is a discretionary 3 determination that the zoning administrator made. 4 I'd also like to mention, Your Honor, that there 5 was some discussion last time -- and my friend and 6 colleague John -- Mr. Wilburn represented to the Court 7 that don't worry, we have the right of appeal of the -- 8 and I have this to hand up, which is the regulations 9 from the Virginia Department of Health and Developmental 10 Services with respect to what -- what do they look at 11 anyway when they're issuing licenses. 12 They are -- and we asked the question. And we 13 researched the question. What -- what physical things 14 does the Virginia Department of Behavioral Health and 15 Developmental Services look at in terms of things like 16 zoning? 17 Because after all, this department is a state 18 agency. It's not part of the county. And its -- its 19 raison d'etra, its reason for existence is with respect 20 to things under its purview, which is behavioral health 21 and developmental services, not zoning. 22 And we have evidence in the record -- the letter</p>	<p style="text-align: right;">Page 23</p> <p>1 here, Your Honor, is they have nothing to do with 2 zoning. 3 They have to do with the details of the home and 4 the use on the property with respect to things like you 5 got to get -- you have to have a building -- Section 6 12VAC35-105-260, building inspection classification. It 7 says that you have to submit a copy of the certificate 8 of use and occupancy. 9 Now, remember you have to get a zoning permit 10 before you can get a certificate of occupancy under that 11 other section. 12 Subsection 255, please submit a floor plan with 13 room dimensions. 14 You have -- that has nothing to do with the 15 zoning on the property. 16 Section 270, building modifications. If you 17 want to make a modification, you do so in compliance 18 with local regulations. 19 Physical environment, this is an interesting 20 one. It has to be accessible to the -- the home itself 21 has to be accessible to people with physical and sensory 22 disabilities. It has to be clean, free of foul odors,</p>
<p style="text-align: right;">Page 22</p> <p>1 that is in the record and I pointed out last time, the 2 letter from Jay Benz, who is the office of -- the 3 director of the office of licensing in the department, 4 that we have nothing -- that is the Virginia Department 5 of Behavioral Health and Developmental Services has 6 nothing to do with local zoning. It's a completely 7 different idea. 8 You get your zoning, and then you can get your 9 license. 10 And that is also reflected from the other way 11 around from the zoning determination. You got your 12 zoning, but you got to get your license in order to 13 start your use. 14 So the two agencies are consistent. 15 But we asked the Virginia Department of 16 Behavioral Health and Developmental Services what is it 17 that you looked at anyway. And we researched this on 18 our own. 19 And these are the regulations that are 20 applicable: 21 We can go -- I will go through them briefly. 22 They're very short. But you will see the overall theme</p>	<p style="text-align: right;">Page 24</p> <p>1 well maintained. It has to promote the maintenance of 2 sanitary facilities. It has to be well ventilated, 3 adequate hot and cold running water, sufficient 4 lighting, recycling, composting, garbage disposal should 5 not create a nuisance. If smoking is permitted, it has 6 to be outside, et cetera. 7 We're told that the next one, food services 8 section, Section 290 is not applicable. But it has 9 nothing to do with zoning. 10 Here's an important one, Section 3-351-5300, 11 sewer and water inspections. They have to be on public 12 water and sewage or a nonpublic water and sewage 13 disposal system. 14 Remember, that's what's going on right now with 15 the zoning permit. Because we're concerned that that 16 septic system does not account for the commercial use of 17 the property, namely all of the workers who are going to 18 be there to attend to these patients. 19 Section 310 deals with weapons. Nothing to do 20 with zoning. You can't have any -- weapons have to be 21 kept under lock and key, which you might expect would be 22 a good idea.</p>

<p style="text-align: right;">Page 25</p> <p>1 Fire inspections, we're told that one doesn't 2 apply. But it has nothing to do with zoning. 3 And then 325, a community liaison, good idea to 4 have a community liaison. So nothing to do with whether 5 the use is allowed in the first place. 6 Section 330 is beds. You shall not operate more 7 beds than the number for which the location is licensed. 8 Nothing to do with zoning. 9 Bedrooms -- how big the bedrooms need to be 10 under Section 340. Nothing to do with zoning. 11 Section 350, the condition of beds, nothing to 12 do with zoning. They have to be clean and comfortable 13 with mattresses and pillows and blankets. 14 And privacy, you have to provide -- in Section 15 360, you have to provide a certain level of privacy. 16 THE COURT: Just slow down a second. 17 MR. HAMPSHIRE: Sure. 18 THE COURT: You talked about 340, not talking 19 about rooms. But B, no more than four individuals share 20 a bedroom. 21 Then they go on and except in group homes, no 22 more than two individuals should share a room.</p>	<p style="text-align: right;">Page 27</p> <p>1 the County has from the Department of Developmental 2 Services have. 3 THE COURT: That collection of papers are 4 stapled together and tabbed as Exhibit 4 for today's 5 proceeding. 6 (Thereupon, the documents were marked 7 Petitioners' Exhibit #4 for identification.) 8 MR. HAMPSHIRE: Thank you, sir. I appreciate 9 that. 10 So it's a completely different mission. 11 Therefore, what we also see playing out is that 12 the -- the nature of this commercial use, it's of some 13 interest that Fairfax County -- not directly relative to 14 this case. 15 But the commercial use in Fairfax County, which 16 is the determination in Fairfax County, is in the 17 materials. It's in the record. 18 The congregate housing facility similar to what 19 we have here, almost identical to what we have here was 20 found by the Fairfax County zoning administrator to be a 21 commercial use because of the congregate care. 22 In this County, the analysis that the Fairfax</p>
<p style="text-align: right;">Page 26</p> <p>1 This is kind of occupancy, who is in the house, 2 right? 3 MR. HAMPSHIRE: Yes, sir. But that has nothing 4 to do with -- well, that has nothing to do with whether 5 the use is allowed in the first place. 6 I mean you can have details about whether this 7 is allowed in the house. 8 But whether or not this commercial use is 9 allowed in this zone is what we are objecting to. It's 10 not just residency. It's commercial use. 11 THE COURT: Go ahead. 12 MR. HAMPSHIRE: And then number 370, the ratio 13 of toilets, basins and showers and baths, nothing to do 14 with zoning. Those are inside details. 15 And then lighting -- adequate lighting in halls. 16 So those are all the regulations. 17 So to say, Your Honor, don't worry about zoning, 18 the petitioners have a right to appeal the Virginia 19 Department of Behavioral Health and Developmental 20 Services permit is simply not true. 21 As we said last time, it's a completely 22 different mission that the Court has -- excuse me, that</p>	<p style="text-align: right;">Page 28</p> <p>1 County Zoning Administrator went through was not 2 necessary. 3 Because the Loudoun County Zoning Administrator 4 found this one single house. 5 The Fairfax County Zoning Administrator found 6 three of them together, a congregate housing facility. 7 In Loudoun County, the Zoning Administrator 8 found a single house to be -- a single use to be a 9 congregate housing facility, not because they were bound 10 together with the homes but because of the nature of the 11 commercial use that is going on inside. 12 And so the fundamental question we get back to 13 in this case, getting beyond the ripe decision, if you 14 will, as to whether or not this is an appealable order 15 is whether or not the commercial use which the zoning 16 administrator has determined to be a commercial use by 17 determining it to be a congregate housing facility 18 should be allowed in a residential zone, not just any 19 residential zone. 20 But as Your Honor saw the last time -- and I had 21 a little difficulty answering your question. This is in 22 the record at A134, I believe.</p>

<p style="text-align: right;">Page 29</p> <p>1 And I can hand it up for Court -- a better copy 2 of what I showed for you.</p> <p>3 And it shows you that the nature of the rural 4 area in this -- and the Court remarked last time that it 5 is rural area.</p> <p>6 And because it is a rural area -- it's a 7 combination of cultural/rural development.</p> <p>8 You can see the farm less ordinary, which is a 9 17-acre farm. The residential lots around the farm are 10 between 3 and 5 acres.</p> <p>11 You can see it's not just any residential use. 12 It's certainly not like the residential lots in Fairfax 13 where you could have this type of facility pursuant to a 14 special permit.</p> <p>15 Loudoun County has said because of the very 16 rural nature of this use, it's not allowed at all, but 17 somehow goes further to say that because of the state 18 Code Section 2291, it's allowed anyway.</p> <p>19 And that's the fundamental substantive issue 20 which is -- as the Court noted, it's a very interesting 21 issue on appeal to the Court of Appeals nowadays and 22 then the Supreme Court as to whether or not this</p>	<p style="text-align: right;">Page 31</p> <p>1 and homes housing them to have a superior right than 2 those homes that are occupied by traditional families.</p> <p>3 THE COURT: Discuss the distinction between 4 disability and a mental health factor determined to be a 5 disability for the purpose of your argument.</p> <p>6 MR. HAMPSHIRE: There should be no distinction. 7 If you recall the Code Section 2291 -- I have it 8 here -- 15.2-2291, Subsection A addresses eight -- no 9 more than eight individuals with mental illness, 10 intellectual disability or developmental disability are 11 to reside, et cetera.</p> <p>12 And Subsection B addresses residential facility 13 which no more than eight age-termed or it says disabled 14 persons are to reside.</p> <p>15 But basically, the requirement is the same in 16 those two sections. You can't discriminate between 17 them.</p> <p>18 And we suggest that's a noble goal. It's one we 19 don't disagree with.</p> <p>20 And we're not looking to -- and Loudoun County 21 hasn't done that.</p> <p>22 Loudoun County has said in its zoning ordinance</p>
<p style="text-align: right;">Page 30</p> <p>1 enabling legislation somehow means something other than 2 what we think it means.</p> <p>3 And what we think it means -- and I think it's 4 borne out as we argued last time.</p> <p>5 Keep in mind, as I said last time, that 2291 6 statute is not some foreign statute from some different 7 part of the code.</p> <p>8 It's right in Article 7 of the zoning ordinance. 9 It's part of -- excuse me, of the zoning enabling 10 legislation.</p> <p>11 And all it says is that if you're going to 12 determine something -- you, local government, you, 13 Loudoun County, the City of Fredericksburg, whoever you 14 might be -- if you're going to determine something to be 15 a single family residential use, you can't discriminate 16 between regular families and traditional families -- 17 excuse me, traditional families and disable -- people 18 who are disabled and who are living together in a home. 19 You can't -- you cannot discriminate between those two 20 groups.</p> <p>21 But it does not say that you need to allow 22 disabled, developmentally challenged persons to have --</p>	<p style="text-align: right;">Page 32</p> <p>1 that you shall treat people with disabilities and 2 intellectual disability the same if they're in a 3 residential facility.</p> <p>4 But if does not go further to say, as the zoning 5 administrator has essentially said in this case, by the 6 way, if they -- if an operator of a home wants to come 7 in and operate a commercial use, things that traditional 8 families can't do, having patients for short periods of 9 time, treating them, therapists, staff members coming in 10 and out, stress on the septic system, that kind of 11 thing.</p> <p>12 Because not only because of the residents, but 13 because of the people attending the residents and 14 treating the residents, that is not in the code. And 15 it's nowhere in the General Assembly.</p> <p>16 And as I argued to the Court last time, it's not 17 -- it's also not in the federal case law that talks 18 about the Federal Fair Housing Act upon which 2291 was 19 based.</p> <p>20 But that's our basic point with respect to the 21 substantive issue, that the zoning administrator just 22 got it wrong in saying that all you have to do is have</p>

<p style="text-align: right;">Page 33</p> <p>1 eight persons who are mentally disabled in a facility 2 that looks like a house from the outside, regardless of 3 what's going on inside, and you are -- you're eligible 4 to be treated the same way as a traditional family. 5 We think that's wrong both through a strict 6 construction or a plain reading of the language. 7 But also when you back up and you look at it 8 from a common sense point of view, the General Assembly 9 wanted to usurp the whole idea that local governments 10 get to determine what residential uses are would have 11 said so. 12 They said just the opposite. Because if you 13 look in the language of this 15.2-2291, you will see 14 nowhere is the word commercial use there. 15 You will see the word residential use 16 repeatedly, over and over and over again. 17 And again, the operative language of the statute 18 is no conditions more restrictive than those imposed on 19 residences occupied by persons related by blood, 20 marriage or adoption shall be imposed on any such 21 facility. 22 Loudoun County hasn't done that.</p>	<p style="text-align: right;">Page 35</p> <p>1 And Loudoun County has a lot of trouble with 2 septic systems. 3 So to put a commercial use in a not only 4 residential zone, but an agricultural, rural residential 5 zone where the septic system is about to be -- may very 6 well be over capacitated is a practical -- practical 7 illustration, I would say, to our point -- our legal 8 point. 9 Our legal point is that, again, commercial uses 10 were not intended to be allowed in residential zones 11 that the local government has determined to be 12 residential zones. 13 And if you recall my argument from before, I 14 handed up the AR-1 district. And it talks about the 15 policies and the purposes of the AR-1 zone, which again 16 is to promote rural economies, rural agricultural 17 economies and low density residential development. 18 And that's why you see those acreages of 3 to 5 19 acres, and even the farm less ordinary next door is 17 20 acres. 21 So it puts a commercial use right in the middle 22 of all of that, what is a practical problem and also in</p>
<p style="text-align: right;">Page 34</p> <p>1 But yet, the zoning administrator wants to go 2 further and say that the operators of these commercial 3 facilities, that she, herself, has determined to be 4 commercial by finding them to be congregate housing 5 facilities somehow have a superior right to engage in 6 commercial uses where traditional families could not. 7 And we see that playing out right now in 8 practical ways with the stress on the septic system that 9 the health department is evaluating as we speak. 10 If you look at that picture, Your Honor, that 11 I've handed up, you will see -- it's hard to see because 12 it's two dimensional. But there is a property line 13 between -- in the back between the Kozikowskis and the 14 Palmers and the facility in yellow. And right along 15 that property line runs a stream. There's a little 16 bridge right there. And that's also in the materials. 17 There is significant concern about the effluent 18 from these septic systems running into the streams and 19 also running into the neighbors' yards. 20 Because frankly, as the Court might appreciate, 21 the soils in Loudoun County aren't so good. They're 22 rocky soils. They're not so good.</p>	<p style="text-align: right;">Page 36</p> <p>1 direct contradiction to the code sections that I have 2 talked about. 3 I believe that's all I have for now, Your Honor, 4 unless the Court has other questions. 5 THE COURT: No. Thank you. 6 MR. HAMPSHIRE: Thank you very much. 7 Oh, I'm sorry, Mr. Bartolomucci has a few words, 8 if Your Honor please, co-counsel. 9 MR. BARTOLOMUCCI: Thank you, Your Honor, I am 10 Chris Bartolomucci for the petitioner. And I will be 11 very brief. 12 But I did want to raise and reiterate our legal 13 argument that the 2291 statute does not apply here as a 14 matter of law. 15 Because those folks who come to the Newport 16 facility for treatment are not residents. 17 The 2291 statute uses the words residents twice. 18 It applies to a residential facility in which up to 19 eight people with mental illness reside. 20 So if they're not residents, they can't take 21 advantage of that statute. 22 And what Newport operates are short-term</p>

<p style="text-align: right;">Page 37</p> <p>1 treatment centers. These are not residences. 2 And the folks who stay in them do so 3 temporarily. 4 Newport patients are just that, they're 5 patients. You might call them a visitor or a guest, but 6 they're not Loudoun County residents. 7 Now, at the prior hearing, I cited to Your Honor 8 Black's Law Dictionary from the Fifth Edition of 9 residents -- of resident -- the word resident. 10 And with the Court's indulgence, I will repeat 11 that. 12 And the definition says that a resident is 13 someone who is intent to remain in the location is, 14 quote, something other than merely transitory in nature, 15 end quote -- something other than merely transitory in 16 nature. 17 And that -- that's the very definition of a 18 Newport patient. They're someone who is at the 19 treatment center on a transitory, temporary basis. 20 When their insurance runs out, they have to go 21 home. They have to go back to wherever they came from 22 before they came to treatment at Newport.</p>	<p style="text-align: right;">Page 39</p> <p>1 probably right, Your Honor. But that's my sufficient 2 view today. 3 THE COURT: This is just so well lawyered and so 4 well analyzed, so detailed, I think the appellate courts 5 would welcome this kind of test to the elegant names. 6 MR. BARTOLOMUCCI: Well, Your Honor, as an 7 appellate lawyer, I was told the -- that the first rule 8 of appellate practice is win below. 9 So we hope Your Honor will see fit to agree with 10 us on the 2291 issue. 11 THE COURT: Thank you. 12 MR. BARTOLOMUCCI: Thank you. 13 THE COURT: Good morning. 14 MR. LAWRENCE: Good morning, Your Honor. 15 Nicholas Lawrence. I represent the Board of 16 Supervisors. 17 Your Honor, there is a whole lot that's been 18 said in the last 40 minutes that is not in the record 19 and which may or may not be correct. 20 I would submit that the Court's review, first 21 and foremost, is limited to what's in the record. 22 So Mr. Hampshire's comments about soil quality,</p>
<p style="text-align: right;">Page 38</p> <p>1 So the Newport standards are more like a 2 hospital or a hotel. 3 And the fact is their stay is temporary or 4 transitory. 5 If 2291 doesn't apply, then Loudoun County's 6 congregate housing rule has to govern here, and that 7 makes this use forbidden. 8 So this is -- 9 THE COURT: Say that again. 10 MR. BARTOLOMUCCI: Yeah. If 2291 does not apply 11 to the Newport facilities, then Loudoun's congregate 12 housing rule within its zoning code does apply. And 13 that make these centers forbidden. 14 So if they don't win on 2291, they lose this 15 case. 16 So this is an issue I hope Your Honor will pay 17 attention to, because it's a clean way to resolve the 18 whole case. 19 And this will certainly be an issue on appeal if 20 there is one following Your Honor's -- 21 THE COURT: There's going to be one. 22 MR. BARTOLOMUCCI: You think so? You're</p>	<p style="text-align: right;">Page 40</p> <p>1 pollution, none of that is in the BZA record. 2 Nobody was given any notice that that would be 3 raised or addressed today. They called nobody. Nobody 4 has been cross examined. Those are simply assertions of 5 counsel. 6 The County's interest, Your Honor, is in having 7 a regulatory process that is allowed to function. 8 Now, our process is not perfect. But it's going 9 to be a whole lot worse if we've got private entities 10 coming in at the wrong point in the process and 11 convincing the Court to make decisions that are not yet 12 ready to be made. 13 And so our point, first and foremost, is that 14 this -- this decision by the BZA that the matter was not 15 appealable is correct. It's correct because the letter 16 Michelle Lohr sent to Newport's counsel was advisory. 17 Mr. Hampshire started his presentation by 18 walking you through some of the provisions of the zoning 19 ordinance. 20 And he started with the provision that allows -- 21 or purports to allow the zoning administrator to issue 22 binding opinions in response to letters from private</p>

<p style="text-align: right;">Page 41</p> <p>1 landowners. That's Section 4-01.</p> <p>2       What I hope the Court understands is that their</p> <p>3 argument about supremacy is exactly backwards.</p> <p>4       They're suggesting to you that the County is</p> <p>5 trying to avoid judicial review and that the County is</p> <p>6 trying to cheat them out of their day in court. That is</p> <p>7 not correct.</p> <p>8       We were absolutely crystal clear. My colleague,</p> <p>9 who handled this matter before the Board of Zoning</p> <p>10 Appeals, was absolutely crystal clear.</p> <p>11       And if you look at the closing pages of the</p> <p>12 transcript of the BZA hearing, everybody was absolutely</p> <p>13 clear. If a permit is issued, they can appeal it.</p> <p>14       But they have to wait until the permit is</p> <p>15 issued. They can't appeal the advisory opinion issued</p> <p>16 by Ms. Lohr.</p> <p>17       They point at the language in the ordinance and</p> <p>18 they point to language in the letter that suggests that</p> <p>19 it is appealable.</p> <p>20       And I'd like to make sure the Court understands</p> <p>21 the County's position on that.</p> <p>22       This ordinance was enacted in 1993 -- 1993. It</p>	<p style="text-align: right;">Page 43</p> <p>1       And then they considered the Rhodes case in</p> <p>2 2018.</p> <p>3       All of these address the concept of finality and</p> <p>4 the concept of appealability as it relates to things</p> <p>5 that the zoning administrator does. Just like courts do</p> <p>6 lots of things, the zoning administrator does lots of</p> <p>7 things.</p> <p>8       But just because you do it doesn't mean it's</p> <p>9 appealable.</p> <p>10       And just because the zoning administrator does</p> <p>11 it doesn't mean it's immediately appealable.</p> <p>12       Just like I have to wait for you to issue a</p> <p>13 final order before I can run to the Court of Appeals,</p> <p>14 they have to wait, and they have to wait for the zoning</p> <p>15 administrator to make a final decision.</p> <p>16       And the Supreme Court has told us in Vulcan, in</p> <p>17 Crucible, in Lilly and in Rhodes what a final decision</p> <p>18 looks like. It's one that affects a substantial</p> <p>19 property right. It's one that grants or denies a right.</p> <p>20       And so when you look at that letter, it tells</p> <p>21 them what the zoning administrator thinks of their</p> <p>22 described use. But it does not grant them the right.</p>
<p style="text-align: right;">Page 42</p> <p>1 was based on the County's understanding of the enabling</p> <p>2 legislation.</p> <p>3       In particular, if you look at 15.2-2314, that is</p> <p>4 the code section that gives this Court the authority to</p> <p>5 review a decision by the BZA.</p> <p>6       If you look at 15.2-2209 and 15.2-2211, those</p> <p>7 are the code sections that give the BZA, first of all,</p> <p>8 its existence, and second of all, its authority to</p> <p>9 review decisions by the zoning administrator.</p> <p>10       Now, I wasn't here then, Judge. But this is</p> <p>11 what I think happened.</p> <p>12       In 1993, the zoning ordinance was adopted. And</p> <p>13 it has this expansive authority for the administrator.</p> <p>14 He's allowed to issue binding decisions, and those can</p> <p>15 be appealed to the BZA.</p> <p>16       And then in 1994, the Supreme Court of Virginia</p> <p>17 considered the Vulcan case. In 1994, the next year,</p> <p>18 after our ordinance was adopted, they considered the</p> <p>19 Vulcan case.</p> <p>20       And then they considered the Lilly case in 2000.</p> <p>21       And then they considered the Crucible case in</p> <p>22 2009.</p>	<p style="text-align: right;">Page 44</p> <p>1 That comes with the zoning permit.</p> <p>2       Mr. Hampshire has made a lot of comments about</p> <p>3 zoning permits and how they work in other cases he's had</p> <p>4 in other jurisdictions, just as he's made comments about</p> <p>5 what Fairfax County thought about a different</p> <p>6 application by Newport under its ordinance.</p> <p>7       I submit to Your Honor we need to stay focused</p> <p>8 on the Loudoun County ordinance and this proposal.</p> <p>9 Because I don't know what happened in this case.</p> <p>10       That case is not anything I was involved in.</p> <p>11 It's not anything where the papers are here before the</p> <p>12 Court for review.</p> <p>13       It's another one of those comments that's not in</p> <p>14 the record, it's not in evidence. It's just being</p> <p>15 asserted. And while certainly that is within the bounds</p> <p>16 of advocacy, I'd submit it's not something the Court</p> <p>17 ought to rely on.</p> <p>18       When we look at the Loudoun County ordinance --</p> <p>19 this is the handout Mr. Hampshire handed up for you. It</p> <p>20 starts at 6-1000. 1000, 1001, 1002. 1002 is very</p> <p>21 important to us.</p> <p>22       No zoning permit shall be issued where the</p>

<p style="text-align: right;">Page 45</p> <p>1 structure to be constructed or the use contemplated 2 would be in violation of the provisions of this 3 ordinance or any other applicable county law, ordinance 4 or regulation. 5 Mr. Hampshire has told you all these other 6 things come later. All these other things are dealt 7 with later. 8 Well, maybe they are in other jurisdictions. 9 But in Loudoun County, the way our ordinance is 10 designed, the way it's structured, the zoning permit is 11 really, really key. 12 We don't issue the zoning permit until the 13 application has been through review by other agencies. 14 In this case, the application is being reviewed 15 by the health department with respect to the septic. 16 That review is under way. 17 Regardless of what the zoning administrator 18 thinks of the proposal's compliance with the zoning 19 ordinance, the permit cannot be issued until it clears 20 the health department. 21 And if we have a larger development that would 22 affect traffic, it wouldn't be able to be issued until</p>	<p style="text-align: right;">Page 47</p> <p>1 Because this issue of finality, this issue of whether 2 it's appealable is a serious issue. We've got multiple 3 Supreme Court cases out there that say it's not 4 appealable unless it's final. And -- 5 THE COURT: Final in the sense of the zoning 6 permit being issued? 7 MR. LAWRENCE: Well, that's what we think. 8 That's what we think those cases stand for. 9 THE COURT: Right. 10 MR. LAWRENCE: They have a different view. But 11 that's what we think those cases stand for. 12 We think judicial review -- of course, they're 13 entitled to judicial review. But they have to wait 14 until the administrator is done. 15 And the reason I say common sense, Judge, is 16 what are we going to do? We're going to go down to 17 Richmond and be standing in the Supreme Court of 18 Virginia and have one of the justices look at us and say 19 where was the authority under 2314 for this to be 20 appealed at all. 21 Where is the trial court -- or in this case, 22 you're sitting as an appellate court. Where is the</p>
<p style="text-align: right;">Page 46</p> <p>1 it cleared review by VDOT. 2 And if it had a need for municipal water 3 service, it wouldn't be issued until it cleared review 4 by either Loudoun Water or the Town of Leesburg, 5 depending where in the county it would be located. 6 It will affect the County. It will affect our 7 administration of this issue if the Court issues an 8 order directing the zoning administrator to grant this 9 permit. Because the review that's required -- 10 THE COURT: Just a second. 11 MR. LAWRENCE: Yes, sir. 12 THE COURT: Can the Court order the zoning 13 administrator to grant the permit? 14 MR. LAWRENCE: If the Court were to do that. 15 That's what I think Mr. Wilburn would like to see you 16 do. 17 THE COURT: Okay. Go ahead. 18 MR. LAWRENCE: They would like you to order not 19 to grant it. 20 THE COURT: I understand. 21 MR. LAWRENCE: Now, my concern, if you enter 22 that order is judicial economy and common sense.</p>	<p style="text-align: right;">Page 48</p> <p>1 circuit court's authority to review this matter where 2 the administrator hasn't acted and then, you know, if 3 you come back down here for the administrator to do what 4 he should do before the appeal starts? 5 So if you take nothing else from my comments 6 here today, Judge, I would ask you to consider waiting 7 until the permit -- 8 THE COURT: What kind of order would be issued 9 that would grant your wish? 10 MR. LAWRENCE: Your Honor, I --I would ask for 11 what we've asked in the brief, which is enter an order 12 saying the BZA was correct, this letter that the 13 administrator issued is advisory only. It's not 14 binding. Because that's a -- that's a legal 15 determination, whether it's binding or not. 16 And the parties have the right -- 17 THE COURT: Did you -- did you just ask me to 18 say that judicially, the wording in it is correct? I 19 think you're asking me to say it's not final. 20 MR. LAWRENCE: Correct. 21 THE COURT: They're two different things. But I 22 hear you. Go ahead.</p>

<p style="text-align: right;">Page 49</p> <p>1 MR. LAWRENCE: It's not final. It's not 2 appealable. 3 THE COURT: But the content need not be right or 4 wrong in the view of the Court? 5 MR. LAWRENCE: Correct. That's right. 6 THE COURT: Okay. 7 MR. LAWRENCE: Now, the application -- this is 8 what I've been provided by the County staff. 9 The application for the permit was filed or, at 10 least according to the stamp, received by the County on 11 October 17. It's under review. 12 I'm not in a position to tell the Court when it 13 will be acted on. 14 Because the review, particularly the Health 15 Department's assessment of the septic situation is 16 ongoing. 17 And I've been absolutely scrupulous, Judge, to 18 make sure that nobody feels like they ought to rush it. 19 Nobody feels like they ought to delay it. 20 They ought to take the time that they need as 21 professionals to evaluate whatever is out there and 22 determine what issues may or may not exist.</p>	<p style="text-align: right;">Page 51</p> <p>1 does the eight and five mean? 2 MR. LAWRENCE: Patients. 3 THE COURT: Okay. 4 MR. LAWRENCE: Patients. If you look at the 5 last page of that application document I handed up, 6 right here, it says bed capacity, five. 7 THE COURT: Okay. 8 MR. LAWRENCE: They wanted eight. The state 9 gave them five. 10 I don't know what our Health Department is going 11 to do. 12 But I know that they've been looking at that 13 since the state made whatever inquiry they made during 14 the licensing process. 15 So I do not expect it's going to be, you know, 16 some enormously lengthy review period. 17 I would submit that this may be a case where you 18 stay it. You wait, you know, and see what the 19 administrator does. 20 And then if they want to appeal, they can 21 appeal. If they want to appeal, they can appeal. And 22 then the appeals could be consolidated.</p>
<p style="text-align: right;">Page 50</p> <p>1 But the review is under way. And I can tell you 2 I would be surprised if it takes very much longer. 3 THE COURT: Can you venture a guess as to the 4 probable issuance time? 5 MR. LAWRENCE: Judge, I wouldn't have been 6 surprised if it came on Friday. I wouldn't be surprised 7 if I walk back and find that they made a decision today 8 while I'm standing here. 9 It's not -- and the reason why I say that is 10 because when they applied for their state license, the 11 State Licensing Board contacted the Health Department 12 and asked for information about the septic. 13 And if you look at the license that they 14 received, it's not what they asked for. They asked for 15 a license for eight. They got a license for five. 16 And it's my understanding that's because of the 17 septic issue -- because of the state's assessment of the 18 septic issue. 19 THE COURT: Eight people -- or five people, is 20 that what you're saying? 21 MR. LAWRENCE: Your Honor, if you look at -- 22 THE COURT: Eight versus five people -- what</p>	<p style="text-align: right;">Page 52</p> <p>1 Or, you know, our position as to what is -- what 2 is correct is that you just rule that it's not 3 appealable, that the BZA made the correct determination, 4 and that appealable has to wait. 5 THE COURT: You got the net result the same in 6 those two choices, don't you? 7 MR. LAWRENCE: I think you do. 8 THE COURT: If I say it's not appealable, I 9 would issue a nondecision, I guess. 10 MR. LAWRENCE: Well, you'd issue a decision as 11 to appealability. You would affirm the ruling of the 12 BZA. 13 THE COURT: How would that be worded -- how 14 would that be worded? Would I just say I dismiss this 15 as premature or would it say I stay it until it's 16 mature? What would be the wording? 17 MR. LAWRENCE: So under 2214, your options are 18 to affirm, modify or reverse. And so it's -- 19 THE COURT: If it's premature, how am I supposed 20 to do any of the three? 21 MR. LAWRENCE: Well, that's what the BZA found. 22 So I think you can just say the BZA's</p>

<p style="text-align: right;">Page 53</p> <p>1 determination is affirmed, and it's dismissed, period.</p> <p>2 THE COURT: How can I affirm that if you're</p> <p>3 telling me I have no jurisdiction?</p> <p>4 MR. LAWRENCE: Well, I'm telling you it's not</p> <p>5 appealable. It's not a final order.</p> <p>6 THE COURT: I hear you saying it's not</p> <p>7 justiciable at this time.</p> <p>8 The Court has no business dealing with it.</p> <p>9 Why would I, therefore, rule that and then go</p> <p>10 ahead and make a ruling as to the content of previous</p> <p>11 acts?</p> <p>12 MR. LAWRENCE: Because you're being asked to</p> <p>13 review the decision of the BZA. You're sitting in an</p> <p>14 appellate capacity.</p> <p>15 And so the ruling has been appealed to you. It</p> <p>16 is their determination that it's not appealable because</p> <p>17 the letter is not a final decision.</p> <p>18 THE COURT: Help me get out of my little</p> <p>19 cul-de-sac here. I'm thinking about the power of the</p> <p>20 Court.</p> <p>21 Number one, it seems to me it's unclear when you</p> <p>22 argue the Court can't review it, it's not justiciable,</p>	<p style="text-align: right;">Page 55</p> <p>1 MR. LAWRENCE: Correct. And I'm asking you to</p> <p>2 let the administrator make the decision first.</p> <p>3 And then they can take that argument up in the</p> <p>4 context of a final decision of a -- of an unquestionably</p> <p>5 appealable decision as opposed to in the context of this</p> <p>6 case where we think it's very clear that you cannot</p> <p>7 reach the question, because the administrator has not</p> <p>8 yet ruled.</p> <p>9 I'd point you to the "Aragoss" case that we</p> <p>10 cited in our brief.</p> <p>11 THE COURT: I can tell you right now -- the</p> <p>12 questions may have already suggested it to you. I would</p> <p>13 have to be educated a bit further as to how, if I agree</p> <p>14 with you, that it's premature, that I go back,</p> <p>15 nonetheless, to a pre-existing thing and rule. I don't</p> <p>16 understand that linkage.</p> <p>17 MR. LAWRENCE: Okay. So if your -- if Your</p> <p>18 Honor makes a ruling in this case, you determine that</p> <p>19 you do not have authority under the statute to reach the</p> <p>20 merits of the question, and you enter a final order,</p> <p>21 they can appeal that.</p> <p>22 And the Court of Appeals would have the</p>
<p style="text-align: right;">Page 54</p> <p>1 you can't appeal it.</p> <p>2 Number 2, you're saying you're sort of capable</p> <p>3 of taking partial jurisdiction and, by the way, saying</p> <p>4 we've got it right so far.</p> <p>5 MR. LAWRENCE: So two things, Judge.</p> <p>6 The Court always has jurisdiction to determine</p> <p>7 its own jurisdiction. And so that's -- that's akin to</p> <p>8 what I'm suggesting.</p> <p>9 You certainly have authority to review what the</p> <p>10 BZA did and determine whether you have the authority --</p> <p>11 whether the merits of the question is justiciable,</p> <p>12 whether, as they want you to order -- they want you to</p> <p>13 rule 2291 does not apply. They'd like you to rule that</p> <p>14 2291 does apply.</p> <p>15 In our view --</p> <p>16 THE COURT: Which would be decisive as to the</p> <p>17 effort to put this residential treatment center in play.</p> <p>18 MR. LAWRENCE: I'm sorry, Your Honor. I missed</p> <p>19 the first part of that.</p> <p>20 THE COURT: As you just stated, their request is</p> <p>21 they're asking me to affirmatively rule on the validity</p> <p>22 of their arguments.</p>	<p style="text-align: right;">Page 56</p> <p>1 authority to review and determine whether you're correct</p> <p>2 as to the scope of your authority.</p> <p>3 And what I'm suggesting is it's the same</p> <p>4 situation with the Board of Zoning Appeals.</p> <p>5 You sit here in an appellate capacity, and</p> <p>6 you're reviewing the decision by the Board of Zoning</p> <p>7 Appeals.</p> <p>8 They decided -- they ruled that consideration of</p> <p>9 the merits of the appeal was not within their authority</p> <p>10 under 15.2-2309 and 15.2-2311.</p> <p>11 Your review, I'm suggesting, should be limited</p> <p>12 to whether they were correct.</p> <p>13 And if they were correct that this -- this</p> <p>14 letter by Michelle Lohr could not be appealed to them</p> <p>15 because it's not a final decision, then you certainly</p> <p>16 have authority to affirm that, just that.</p> <p>17 THE COURT: I get that as two distinctly</p> <p>18 different things from a judge standpoint.</p> <p>19 One is adjudicating the merits, and two, it is</p> <p>20 adjudicating on timeliness. I hear two different</p> <p>21 things.</p> <p>22 MR. LAWRENCE: Correct. I agree. They are very</p>

<p style="text-align: right;">Page 57</p> <p>1 different things.</p> <p>2 We're asking you to rule on the timeliness</p> <p>3 issue.</p> <p>4 We're asking you not to rule on the substance --</p> <p>5 on the merits.</p> <p>6 THE COURT: I just heard you for the last ten</p> <p>7 minutes urging me to find that the statements made by</p> <p>8 the County so far are correct.</p> <p>9 That's what -- I may have been misunderstanding</p> <p>10 what you're telling me.</p> <p>11 MR. LAWRENCE: No. I'm asking you to rule that</p> <p>12 this letter is advisory and not --</p> <p>13 THE COURT: The nature of it being advisory is</p> <p>14 different than the advice that it's having --</p> <p>15 MR. LAWRENCE: Correct. And if you -- if you</p> <p>16 decide that I'm wrong, that this is not advisory, that</p> <p>17 it is, indeed, binding, then we have a position on the</p> <p>18 merits.</p> <p>19 But I have not gotten to that yet.</p> <p>20 THE COURT: Go ahead.</p> <p>21 MR. LAWRENCE: All right. The other thing I</p> <p>22 want to touch on, Your Honor, this discussion of the</p>	<p style="text-align: right;">Page 59</p> <p>1 Commission or the Board of Supervisors.</p> <p>2 The other point I'd like to make, Your Honor,</p> <p>3 their position really is asking you to find that the</p> <p>4 administrator is supposed to look behind the decision by</p> <p>5 the State Licensing Board, right.</p> <p>6 And here, I'm turning a little bit to our</p> <p>7 position on the merits, if you think it's appropriate to</p> <p>8 reach that.</p> <p>9 The statute, which is set out in our brief --</p> <p>10 and, of course, Your Honor has a copy -- 15.2-2291. And</p> <p>11 it's Subsection A that applies here.</p> <p>12 It says as follows: Zoning ordinances for all</p> <p>13 purposes shall consider a residential facility in which</p> <p>14 no more than eight individuals with mental illness,</p> <p>15 intellectual disability or developmental disabilities</p> <p>16 reside as residential occupancy by a single family.</p> <p>17 For purposes of this section, they rule out drug</p> <p>18 addiction.</p> <p>19 And then the last sentence is very important.</p> <p>20 For purposes of this subsection, quote, residential</p> <p>21 facility, closed quote, means any group home or other</p> <p>22 residential facility for which the Department of</p>
<p style="text-align: right;">Page 58</p> <p>1 nature of the review being done by the County.</p> <p>2 Mr. Hampshire has said repeatedly it's</p> <p>3 administrative. He's using that word in a manner that I</p> <p>4 think he assumes its a rubber stamp. In other words,</p> <p>5 you file the application, you pay the fee, and you get</p> <p>6 the permit.</p> <p>7 That's not what administrative means. And</p> <p>8 that's not what we have admitted to in our answers.</p> <p>9 We agree it's administrative. It's not</p> <p>10 legislative.</p> <p>11 That is the Planning Commission and the Board of</p> <p>12 Supervisors do not have a role here in considering the</p> <p>13 application and deciding as a legislative body whether</p> <p>14 they're going to allow the use or not, as they might for</p> <p>15 a request for rezoning or as they might for a request</p> <p>16 for special exception.</p> <p>17 Administrative just mean it's being done by a</p> <p>18 professional zoning staff in the County. It doesn't</p> <p>19 mean it's going to be granted. It doesn't mean it's</p> <p>20 going to be denied.</p> <p>21 It just means it's going to be done by the</p> <p>22 professionals, the planning staff, not by the Planning</p>	<p style="text-align: right;">Page 60</p> <p>1 Behavioral Health and Developmental Services is the</p> <p>2 licensing authority under the code.</p> <p>3 And so they're arguing to you -- and I don't --</p> <p>4 I don't dispute that these arguments could have merit,</p> <p>5 right.</p> <p>6 They argue this commercial versus residential</p> <p>7 distinction. And they say 2291 is not intended to apply</p> <p>8 to a commercial use like Newport's.</p> <p>9 Now, the County's view is that's not the most</p> <p>10 natural reading of the statute, because they're</p> <p>11 essentially inserting the word commercial in the</p> <p>12 statute.</p> <p>13 And as you know, courts don't rewrite statutes.</p> <p>14 That's up to the legislature.</p> <p>15 However, it's an argument that certainly is not</p> <p>16 frivolous.</p> <p>17 My point, Your Honor, is that's an issue for the</p> <p>18 state.</p> <p>19 We're instructed to treat as a residential</p> <p>20 facility any group home or other facility for which the</p> <p>21 state has issued that license. That's our instruction.</p> <p>22 THE COURT: Where in this decision process,</p>

<p style="text-align: right;">Page 61</p> <p>1 getting through the state decision is the zoning 2 administrator's decision? 3 MR. LAWRENCE: Our position, Your Honor, is that 4 the state has to issue the license before the zoning 5 administrator will consider the application. 6 THE COURT: So that's a procedure -- procedural 7 requirement? 8 MR. LAWRENCE: Correct. And that's -- that's 9 essentially what this letter from Michelle Lohr said is 10 you have to get the state license, and then you have to 11 submit the zoning permit application. And that's where 12 we are in the process. 13 They've got the license. The application has 14 been submitted. The administrator has not yet made his 15 decision. 16 But I would submit to you that if you accept 17 their arguments on the merits that this does not apply 18 to commercial facilities, then the zoning administrator 19 is being -- the local zoning administrator -- the County 20 zoning administrator is being put in the position where 21 he would be second guessing or evaluating the licensing 22 decision of the commonwealth. And --</p>	<p style="text-align: right;">Page 63</p> <p>1 the County issues a zoning permit. 2 MR. LAWRENCE: Your Honor, I don't mean to be -- 3 perhaps I am misunderstanding you. But we believe the 4 two are one in the same. 5 The BZA determined that it did not have 6 jurisdiction because there's no final decision on a 7 permit. 8 We're just asking you to rule that they were 9 correct on that determination at that point. 10 It doesn't prevent them from appealing on the 11 merits later once the decision has been made. 12 THE COURT: Okay. 13 MR. LAWRENCE: We don't see any daylight between 14 what you're asking us to do and what the BZA has already 15 done. 16 The BZA did not go any further and express any 17 position on whether this facility should be allowed in 18 this -- in this neighborhood. 19 THE COURT: Why then have I heard arguments that 20 I lack jurisdiction? 21 MR. LAWRENCE: Because we think it's not a final 22 order.</p>
<p style="text-align: right;">Page 62</p> <p>1 THE COURT: I'm recalling the thought processes 2 I applied when you folks posed these various debate 3 points to me. And that was almost deferring one key 4 issue, and that was a state agency decision. 5 I'm hearing now a state agency factor that I'm 6 supposed to consider when I said that decision might or 7 might not help me make my decision as to the merits 8 before us. 9 MR. LAWRENCE: Correct. 10 THE COURT: I'm asking you now if I'm not armed 11 with justiciable facts mature enough for a decision by 12 this Court, why am I reaching into the future on that on 13 a decision that hasn't come to me? I hoped it would, 14 but it hasn't. 15 MR. LAWRENCE: I don't think you should. 16 That's why I think that you should affirm the 17 BZA's determination that it's not yet ripe. 18 THE COURT: You keep wanting me to say that I am 19 going to affirm as valid and legally compelling the 20 documents issued so far within the County's work. 21 You're also asking me -- and we've covered this 22 several times -- to find I don't have jurisdiction until</p>	<p style="text-align: right;">Page 64</p> <p>1 We think you have to have a final order before 2 you would have jurisdiction to go on and determine the 3 merits. 4 THE COURT: And the letter opinion is not a 5 final order in this? 6 MR. LAWRENCE: Correct. That's what the BZA 7 determined. 8 And we're just asking you to affirm that the BZA 9 is correct and that the -- the entire question has to 10 wait for the administrator's determination that the 11 permit should either be issued or not. 12 THE COURT: Hypothetically, a judge sitting here 13 today could rule that the letter opinion is legally 14 correct. And would the zoning administrator then say 15 no, it's not, I disagree? 16 Why wouldn't be that be the power of the zoning 17 administrator to say the judge is wrong? 18 MR. LAWRENCE: Well, I think that's -- I'm not 19 going to say whether it's likely or not likely in this 20 case. 21 THE COURT: No. I don't know the betting on 22 that.</p>

<p style="text-align: right;">Page 65</p> <p>1 MR. LAWRENCE: Right.</p> <p>2 THE COURT: But I'm asking you intellectually,</p> <p>3 how do I, you know, legally rule the validity of the</p> <p>4 existing letter when it still awaits, in one of your key</p> <p>5 arguments --</p> <p>6 MR. LAWRENCE: Correct.</p> <p>7 THE COURT: -- a finality of the decision by the</p> <p>8 zoning administrator?</p> <p>9 MR. LAWRENCE: Correct. Correct. So</p> <p>10 hypothetically, if they were to come in tomorrow and</p> <p>11 tell the zoning administrator we'd like to amend this</p> <p>12 application, we'd like to add new facts or different</p> <p>13 facts or change something about the application, he</p> <p>14 would have to consider that.</p> <p>15 And those would be issues that wouldn't be</p> <p>16 before the Court.</p> <p>17 And so that's one of the reasons why we don't</p> <p>18 think it's yet appealable.</p> <p>19 We don't think it can be appealed until the</p> <p>20 administrator makes a final decision that either grants</p> <p>21 them a property right or denies them a property right.</p> <p>22 Up until that point, it's just -- it's just an</p>	<p style="text-align: right;">Page 67</p> <p>1 MR. LAWRENCE: Okay. I'm not asking you to do</p> <p>2 that unless you rule -- so we've got a -- we have got an</p> <p>3 alternative situation here.</p> <p>4 I don't know how you're going to rule on my</p> <p>5 argument that this is advisory only.</p> <p>6 If you agree with that, I think the case is</p> <p>7 over, and we await the administrator's determination.</p> <p>8 And then everybody can appeal that.</p> <p>9 If you disagree with me, then we do have a</p> <p>10 position on the merits of what she stated here. And I</p> <p>11 would defend her analysis.</p> <p>12 THE COURT: Okay.</p> <p>13 MR. LAWRENCE: Okay.</p> <p>14 THE COURT: Yes.</p> <p>15 MR. LAWRENCE: The BZA, in our view, simply</p> <p>16 affirmed that in its opinion, this is advisory.</p> <p>17 They didn't reach the merits. They didn't say</p> <p>18 whether she was correct or incorrect. They just said it</p> <p>19 was advisory and that the decision had to wait for a</p> <p>20 ruling on the permit.</p> <p>21 And so that's why when I say affirm the decision</p> <p>22 by the BZA, that's what I'm asking you to affirm, their</p>
<p style="text-align: right;">Page 66</p> <p>1 opinion. It's just an advisory opinion, which zoning</p> <p>2 administrators can give, and courts are prohibited from</p> <p>3 constitutionally.</p> <p>4 THE COURT: Are you arguing that I should find</p> <p>5 the legal correctness of the existing opinion so that</p> <p>6 your adversary has an opportunity to appeal?</p> <p>7 MR. LAWRENCE: No. I am --</p> <p>8 THE COURT: I heard something like that earlier.</p> <p>9 MR. LAWRENCE: Just so we're clear on what</p> <p>10 we're -- what we're talking about, Judge, Exhibit A to</p> <p>11 our brief -- and I believe it's Exhibit A to the</p> <p>12 petition -- is the November 29, 2021, letter from the</p> <p>13 deputy administrator.</p> <p>14 We're asking you to rule that that opinion is</p> <p>15 advisory only, and that because it's advisory only, it's</p> <p>16 not appropriate to reach the merits of what's in it.</p> <p>17 THE COURT: That part is utterly clear to me</p> <p>18 that you're asking me that.</p> <p>19 MR. LAWRENCE: Okay.</p> <p>20 THE COURT: When you put a second part to it</p> <p>21 that I should go ahead and say it's legally correct,</p> <p>22 that seems very different as a judicial outcome.</p>	<p style="text-align: right;">Page 68</p> <p>1 conclusion that this was advisory only, it was not final</p> <p>2 or appealable.</p> <p>3 THE COURT: Thank you.</p> <p>4 MR. LAWRENCE: Thank you, Your Honor.</p> <p>5 THE COURT: If counsel need a break, tell me.</p> <p>6 MR. WILBURN: I do not. But --</p> <p>7 THE COURT: I will defer to counsel. All right.</p> <p>8 Go ahead.</p> <p>9 MR. WILBURN: May it please the Court, Your</p> <p>10 Honor. My name is John Wilburn. I'm with McGuire</p> <p>11 Woods. I'm here on behalf of respondent, Monroe.</p> <p>12 With me today is also counsel for Monroe Michael</p> <p>13 Allen.</p> <p>14 Your Honor, when we last appeared before you,</p> <p>15 there were three issues before the Court that remain in</p> <p>16 front of the Court today.</p> <p>17 The first was one that you engaged with the</p> <p>18 County Attorney on, and Mr. Hampshire spoke about</p> <p>19 initially, and that is whether the zoning</p> <p>20 administrator's decision is appealable. That's issue</p> <p>21 one.</p> <p>22 Assuming that it is, we get to issues two and</p>

<p style="text-align: right;">Page 69</p> <p>1 three.</p> <p>2 Issue two is whether Newport qualifies as a</p> <p>3 residential facility. That's a term under 15.2-2291</p> <p>4 talking to are they a residential facility. And that's</p> <p>5 determined by whether you get a license by the</p> <p>6 Department of Health.</p> <p>7 And Your Honor deferred this case pending a</p> <p>8 decision on that, which we now have.</p> <p>9 The third issue is if we are licensed as a</p> <p>10 residential facility, which we now have been, does</p> <p>11 15.2-2291 allow us to operate in a residential district.</p> <p>12 The respondent -- I'm sorry, the petitioners</p> <p>13 have made two arguments today as to why that would not</p> <p>14 apply.</p> <p>15 The first is that commercial activity is not</p> <p>16 allowed. That's demonstrably wrong. And I'll explain</p> <p>17 why.</p> <p>18 The second is that these patients would not</p> <p>19 reside there within the meaning of the law.</p> <p>20 Their case is on point to this that demonstrate</p> <p>21 why that's incorrect.</p> <p>22 But I first want to take up this</p>	<p style="text-align: right;">Page 71</p> <p>1 affirm, you can reverse, you can modify the decision of</p> <p>2 the BZA.</p> <p>3 The BZA here said it was not an appealable</p> <p>4 decision.</p> <p>5 So there's no question that you have the</p> <p>6 authority, if you find that it was not appealable, to</p> <p>7 simply defer this to another date through some version</p> <p>8 of the order or if you think in the interest of judicial</p> <p>9 economy that it's sufficiently well developed, that the</p> <p>10 parties benefit from deciding it, you can modify it by</p> <p>11 turning to an issue on -- a decision on the merits.</p> <p>12 In fact, the Code and the Supreme Court have</p> <p>13 made clear that you have the ability to decide questions</p> <p>14 of law de novo.</p> <p>15 So in any event, regardless of what the BZA or</p> <p>16 the zoning administrator think on these positions is if</p> <p>17 it's a question of law, that's solely within this</p> <p>18 Court's authority to decide.</p> <p>19 And I believe -- I'm agreeing with my friend,</p> <p>20 Mr. Hampshire, that we want you to do that.</p> <p>21 At page 3 of the petitioner's brief, they say</p> <p>22 principles of judicial economy dictate, that the Court</p>
<p style="text-align: right;">Page 70</p> <p>1 procedural/substantive issue about whether the zoning</p> <p>2 administrator's decision was appealable. Because it</p> <p>3 drives, as Your Honor has properly detected -- I can</p> <p>4 tell from your questions -- it drives whether we need to</p> <p>5 get to the merits at all.</p> <p>6 On that issue, the petitioners take the position</p> <p>7 that it was an appealable decision.</p> <p>8 The County takes the position it was not</p> <p>9 appealable.</p> <p>10 Frankly, the respondents are agnostic on it. We</p> <p>11 want you to decide the issue.</p> <p>12 But the outcome, if you decide it's not</p> <p>13 appealable, is an order that would say some version of I</p> <p>14 make no decision on the merits, but this issue is not</p> <p>15 ripe or it's not appealable. It would be something that</p> <p>16 -- that defers the merits question until later.</p> <p>17 But the petitioners and we agree that there's a</p> <p>18 -- there's an option that would allow the Court to</p> <p>19 decide the merits nonetheless. And it's built right</p> <p>20 into the appellate code.</p> <p>21 And what the code that we're here on today</p> <p>22 allows the Court to do is to, in any event, you can</p>	<p style="text-align: right;">Page 72</p> <p>1 should exercise your discretion.</p> <p>2 I recognize that's discretion to address these</p> <p>3 issues on the merit rather than deferring it.</p> <p>4 THE COURT: That would -- that would mean I have</p> <p>5 -- you're saying I have jurisdiction, though.</p> <p>6 MR. WILBURN: Yes, Your Honor.</p> <p>7 Your Honor found previously you have</p> <p>8 jurisdiction to hear this matter.</p> <p>9 And as the County Attorney correctly points out,</p> <p>10 you always have jurisdiction to decide whether you have</p> <p>11 jurisdiction.</p> <p>12 But here, there's an initial decision where the</p> <p>13 Court can decide is it an appealable issue.</p> <p>14 And even if not -- even if not, you have the</p> <p>15 discretion under the statute -- petitioners agree with</p> <p>16 me on this -- it's their point to which I agree, that</p> <p>17 you can modify. You can get to the merits under the</p> <p>18 authority of the statute that allows you to modify what</p> <p>19 the BZA did and decides questions of law de novo.</p> <p>20 So we think -- we think you have the authority</p> <p>21 to dismiss the appeal as not being -- not being ripe,</p> <p>22 not being a final decision by the zoning administrator.</p>

<p style="text-align: right;">Page 73</p> <p>1 We think you also, though, have the discretion 2 under the statute to turn to the merits and decide this 3 issue for the parties. And we think you can do that on 4 this record. 5 And I'll turn to the merits unless Your Honor 6 has a question about that, whether the decision -- 7 THE COURT: No. Go ahead. 8 MR. WILBURN: On the merits, the first question 9 is whether Newport qualifies as a residential facility. 10 And this is important -- there's a case that the 11 petitioners have not cited, and it's an important case. 12 Because to my knowledge, it's the only Virginia Supreme 13 Court case that has addressed this statute. And the 14 predecessor statute is substantially the same. 15 In 1995, in a decision in Tribble against Bland, 16 it's at 250 Virginia, 20, the Virginia Supreme Court 17 held as follows: This section, referring to the statute 18 we're talking about today, provides that a group home in 19 which eight or less mentally ill -- there's some other 20 language, mentally retarded or other disabled person 21 residing -- that has been licensed by the Department of 22 Mental Health may not be excluded from residential</p>	<p style="text-align: right;">Page 75</p> <p>1 facility. That's a lot of the argument that you've 2 heard. 3 But that was decided by the Virginia Board of 4 Behavioral Health. 5 And we know that, because the last sentence the 6 operative statute says that that decision is made by the 7 Board of Health at the state level, not by anybody else, 8 not by the zoning administrator, the BZA or in the first 9 instance by the circuit court. 10 What the statute says is for the purposes of 11 this subsection, a residential facility -- and the 12 General Assembly put it in quotes -- means any group 13 home or other residential facility for which the 14 Department of Behavioral Health and Developmental 15 Services is the licensing authority. 16 And so Your Honor correctly, in my view, 17 adjourned our previous hearing because we had not yet 18 obtained the license. It was the license that -- 19 application had been made. 20 We have submitted to the Court the license was 21 issued on October 13th of this year. And notably, it 22 was issued by the Virginia Health operations -- the</p>
<p style="text-align: right;">Page 74</p> <p>1 districts by zoning ordinances. 2 And that's exactly what -- what the petitioners 3 are asking the Court to do. 4 They're asking you, on one theory or another, to 5 exclude our now licensed facility which will treat fewer 6 than eight residents with mental health issues -- to 7 exclude them from the residential zoning district. And 8 the law simply does not allow that. 9 The law on this, Your Honor, is plainly stated 10 in the statute of -- the very first sentence in 11 15.2-2291(A), the statute the Supreme Court was talking 12 about in the section that I just read from the Tribble 13 decision. 14 It provides zoning ordinances for all purposes 15 shall consider a residential facility in which no more 16 than eight individuals with mental illness reside with 17 one or more resident or nonresident staff person as 18 residential occupancy by a single family. 19 So if you are a residential facility, and you 20 have fewer than eight patients, the County has to treat 21 you as a residential occupancy by a single family. 22 So the question is are we a residential</p>	<p style="text-align: right;">Page 76</p> <p>1 entity that's described here. And we were licensed as a 2 mental health residential group home service for adults, 3 residential. 4 So the statute says if you get this license, you 5 are, in quotes in the statute, a residential facility. 6 And if you're a residential facility, then you 7 are treated as a single family residential occupancy for 8 all purposes. 9 So it's very clear that once you get that -- 10 once you get that license that you're a residential 11 facility, and you get the benefit of the statute. 12 In fact, Judge Bach -- there's another case. 13 It's not a Virginia Supreme Court case. But Judge Bach 14 in the Kaleidoscope decision recognized the process that 15 we're talking about exactly here. This is in Fairfax. 16 And what Judge Bach said in that case is as 17 follows: Both the Fairfax zoning ordinance and its 18 counterpart provision in the Virginia Code provide that 19 licensure of a residential facility by the Department of 20 Mental Health &amp; Mental Retardation and Substance Abuse, 21 DMH, brings the facility within the protection of the 22 statute.</p>

<p style="text-align: right;">Page 77</p> <p>1 And he was correct in reaching that conclusion. 2 He said logic dictates that the administrative 3 body with the most qualified personnel determine whether 4 or not facilities are eligible for group home status. 5 So what Judge Bach did there was mirror what the 6 Virginia Supreme Court said in Tribble, which is the 7 dispositive fact is not what the zoning administrator 8 says or the BZA or anyone else, but the dispositive fact 9 is how the Commonwealth of Virginia decides to license 10 an entity or not. 11 If you get the license, and you're licensed as a 12 residential home, which we are, then by definition, 13 you're a residential facility. And you get the benefit 14 of 2291(A). 15 There is nothing to be argued about that. 16 Nevertheless, the petitioners made two 17 arguments. 18 The first is one I'm surprised to hear yet 19 again. And that is that 2291 excludes a commercial or 20 for profit enterprise. 21 Notably, they don't cite any cases -- no 22 Virginia case that says that. The Virginia Supreme</p>	<p style="text-align: right;">Page 79</p> <p>1 They were actually going to write into nonprofit 2 or noncommercial into the statute and chose not to. 3 And as Your Honor is aware, often -- that's the 4 wrong way to express it. It is rare in Virginia when we 5 have any meaningful legislative history. We have very 6 little. 7 This was such an important issue that there was 8 -- the exact question that is before you today where the 9 petitioner is saying you should read a commercial 10 exception into the statute was considered and rejected 11 by the General Assembly. You should not -- should not 12 write that in there. 13 It also wouldn't make sense. Because the 14 General Assembly did choose to create a definition of 15 residential facility. So they'd ask you to find it's 16 not residential. 17 But the General Assembly said residential 18 facility means any group home or other residential 19 facility in which the Department of Behavioral Health 20 and Developmental Services is the licensing authority. 21 And the license authority issued a license that 22 we are a residential group home.</p>
<p style="text-align: right;">Page 78</p> <p>1 Court case doesn't say it. Judge Bach's case doesn't 2 say it. 3 There is simply no authority for that 4 proposition. And it's not in the statute. It doesn't 5 say that in the statute. It doesn't say nonprofit. 6 I think what's noteworthy about this, Your 7 Honor, is the Supreme Court decision that I talked about 8 in Tribble, that was 1995. There was some public 9 dissatisfaction with that. 10 And the General Assembly considered in 2000 -- 11 in 2000 whether to add the words nonprofit or 12 noncommercial to the statute. That was actually a bill 13 that was proposed. 14 The Virginia Attorney General at the time issued 15 an opinion to the Virginia General Assembly saying that 16 would be illegal, it would violate both the Virginia 17 Fair Housing Act and the Federal Fair Housing Act to 18 include that. 19 And as a result, it was not included by 20 unanimous vote. 21 The General Assembly rejected what petitioners 22 are asking you to do here to read into.</p>	<p style="text-align: right;">Page 80</p> <p>1 So with this license read in conjunction with 2 the definition of residential facility, it would be 3 incorrect to find that we're a commercial facility or 4 even if you're a commercial facility that somehow 5 doesn't apply. 6 These are definitions that are imposed by the 7 General Assembly, so it's just wrong. 8 The second argument that was made is we don't -- 9 we don't fit the definition of 2291 because we don't 10 reside. That was the argument. And counsel said he 11 looked at the definition of reside. And it's -- it's 12 your home. 13 And because this is transient in nature or, you 14 know, some semi -- they're not there permanently, it 15 doesn't meet the definition. 16 Well, that argument has been specifically 17 rejected. 18 Your home is your domicile. And what courts 19 have said is that you reside in the context of the 20 statute. 21 And it's clear that you need not have it as your 22 permanent residence.</p>

<p style="text-align: right;">Page 81</p> <p>1 Notably, counsel, when he made that statement to 2 you, he didn't cite a single Virginia case that says 3 that. 4 But what he said is there are some cases 5 somewhere in which that's the case. 6 They cited one case in their opening brief. And 7 in the opening brief, they cited a -- another Fairfax 8 decision. 9 And that case -- I want to cite it to Your Honor 10 because it's on point. 11 And to be clear, the record in this case shows 12 that our patients will stay between 30 and 90 days with 13 an average of a 45-day stay. 14 And the -- I apologize. The Fairfax case looked 15 at the definition of reside. 16 And with that definition found that 45 days 17 easily met the definition. 18 I'm going to find the citation, Your Honor. It 19 just popped out of my head. And I don't see it in my 20 notes. 21 But there are a legion of cases on this point if 22 you get outside of Virginia that are contrary to the</p>	<p style="text-align: right;">Page 83</p> <p>1 about when the -- the license -- this is subpart C. A 2 license shall describe a services license, which they've 3 done, for disability individuals, which they've done 4 here, the location where they're to be resided. They 5 specifically put in the location where this would be 6 provided. And the number of individuals each 7 residential location may serve at a given time. 8 So this is something that's within the exclusive 9 purview in the first instance of the Board of Health. 10 Now, Mr. Hampshire, I think, implied that my 11 previous statement to the Court about rights of appeals 12 perhaps incorrect. And I can assure Your Honor that 13 it's not. 14 The license was issued on October 13th, I 15 believe. That's the date on it. 16 THE COURT: The statewide license? 17 MR. WILBURN: The statewide license, yes, Your 18 Honor. 19 The petitioners -- there's an appeal right under 20 the Administrative Processes Act. It's Virginia Code 21 2.2-4002. 22 So if they believe -- if the petitioners truly</p>
<p style="text-align: right;">Page 82</p> <p>1 plaintiff's petition. 2 The first is Lakeside Resorts -- now, these are 3 out of Virginia case, but these are cases under the 4 Virginia Fair Housing Act. 5 But they make very clear that as little as 14 6 days has been found to be sufficient to constitute 7 reside within the meaning of the statute. 8 Connecticut Hospital City against New London, 9 Schwartz against City of Treasure Island. That's one 10 where the reside -- it was simply a place where people 11 went sometimes to vacation during the summer just 12 briefly. They were considered residing within the Fair 13 Housing Act. 14 But there is simply no authority, none, for the 15 petitioner's proposition that the patient who's there 16 for 30 days doesn't meet the definition of reside. 17 Moreover, that's actually a decision that was 18 reached by -- by, again, the Board of Health. 19 There are notes to actually point out that you 20 can have five residents. 21 When you look at the enabling legislation, this 22 is at Virginia Administrative Code 35-105-30. It talks</p>	<p style="text-align: right;">Page 84</p> <p>1 believe that the Board of Health got this wrong and we 2 don't qualify as a residential facility, and we should 3 not operate here because of whatever reasons they have, 4 they have a right to appeal that. 5 And then if they're dissatisfied with the 6 administrative process, there is an appeal to the 7 circuit court where Your Honor or some other judge would 8 look at it should this license have been issued. 9 THE COURT: Say that again. What's the appeal 10 to the circuit court? 11 MR. WILBURN: Well, it's an appeal under the 12 Administrative Processes Act. 13 So you first go through the APA. And then there 14 is a decision from the agency, and the disappointed 15 party has a right of appeal. I believe it's 30 days, 16 but I don't have that committed to memory. 17 But the point is, Your Honor, for now, as we sit 18 here today in this courtroom, there is a valid license 19 that licensed our facility as a residential facility. 20 And under the statute, as expressed by the 21 Supreme Court in Tribble, we have all the rights and all 22 the protections of 15.2-2291. Chief among them is to</p>

<p style="text-align: right;">Page 85</p> <p>1 operate in a -- in a residential single family area, 2 which we're asking to do. 3       So they're just wrong on this. 4       There are some other points that I won't spend a 5 lot of time on, Your Honor. 6       Mr. Hampshire passed Your Honor up a -- or 7 showed the Court a picture or made some reference to 8 pollution or septic fields. 9       None of that is in front of the Court. That's 10 part of the permitting process. 11       The permitting process, contrary to counsel's 12 suggestion, is a robust process. 13       And so one of the things that's being looked at 14 again on a local and state level is the septic field. 15 We don't have permit approval. 16       So I don't know how that will come out, Your 17 Honor. 18       I hope we get permit approval. We have 19 submitted engineering data. 20       I think the County has looked at it. None of 21 that is in front of the Court. We believe that the 22 permit will issue.</p>	<p style="text-align: right;">Page 87</p> <p>1 rights. It was advisory only. And the BZA correctly 2 found that. 3       And so the County says you shouldn't decide 4 anything. You don't decide the merits. You should 5 dismiss the appeal and the order saying you don't decide 6 anything, it's premature. 7       The petitioners -- they did -- it's an 8 appealable decision affecting rights. 9       Mr. Hampshire explained to you why he thinks 10 it's important. 11       And as a result, the BZA got it wrong when they 12 said it wasn't appealable. It's properly before you. 13 Pardon me, and you should decide the merits and decide 14 on their weight. 15       As I mentioned, we are agnostic on it. We'd 16 like you to decide the issue. 17       But I think you can do it by either agreeing 18 with the petitioners that it is an appealable issue or 19 agreeing with the County that it was not appealable, but 20 then exercising your discretion under the statute to 21 address the de novo question of law. 22       And the de novo question of law that remains, if</p>
<p style="text-align: right;">Page 86</p> <p>1       But if it does or doesn't, all of that is 2 subject to its own appeal under 15.2-2311. 3       But none of that record is in front of Your 4 Honor. 5       The implication that you should weigh Mr. 6 Hampshire's suggestion that this is somehow not suitable 7 on a pollution or septic field basis is flawed, Your 8 Honor. 9       That septic field process is an expert driven 10 issue with measurements and calculations and engineering 11 data, perhaps a staff report, all of which gets analyzed 12 by the state. 13       THE COURT: None of which I've heard. 14       MR. WILBURN: None of which you've heard, and 15 all of which has its own appellate process which isn't 16 before the Court. 17       So, Your Honor, I'd sort of go back to the 18 original -- the core questions for the Court. 19       The first one, is there something for you to 20 decide today? Is there something before you properly? 21       The County says no, that there was -- the zoning 22 administrator's decision did not affect anybody's</p>	<p style="text-align: right;">Page 88</p> <p>1 you decide the merits, would be do we qualify as a 2 residential facility. The answer is unquestionably, 3 yes, with the issuance of a license. It says so in the 4 definition, 15.2-2291, the last sentence. 5       The Supreme Court in Tribble said exactly that. 6 If you have a license, you get all of the benefits and 7 protections of the statute. 8       Judge Bach said the same thing in his case in 9 Kaleidoscope. 10       So it's unquestionably yes. 11       The only arguments that they make in response to 12 that are the two that I suggested. There's simply no 13 basis for it. 14       One is that somehow a commercial activity or for 15 profit activity is excluded. It's not in the statute. 16       The definition -- it's going to be contrary to 17 the definition which says if you have a license, you're 18 a residential facility. So it's just wrong. 19       And the record shows we've attached to our 20 brief -- the opinion by the Attorney General's Office, 21 which is final, and the legislative history rejected 22 that issue. So that's just wrong. And there is no</p>

<p style="text-align: right;">Page 89</p> <p>1 authority for it.</p> <p>2 And then the last argument that they make is</p> <p>3 they want you to find that these individuals who we</p> <p>4 don't even know who they are -- I mean it's worth</p> <p>5 pointing out they want you to find that some person,</p> <p>6 whose name you don't know, is not a resident at a</p> <p>7 facility that hasn't opened. That's pure speculation,</p> <p>8 number one.</p> <p>9 And number 2, the legal basis -- the legal</p> <p>10 theory on it is that because they will be there for 30</p> <p>11 days, they don't reside within the meaning of the</p> <p>12 statute.</p> <p>13 We've cited probably ten cases that say as</p> <p>14 little as 14 days. It turns on two questions. One, are</p> <p>15 they there for some meaningful period of time. And 14</p> <p>16 days has been found to be sufficient. And 2, do they</p> <p>17 view it as a place they return to during treatment.</p> <p>18 That's the test.</p> <p>19 And there is no information before Your Honor</p> <p>20 that would indicate contrary.</p> <p>21 Again, this is an example. I understand why</p> <p>22 petitioners want to be in front of the Court and have a</p>	<p style="text-align: right;">Page 91</p> <p>1 haven't happened.</p> <p>2 We're licensed to have residents there. We need</p> <p>3 -- we understand we have to have residents there.</p> <p>4 There's simply no -- nothing in the record that</p> <p>5 would allow the Court to accept the invitation of the</p> <p>6 petitioners to say we're going to have somebody who</p> <p>7 doesn't reside.</p> <p>8 We don't know who these people are. We don't</p> <p>9 know what to tell the Court. We don't know what their</p> <p>10 schedule is.</p> <p>11 There's no facts before the Court at all upon</p> <p>12 which the Court can make that determination.</p> <p>13 And so, again, I understand the eagerness to get</p> <p>14 it in front of the Court and have these issues heard,</p> <p>15 because the petitioners certainly are interested and</p> <p>16 concerned about this project. People are worried about</p> <p>17 whether they will get that to be heard.</p> <p>18 But the only issue -- the only legal question</p> <p>19 for Your Honor, if you choose to take it up, either</p> <p>20 under the discretionary language of the appellate</p> <p>21 statute or because you find that there was a sufficient</p> <p>22 final determination by the zoning administrator -- there</p>
<p style="text-align: right;">Page 90</p> <p>1 decision on these issues. But that's yet another</p> <p>2 example where it's premature.</p> <p>3 For example, if we had ten people out there</p> <p>4 instead of we recruit for five -- or the statute says</p> <p>5 eight. We had ten people out there. That's the time to</p> <p>6 come to either the licensing body or the zoning</p> <p>7 administrator and say they're in violation of this</p> <p>8 requirement.</p> <p>9 THE COURT: You might even violate the reside</p> <p>10 definition issued by the state agency.</p> <p>11 MR. WILBURN: That was going to be my next</p> <p>12 point.</p> <p>13 THE COURT: Ten would get into the reside</p> <p>14 definition.</p> <p>15 MR. WILBURN: That's correct. If you did have</p> <p>16 the exact number of people -- if somebody who was</p> <p>17 commuting, for lack of a better term, they're showing up</p> <p>18 daily, but they don't take meals there, they don't sleep</p> <p>19 there.</p> <p>20 THE COURT: That's what I'm talking about, ten</p> <p>21 drive-ups every morning.</p> <p>22 MR. WILBURN: Correct. But those are facts that</p>	<p style="text-align: right;">Page 92</p> <p>1 are two.</p> <p>2 Are we a residential facility? The license and</p> <p>3 the statute say yes.</p> <p>4 And if we're a residential facility, are we</p> <p>5 entitled to operate in an R-1 district? The statute</p> <p>6 says yes. The Attorney General said yes. The Supreme</p> <p>7 Court said yes. And Judge Bach, under similar facts,</p> <p>8 said yes.</p> <p>9 So we think that's sort of the decision on how</p> <p>10 this goes, Your Honor.</p> <p>11 Do you have any questions about any of this?</p> <p>12 THE COURT: I don't.</p> <p>13 MR. WILBURN: Thank you.</p> <p>14 MR. HAMPSHIRE: Thank you, Your Honor. I very</p> <p>15 much appreciate your attention to these issues.</p> <p>16 I'd just like to -- Gifford Hampshire again for</p> <p>17 the petitioners -- go through them a little bit.</p> <p>18 I'd like to start with the advisory -- alleged</p> <p>19 advisory decision issued.</p> <p>20 And I'd like to point the Court to our brief --</p> <p>21 page 5 of our reply brief, actually -- no. Excuse me.</p> <p>22 Page 5 of our initial brief, petitioners' hearing</p>

<p style="text-align: right;">Page 93</p> <p>1 memorandum.</p> <p>2 And we discuss -- Mr. Lawrence discussed the</p> <p>3 Vulcan Materials case and the Lilly versus Caroline</p> <p>4 County case.</p> <p>5 And these deal with two cases where the Virginia</p> <p>6 Supreme Court -- the Supreme Court of Virginia found</p> <p>7 these decisions to be advisory.</p> <p>8 And for the reasons we state in our brief, those</p> <p>9 decisions were fundamentally different from what we have</p> <p>10 here.</p> <p>11 And the fundamental difference was, as we say in</p> <p>12 our brief, that those decisions were oral decisions.</p> <p>13 They were advice.</p> <p>14 In the case of Vulcan, it was advice issued over</p> <p>15 the telephone at meetings.</p> <p>16 And the Court held that precisely because they</p> <p>17 were oral decisions over the telephone that they -- that</p> <p>18 Vulcan had no available or adequate administrative</p> <p>19 remedy such as an appeal to the Board of Zoning Appeals.</p> <p>20 And while the Lilly court distinguished Vulcan</p> <p>21 on that basis, that -- they did so on the basis that</p> <p>22 there were applications pending at the time.</p>	<p style="text-align: right;">Page 95</p> <p>1 that any decision of a zoning administrator or other</p> <p>2 administrative officer in the administration and</p> <p>3 enforcement of the zoning ordinance may be appealed by</p> <p>4 somebody who is aggrieved.</p> <p>5 And this Court has found that our -- our clients</p> <p>6 are aggrieved. They are aggrieved.</p> <p>7 So Loudoun County, again, does not get to call</p> <p>8 something an interpretation and slip in words and say</p> <p>9 the interpretation is not a decision because somehow it</p> <p>10 came out in a different version of the zoning ordinance.</p> <p>11 And you know, proof of that is also in the</p> <p>12 zoning determination itself.</p> <p>13 You know, I mean here it is, right here in black</p> <p>14 and white, and this is in the record. This decision is</p> <p>15 final and unappealable if not appealed within 30 days.</p> <p>16 What are my clients supposed to do? Ignore that</p> <p>17 and say somehow they don't -- the County doesn't mean</p> <p>18 what it says it means here and not appeal this and spend</p> <p>19 thousands and thousands and thousands of dollars on</p> <p>20 lawyers like us to appeal to the Board of Zoning</p> <p>21 Appeals, only for the Board of Zoning Appeals to say</p> <p>22 never mind, it doesn't matter, they didn't really mean</p>
<p style="text-align: right;">Page 94</p> <p>1 So in other words, what the Lilly court found</p> <p>2 was okay, it was oral, as in Vulcan, but we had an</p> <p>3 application pending at the time. And that gave us some</p> <p>4 validity that it was actually concrete. It was</p> <p>5 something other than just oral advice over the</p> <p>6 telephone.</p> <p>7 The facts in this case are fundamentally</p> <p>8 different.</p> <p>9 There is no issue in this case that we have a</p> <p>10 written decision -- we have a written decision by the</p> <p>11 zoning administrator.</p> <p>12 And so I would submit to you that the cases of</p> <p>13 Vulcan and Lilly simply are inapposite to this case.</p> <p>14 Rather -- I'd also like to address the assertion</p> <p>15 from Mr. Lawrence that somehow Loudoun County can decide</p> <p>16 something is not appealable by labeling it an</p> <p>17 interpretation.</p> <p>18 I can assure the Court that the General Assembly</p> <p>19 would not take a fair view of that.</p> <p>20 The General Assembly views localities as having</p> <p>21 to comply with the dictates of its laws, and including</p> <p>22 15.2-2309 that says that any decision -- or is it 2311,</p>	<p style="text-align: right;">Page 96</p> <p>1 it?</p> <p>2 That -- there is something fundamentally wrong</p> <p>3 about that in addition to being in contradiction of the</p> <p>4 code.</p> <p>5 So the language of the statute matters. The</p> <p>6 language of the letter matters.</p> <p>7 The conduct of the parties matter. Because</p> <p>8 after all, the record is clear that -- that Newport</p> <p>9 requested this decision. They requested it for</p> <p>10 precisely the reasons I illustrated earlier. And they</p> <p>11 got a favorable decision.</p> <p>12 And my clients found out about it. And they saw</p> <p>13 this language. This decision is final and unappealable</p> <p>14 if not appealed within 30 days. And they appealed it.</p> <p>15 Why would the County say it's final and</p> <p>16 unappealable if it wasn't final and unappealable?</p> <p>17 And the reason it's final and unappealable is</p> <p>18 because of that line of cases that I cited to the Court</p> <p>19 earlier.</p> <p>20 It starts with -- Dick Kelly Enterprises is one</p> <p>21 of them -- a long line of Virginia cases that say that</p> <p>22 if somebody who is aggrieved by a zoning determination</p>

<p style="text-align: right;">Page 97</p> <p>1 doesn't appeal it within 30 days, lets 30 days go by, 2 they cannot later collaterally attack that opinion. 3       And so let's play out a little bit, Your Honor, 4 about what happened in this case. 5       If the Court decided to affirm the BZA's 6 nondecision to say the BZA was correct in deciding they 7 didn't have jurisdiction. 8       So we go back to the zoning permit. Keep in 9 mind there is an admission in this case, my clients 10 won't necessarily get notice of that permit getting 11 issued. And it's not issued by the Board of 12 Supervisors. It's not issued by the zoning 13 administrator even. It's issued by the building -- the 14 Office of Building Code and Development. 15       So they may or may not get notice of it. 16       But if they get notice of it, what's going to 17 happen? Okay. 18       So we go back there. And they file an appeal. 19 They go through the motions. They pay even more money 20 for lawyers. 21       And they go back before the Board of Zoning 22 Appeals and say that this zoning permit was</p>	<p style="text-align: right;">Page 99</p> <p>1 decision? 2       MR. HAMPSHIRE: Not the zoning administrator. 3       THE COURT: I asked earlier about when could we 4 estimate the arrival of this opinion. 5       MR. HAMPSHIRE: Well, that's why I'm answering, 6 Your Honor, the opinion has already been made. 7       The opinion has been made yes, you may do this 8 if X and Y. That's the decision. 9       And X and Y -- X has happened, which is the 10 Virginia Health Department permit. That's happened. 11       Y, as Mr. Lawrence said, may happen any day. 12       And so when Y happens, if the Court says the 13 zoning determination didn't decide anything, then we're 14 back before the Board of Zoning Appeals, and we're 15 caught in the classic catch 22 where the circuit 16 court -- this is a hypothetical -- will rule the BZA is 17 correct, and nothing has been decided. 18       And then you go back before the Board of Zoning 19 Appeals, and the zoning administrator could say very 20 well, I already made the decision. 21       And so then we're stuck in an overstand. 22       MR. LAWRENCE: Your Honor, I can address that</p>
<p style="text-align: right;">Page 98</p> <p>1 improvidently granted. 2       The BZA is going to say we don't have 3 jurisdiction over a lot of these decisions. 4       These decisions have nothing to do with the 5 zoning ordinance. A lot of them don't. There are a 6 couple that do. 7       But then the zoning administrator says with 8 respect to standards of issuance, Section 6-1002, I've 9 already made my decision. My decision was -- 10       THE COURT: Say that again. 11       MR. HAMPSHIRE: The zoning administrator may 12 very well say -- 13       THE COURT: Oh, very well. I thought you were 14 going to tell me he has already. 15       MR. HAMPSHIRE: I'm trying to play this 16 hypothetical out. 17       THE COURT: You may be thinking he's already got 18 his decision. 19       MR. HAMPSHIRE: Well, I think that the zoning 20 administrator has made a decision. That's my point. 21 But -- 22       THE COURT: Is it a decision to not make a</p>	<p style="text-align: right;">Page 100</p> <p>1 concern. Because it's very clear on the record in the 2 BZA and in our brief -- 3       MR. HAMPSHIRE: Your Honor -- 4       THE COURT: Go ahead. 5       MR. LAWRENCE: I will make the representation 6 again we are not going to do that. We are not going to 7 take the position that in an appeal of the permit that 8 they would be barred because it wasn't addressed at some 9 earlier time. 10       That was made in the BZA record. It's very 11 clear in the transcript. We've made it clear in our 12 briefs. I'll make it clear again. 13       MR. HAMPSHIRE: I beg to differ we're very 14 clear, Your Honor. 15       There was a question from the BZA. And it was 16 answered in a very kind of halting fashion by the 17 Assistant County Attorney there. It wasn't very clear 18 in the record. 19       But I don't think that we can -- that's what you 20 dictate. 21       What you dictate is whether it was a decision 22 and it was a decision under 15.2-2311 if it was</p>

<p style="text-align: right;">Page 101</p> <p>1 appealable to the Board of Zoning Appeals.</p> <p>2       And the Virginia Code does not distinguish</p> <p>3 between interpretations and decisions.</p> <p>4       And the line of cases of Vulcan and Lilly simply</p> <p>5 don't apply, because those related to oral decisions,</p> <p>6 not written decisions.</p> <p>7       Now, the distinction Mr. Wilburn talked about --</p> <p>8 or I think it was Mr. Lawrence -- is not the distinction</p> <p>9 between administrative and legislative decisions.</p> <p>10 Because there's no data here that the zoning permit</p> <p>11 would not be issued -- or even this decision was issued</p> <p>12 legislatively.</p> <p>13       The decision here is between administrative</p> <p>14 permits and discretionary decisions.</p> <p>15       The zoning administrator has the ability -- and</p> <p>16 I don't think this is contested legally to make -- has</p> <p>17 the ability to make discretionary decisions, to make</p> <p>18 close calls, to answer questions, subject to the appeal.</p> <p>19       That's the very reason there is an appeal to the</p> <p>20 Board of Zoning Appeals.</p> <p>21       Because while the zoning administrator is imbued</p> <p>22 with discretion, that is subject to challenge, which is</p>	<p style="text-align: right;">Page 103</p> <p>1 of Behavioral Health and Developmental Services is the</p> <p>2 licensing authority.</p> <p>3       So again, who gets to decide what is a</p> <p>4 residential facility subject to licensure?</p> <p>5       Because the record in this case now contains the</p> <p>6 very permit that was issued by the Department. It's</p> <p>7 been submitted to the Court since our last hearing. And</p> <p>8 it contains not just the subject property on it, it</p> <p>9 contains another property on it. And that other</p> <p>10 property is a commercial property near Fairfax Hospital,</p> <p>11 a commercial facility.</p> <p>12       So it's clear not only in the law but in the</p> <p>13 record of this case that the Department of Behavioral</p> <p>14 Health and Developmental Services doesn't just license</p> <p>15 residential facilities, it licenses commercial</p> <p>16 facilities too.</p> <p>17       So the General Assembly in crafting this statute</p> <p>18 the way it was -- was crafted left the determination as</p> <p>19 to what is residential not to the Department of</p> <p>20 Behavioral Health and Developmental Services but to the</p> <p>21 local government.</p> <p>22       And we see that confirmed in the record of this</p>
<p style="text-align: right;">Page 102</p> <p>1 why we're here today.</p> <p>2       Unlike these other decisions within 6.001,</p> <p>3 Subsection A through H, I went through them before. A</p> <p>4 lot of them are not discretionary.</p> <p>5       You either meet the regulations or you don't.</p> <p>6 And their calls are made by administrative officers</p> <p>7 about whether the septic system is sufficient and other</p> <p>8 things, whether there's a clearance and river or stream</p> <p>9 overlay, mountain districts, the number and size and</p> <p>10 location of signs, those sorts of things.</p> <p>11       But they're not discretionary decisions about</p> <p>12 what is allowed and what is not allowed under the zoning</p> <p>13 ordinance.</p> <p>14       With respect to 2291 -- I'd like to move on just</p> <p>15 for a minute to the substance of it, Your Honor.</p> <p>16       Mr. Wilburn makes a good argument. But I think</p> <p>17 what you need to -- what the Court needs to do is to</p> <p>18 recognize that he has read out a very important</p> <p>19 provision in 15.2-2291, Subsection A and Subsection B.</p> <p>20       And it says again for the purpose of this</p> <p>21 subsection, a residential facility means any group home</p> <p>22 or other residential facility for which the Department</p>	<p style="text-align: right;">Page 104</p> <p>1 case by the letter from Jay Benz, who says that the</p> <p>2 Department of Behavioral Health and Developmental</p> <p>3 Services has nothing to do with local zoning as to what</p> <p>4 is residential in the first place.</p> <p>5       It's just that if it is residential, and it's</p> <p>6 subject to licensing, that is the residential facility</p> <p>7 we're talking about in this section. That's what it's</p> <p>8 talking about.</p> <p>9       It did not carve out and say you can expand</p> <p>10 residential neighborhoods to commercial uses.</p> <p>11       Trible versus Bland, we addressed that case also</p> <p>12 in our briefs. And that case is in our reply brief.</p> <p>13 It's in the footnote.</p> <p>14       And what happened in that -- what happened in</p> <p>15 that case was the Town of West Point. And the Town of</p> <p>16 West Point allowed more than the bare minimum -- more</p> <p>17 than the bare minimum of non-related persons to live in</p> <p>18 a house. They allowed 21. And the neighbor sued and</p> <p>19 said you're violating state law, because the state law</p> <p>20 says eight.</p> <p>21       And the general -- and Supreme Court held</p> <p>22 localities can be more permissive than is allowed by the</p>

<p style="text-align: right;">Page 105</p> <p>1 statute -- by the bare minimums of the statute.</p> <p>2 Here, that's not what we have.</p> <p>3 What we have is not being -- not allowing more</p> <p>4 residential, but allowing a completely different use, a</p> <p>5 commercial use in zone.</p> <p>6 And under our reading -- and under the zoning</p> <p>7 administrator's reading, a use that's not allowed in the</p> <p>8 zoning ordinance at all.</p> <p>9 So compare it to Tribble versus Bland, where you</p> <p>10 allowed more people in the house that the local zoning</p> <p>11 ordinance did in this case -- and remember, this case is</p> <p>12 about whether the zoning administrator was correct about</p> <p>13 the reading of the zoning ordinance.</p> <p>14 We have a zoning ordinance that says, according</p> <p>15 to her, this is not allowed but for 2291.</p> <p>16 So we have a zoning ordinance that says that</p> <p>17 it's completely different from the situation at issue in</p> <p>18 Tribble versus Bland. So that case doesn't apply.</p> <p>19 The case of Kaleidoscope -- that's Judge Bach's</p> <p>20 decision back 25 years ago, I guess it was. The facts</p> <p>21 in those cases -- that case is important to look at.</p> <p>22 And it's a long opinion.</p>	<p style="text-align: right;">Page 107</p> <p>1 you can have in the home and that sort of thing.</p> <p>2 Well, it was about people who can reside in the</p> <p>3 home to the extent that they were mentally ill.</p> <p>4 But it didn't have to do to with the application</p> <p>5 of 2291 to this situation.</p> <p>6 The distinction about Mr. Wilburn's argument</p> <p>7 about the General Assembly and how they rejected the</p> <p>8 efforts to restrict to nonprofit, that's not a decision</p> <p>9 we're dealing with here.</p> <p>10 We are not dealing with -- we are not contending</p> <p>11 that this is wrong because it's nonprofit or because of</p> <p>12 a profitable use.</p> <p>13 We're saying that it's a commercial use in the</p> <p>14 zone.</p> <p>15 You can have residential homes that are</p> <p>16 nonprofit. You can have residential homes that are for</p> <p>17 profit. You can have commercial facilities that are</p> <p>18 nonprofit.</p> <p>19 That's not the distinction we're looking at.</p> <p>20 That's the distinction that the General Assembly was</p> <p>21 looking at in terms of that legislation.</p> <p>22 And finally, with respect to the term reside,</p>
<p style="text-align: right;">Page 106</p> <p>1 But what it dealt with was the contention by</p> <p>2 neighbors not that -- not that the local ordinance was</p> <p>3 being violated with respect to whether a certain use is</p> <p>4 allowed but with respect to whether the occupants fell</p> <p>5 within the definition of the protection of the statute</p> <p>6 of being mentally ill in the first place.</p> <p>7 Because these were children who were abused.</p> <p>8 And there's a footnote in that decision -- and it's</p> <p>9 heartbreaking when you read it, because these children</p> <p>10 were just terribly abused. And they had nowhere else to</p> <p>11 go. So they came to this home where they were safe.</p> <p>12 And so in that context, the Court said -- in the</p> <p>13 context of the neighbor saying these kids aren't</p> <p>14 mentally ill, they're not mentally ill, they're just</p> <p>15 troubled, that doesn't fall within the language of the</p> <p>16 statute.</p> <p>17 Judge Bach held -- Fairfax Circuit Court in 1994</p> <p>18 held the state agency that's in charge of mental health</p> <p>19 services is obviously the best agency to determine</p> <p>20 whether children are mentally ill.</p> <p>21 That's what that case was about. It wasn't</p> <p>22 about who can reside in the home and how many people can</p>	<p style="text-align: right;">Page 108</p> <p>1 now, I will concede -- I will concede that there are</p> <p>2 cases that go both ways on this case -- or on this</p> <p>3 issue.</p> <p>4 But the ones we rely upon we think are better</p> <p>5 reasons.</p> <p>6 And, indeed, Judge Bach's decision, which is the</p> <p>7 only case in Virginia, is -- goes our way. And it's</p> <p>8 based upon the Woods versus Rogers case that -- that is</p> <p>9 cited in our briefs.</p> <p>10 And the distinction there is the term reside</p> <p>11 needs to be understood in a number of factors. But it</p> <p>12 needs to be understood in terms of whether the residents</p> <p>13 have anyplace else to go -- whether they have another</p> <p>14 home to go to.</p> <p>15 Because after all, this is -- the whole nature</p> <p>16 of 2291 and the Fair Housing Act legislation upon which</p> <p>17 it was drafted was premised upon the idea that people</p> <p>18 are being discriminated against in residing in homes, of</p> <p>19 being able to be integrated into the community, of being</p> <p>20 treated like everybody else.</p> <p>21 And the rationale of the Kaleidoscope decision</p> <p>22 and Woods versus Foster, I think it is, decision --</p>

<p style="text-align: right;">Page 109</p> <p>1 Woods versus Foster is reside needs to be understood in 2 terms of where if the resident had no place else to go, 3 they have no other home to go to. 4 And in this case, the record is clear that the 5 very purpose of this commercial treatment facility is to 6 be close to real homes of these -- of these patients, 7 because they want to come into the Northern Virginia 8 market, and they want to be -- because up till now, 9 these children have been going -- and young adults have 10 been going to other parts of the country. 11 They want to come into the Northern Virginia 12 market, and they want to be close to these residents' 13 homes. And that's attached to our brief. It's right in 14 the record. That's the purpose. 15 So they have homes to go to. They're coming for 16 short-term treatment. And they go home. 17 THE COURT: Does the distance from one of these 18 properties matter to make -- you got to be 20, 30, 40, 19 50 miles? 20 MR. HAMPSHIRE: I don't think the distance 21 matters. It's whether they have a home to go to, 22 whether they're coming from their home --</p>	<p style="text-align: right;">Page 111</p> <p>1 adequate lighting, all those provisions that deal with 2 those sorts of things. That's a completely different 3 subject. 4 THE COURT: It's inappropriate to make your 5 appeal at this time. 6 I am struggling with how to most effectively 7 give you an ending. And I'm having trouble with a real 8 ending of everything. Because some of this has to 9 linger. 10 But the concept that you would be time wise 11 required to appeal now, that is not in any present 12 thought I have. 13 MR. HAMPSHIRE: Yes, sir. 14 THE COURT: Don't argue it anymore unless you 15 think you should. 16 MR. HAMPSHIRE: All right. I don't think I 17 should. 18 I think those are all of the issues I have. 19 MR. WILBURN: Your Honor, Mr. Hampshire, 20 probably meaning nothing ill, suggested to the Court 21 that I omitted something in my reading of the statute. 22 Might I spend one minute addressing that?</p>
<p style="text-align: right;">Page 110</p> <p>1 THE COURT: I think residence is one of easiest 2 things in this collection of issues to decide, the 3 definition of residence. 4 MR. HAMPSHIRE: I can appreciate that view. 5 The last thing I'd like to touch on, Your Honor, 6 and then I'll be done -- is this idea of the Virginia 7 Department of Behavioral Health appeal. 8 And we have been pointed to -- and Mr. Wilburn 9 mentioned Virginia Code Section 2.2-4000, et sec of the 10 Virginia Administration -- the Virginia Procedural Act, 11 and the administration -- the Administrative Process 12 Act, which is Chapter 40 of Title 2.2 of the Code of 13 Virginia. This is a general act, as Your Honor knows, 14 that allows for appeals from administrative agencies. 15 However, the provisions that I handed up to you 16 before and I went through with at the beginning of my 17 presentation, what would we be appealing? 18 Would we -- I mean we certainly would not be 19 appealing any zoning decision, because no decision has 20 been made. 21 We have no interest in appealing the number of 22 bathrooms or the number of beds or whether there's</p>	<p style="text-align: right;">Page 112</p> <p>1 THE COURT: I can't hear you. 2 MR. WILBURN: Oh, I'm sorry. I should have 3 stepped up. Mr. Hampshire suggested to the Court that I 4 omitted something in my reading of the statute. 5 I'm sure it was not ill intended. But might I 6 have one minute to address that? 7 THE COURT: Sure. 8 MR. WILBURN: The section that Mr. Hampshire 9 read is -- the last sentence of 15.2-2291, which I 10 believe I read correctly. But it says for purposes of 11 this subsection, residential facility, in quotes, means 12 any group home or other residential facility for which 13 the Department of Behavioral Health and Developmental 14 Services is the licensing authority pursuant to this 15 code. 16 I read that word for word. And I believe I did 17 before as well. 18 When you look at the license, we were licensed 19 as a mental health, residential group home service for 20 adults. 21 The statute says a licensed residential facility 22 means any group home that gets the license.</p>

<p style="text-align: right;">Page 113</p> <p>1 So we got a license as a group home. And if it 2 wasn't clear enough, the license actually says 3 residential. 4 So the suggestion that I've somehow misread the 5 statute or something -- 6 THE COURT: You don't need to argue the concept 7 of residence anymore. 8 MR. WILBURN: Thank you, Your Honor. 9 That's all I have, unless you have any further 10 questions. 11 THE COURT: Thank you. 12 Number one, the temptation is to take it under 13 advisement. These people are suffering through delays. 14 The last time I had a full hearing with counsel, 15 I gave you sort of a preservation of ongoing litigation 16 instead of a closure, at least at this level of the 17 judicial process. 18 Unfortunately, today's arguments well done, well 19 written, well argued by good counsel who really know 20 what they're talking about is from a judge standpoint 21 refreshing. 22 Because -- I don't know how to say this</p>	<p style="text-align: right;">Page 115</p> <p>1 proceeding. 2 Bruce Bach was legendary for a lot of things. 3 And one of them was he made good, sensible bread and 4 butter decisions on everything he did. But I didn't 5 always agree with where he is. 6 But the nature of residence is defined. We know 7 what it is, and it has applied. 8 I'm not attempting to do that thing I was 9 partially requested to do and verify the validity and 10 legal correctness of the letter written that is in 11 evidence. 12 I think that would be unproductive in terms of 13 reaching any final decision. 14 And what I do is I'm going to keep jurisdiction. 15 You don't have to start all over with another judge. 16 I've been taught and retaught, so I should know enough 17 to make the call. 18 But this isn't a call of safe or in or out or 19 ball or a strike. This is complicated. 20 And the complication in my mind factually is 21 that decision -- the final decision by the zoning 22 authority.</p>
<p style="text-align: right;">Page 114</p> <p>1 kindly -- we sometimes have to perceive what's really 2 being said by counsel because it's obscure. Nothing is 3 obscure here. 4 The lawyers know what they're doing. The 5 lawyers are issuing valid opinions. 6 I do not, however, have a judicial result that 7 gives you closure, a win or loss 100 percent either way. 8 Number one, I have jurisdiction. 9 Number 2, I'm not going to assert an effort at a 10 final comprehensive decision until a decision of the 11 Board of Zoning -- the finality of that is before me. 12 When they're working on underground water stuff 13 or anything else, I ask at least once -- guesstimate 14 when that decision would be made. 15 I have no belief that it's anything going on 16 here in the form of deliberate delay. 17 I think it's just comprehensive with all the 18 things that have to get done. 19 Secondly, I make no final finding or decision, 20 but I think residence has been clearly defined. 21 I have to smile when I hear it's Bruce Bach's 22 opinion, and it was totally irrelevant to today's</p>	<p style="text-align: right;">Page 116</p> <p>1 I, therefore, find that it is premature for me 2 to reach any other decision on a finality basis. 3 And I keep jurisdiction, which I believe has 4 been created properly, so that there is no time 5 forfeiture by anybody in regard to what's going on among 6 the parties. 7 And third, I do not intend to force somebody to 8 appeal an interim issue when this case cries out that it 9 will probably be appealed on a final issue. 10 What I'm trying to do is recognize the need of 11 people to have closure but not at all cost. 12 And the cost I give you is I don't want to 13 create confusion in the process of litigating. 14 The case is not decided today. Because I find 15 that there is not a finality of the total facts before 16 me. 17 It's parallel to what I did before, saying that 18 it's now a state agency. 19 Now, I need the County decision. 20 I resist the request to adopt, approve or 21 contradict the letter written herein. That's 22 inappropriate to do in light of everything else I've</p>

<p style="text-align: right;">Page 117</p> <p>1 done.</p> <p>2 The nature of jurisdiction, I've said several</p> <p>3 times, I have jurisdiction.</p> <p>4 But I do not have the finality that I need to</p> <p>5 give what I -- in light of all of the thoroughness of</p> <p>6 the arguments and the facets that everybody raises and</p> <p>7 so on, I want to be comfortable that I have every</p> <p>8 factfinding finalized, and any decision I make for right</p> <p>9 or wrong is on a complete record.</p> <p>10 Who gets elected to do that order?</p> <p>11 MR. LAWRENCE: Mr. Wilburn did a great job last</p> <p>12 time.</p> <p>13 THE COURT: Everybody's got a piece of</p> <p>14 unhappiness here. It's not on anyone.</p> <p>15 MR. WILBURN: Thank you, Your Honor. I think we</p> <p>16 will understand your ruling.</p> <p>17 We'll wait for -- we'll contact the Court when a</p> <p>18 decision is made on the permit and reconvene --</p> <p>19 THE COURT: It happened that I -- today -- I</p> <p>20 mean I was down here last week, and they asked for some</p> <p>21 days in December and everything else.</p> <p>22 I can tell you as a retired judge, my calendar</p>	<p style="text-align: right;">Page 119</p> <p>1 MR. WILBURN: We will. It's been a pleasure to</p> <p>2 work with the petitioners' counsel.</p> <p>3 We start a trial on Monday. But so it may match</p> <p>4 up to Mr. Hampshire's schedule. We will work on a date.</p> <p>5 THE COURT: We are going to come back to it.</p> <p>6 What else should I do today? I'm sorry I didn't</p> <p>7 give you a final hammer down.</p> <p>8 MR. WILBURN: That's okay.</p> <p>9 THE COURT: But it's not appropriate.</p> <p>10 MR. LAWRENCE: Your Honor, we will advise</p> <p>11 everyone as soon as the County Attorney's Office is</p> <p>12 aware of a decision being made.</p> <p>13 THE COURT: They may be disappointed I didn't</p> <p>14 endorse their letter. It doesn't mean I don't -- I</p> <p>15 don't agree or disagree. I'm just not touching on that.</p> <p>16 MR. LAWRENCE: Thank you, Your Honor.</p> <p>17 THE COURT: Because I think it's inappropriate</p> <p>18 with the complicated interrelationship with all of the</p> <p>19 parts here.</p> <p>20 Once again, I thank counsel for superb</p> <p>21 preparation and argument.</p> <p>22 MR. HAMPSHIRE: Thank you.</p>
<p style="text-align: right;">Page 118</p> <p>1 is not going to have to wait for quickness. You're not</p> <p>2 going to be waiting weeks or months as a regularly</p> <p>3 sitting judge has.</p> <p>4 MR. LAWRENCE: Thank you, Your Honor.</p> <p>5 THE COURT: And I'll say that I've tried to get</p> <p>6 this intellectually legally and in terms of paying</p> <p>7 attention to all the facts and the level of control</p> <p>8 counsel have already done.</p> <p>9 MR. HAMPSHIRE: I appreciate that.</p> <p>10 I just need to posit to the Court I am leaving</p> <p>11 on a plane tonight and will be back on the 20th of</p> <p>12 November. And we will work with counsel in terms of</p> <p>13 another date.</p> <p>14 THE COURT: I think one of the positives are</p> <p>15 that I enjoy watching is I have lawyers who respect each</p> <p>16 other.</p> <p>17 We don't have snarling hyper competitive stuff</p> <p>18 you see on T.V. and the movies and/or in some courts.</p> <p>19 MR. HAMPSHIRE: Yes, sir.</p> <p>20 THE COURT: No. So you're going to accommodate</p> <p>21 each other on that.</p> <p>22 MR. HAMPSHIRE: We certainly will.</p>	<p style="text-align: right;">Page 120</p> <p>1 THE COURT: To the extent I get it wrong, the</p> <p>2 appellate judges will make the call on that.</p> <p>3 So with that, thank you for another effort of</p> <p>4 getting to a final decision. We'll get there.</p> <p>5 MR. WILBURN: Thank you, Your Honor.</p> <p>6 MR. HAMPSHIRE: Thank you, Your Honor.</p> <p>7 THE COURT: Everybody is free to go.</p> <p>8 (Thereupon, the proceedings were concluded</p> <p>9 at 12:07 p.m.)</p>

<p>1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit: <span style="float: right;">Page 121</span> 2 3 I, Robin Creswell, Notary Public in and for 4 the Commonwealth of Virginia at Large, and whose 5 commission expires April 30, 2027, do certify that the 6 proceedings were held before me and that the foregoing 7 is a true, correct and full transcript of the testimony 8 adduced. 9 I further certify that I am neither related to 10 nor associated with any counsel or party to this 11 proceeding, nor otherwise interested in the event 12 thereof. 13 Given under my hand and notarial seal this 14 15th day of May, 2023. 15  16 Notary Public Registration No. 139100 17 18 Commonwealth of Virginia at Large 19 Job No. 93328 20 21 22</p>	

**WORD INDEX**

&lt; \$ &gt;

**\$3** 13:17 19:11

&lt; 1 &gt;

**1** 3:5**10:05** 1:15**100** 114:7**1000** 44:20**1001** 44:20**1002** 44:20**12:07** 120:9**12VAC35-105-260**  
23:6**139100** 121:14**13th** 75:21 83:14**14** 82:5 89:14, 15**15,2-2291** 69:11**15.2-2209** 42:6**15.2-2211** 42:6**15.2-2291** 31:833:13 59:10 69:3  
84:22 88:4  
102:19 112:9**15.2-2291(A)** 74:11**15.2-2309** 10:4

56:10 94:22

**15.2-2311** 11:7

56:10 86:2

100:22

**15.2-2314** 42:3**15th** 121:14**17** 35:19 49:11**1717** 2:12**1750** 2:20**17-acre** 29:9**18** 1:14**1800** 2:20**1993** 41:22 42:12**1994** 42:16, 17

106:17

**1995** 73:15 78:8

&lt; 2 &gt;

**2** 54:2 89:9, 16  
114:9**2.2** 110:12**2.2-4000** 110:9**2.2-4002** 83:21**20** 73:16 109:18**2000** 42:20 78:10,  
11**20006** 2:13**2009** 42:22**20175** 3:6**2018** 43:2**202** 2:14**2021** 66:12**2022** 1:10**2023** 121:14**2027** 121:5**20th** 118:11**21** 104:18**22** 99:15**22030** 2:7**22102** 2:21**2214** 52:17**2291** 17:7 29:18  
30:5 31:7 32:18  
36:13, 17 38:5, 10,  
14 39:10 54:13,  
14 60:7 77:19

80:9 102:14

105:15 107:5

108:16

**2291(A)** 77:14**2309** 11:7**2311** 94:22**2314** 47:19**25** 105:20**250** 73:16**255** 23:12**27** 4:13**270** 23:16**29** 66:12**290** 24:8**290** 24:8

&lt; 3 &gt;

**3** 29:10 35:18

71:21

**30** 81:12 82:16

84:15 89:10

95:15 96:14 97:1

109:18 121:5

**300** 2:6**30-day** 8:19**310** 24:19**325** 25:3**330** 25:6**3-351-5300** 24:10**340** 25:10, 18**350** 25:11**35-105-30** 82:22**360** 25:15**370** 26:12

&lt; 4 &gt;

**4** 4:13 27:4, 7**40** 39:18 109:18

110:12

**4-01** 41:1**4020** 2:6**45** 81:16**45-day** 81:13

&lt; 5 &gt;

**5** 29:10 35:18

92:21, 22

**50** 109:19

&lt; 6 &gt;

**6.001** 102:2**6-1000** 14:10, 15,

21 44:20

**6-1001** 14:20 15:3**6-1002** 16:16, 20

18:16 20:1 98:8

**6-102** 19:13**6-401** 8:9 10:11

12:9 13:9

**6-401(C)** 8:14

9:19

**691-1235** 2:8

&lt; 7 &gt;

**7** 1:10 11:8 30:8**703** 2:8, 22 3:7**712-5000** 2:22**777-0307** 3:7**787-1060** 2:14

&lt; 9 &gt;

**90** 81:12**900** 2:12**93328** 121:18

&lt; A &gt;

**a.m** 1:15**A134** 28:22**ability** 71:13

101:15, 17

**able** 45:22 108:19**above-captioned**

1:12

**absolutely** 41:8,

10, 12 49:17

**Abuse** 76:20**abused** 106:7, 10**accept** 61:16 91:5**accessible** 23:20,

21

**accommodate**

118:20

**account** 24:16**acreages** 35:18**acres** 29:10

35:19, 20

**Act** 32:18 78:17

82:4, 13 83:20

84:12 108:16

110:10, 12, 13

**acted** 48:2 49:13**activity** 69:15

88:14, 15

**acts** 53:11**add** 65:12 78:11**addiction** 59:18**adding** 6:9**addition** 96:3**additional** 6:8

<p><b>address</b> 43:3 72:2 87:21 94:14 99:22 112:6 <b>addressed</b> 16:20 40:3 73:13 100:8 104:11 <b>addresses</b> 31:8, 12 <b>addressing</b> 111:22 <b>adduced</b> 121:8 <b>adequate</b> 24:3 26:15 93:18 111:1 <b>adjourned</b> 75:17 <b>adjudicating</b> 56:19, 20 <b>administerial</b> 12:13 <b>administration</b> 46:7 95:2 110:10, 11 <b>administrative</b> 10:9 14:4 15:21 18:12 20:20 58:3, 7, 9, 17 77:2 82:22 83:20 84:6, 12 93:18 95:2 101:9, 13 102:6 110:11, 14 <b>administratively</b> 15:14 <b>administrator</b> 8:10, 11, 15, 22 9:1, 21 10:8 11:14 14:6 15:15 17:16 21:3 27:20 28:1, 3, 5, 7, 16 32:5, 21 34:1 40:21 42:9, 13 43:5, 6, 10, 15, 21 45:17 46:8, 13 47:14 48:2, 3, 13 51:19 55:2, 7 59:4 61:5, 14, 18, 19, 20 64:14, 17 65:8, 11, 20 66:13 71:16 72:22 75:8</p>	<p>77:7 90:7 91:22 94:11 95:1 97:13 98:7, 11, 20 99:2, 19 101:15, 21 105:12 <b>administrators</b> 66:2 <b>administrator's</b> 61:2 64:10 67:7 68:20 70:2 86:22 105:7 <b>admission</b> 15:19 97:9 <b>admissions</b> 15:13 <b>admitted</b> 58:8 <b>adopt</b> 116:20 <b>adopted</b> 42:12, 18 <b>adoption</b> 33:20 <b>adults</b> 76:2 109:9 112:20 <b>advantage</b> 36:21 <b>adversary</b> 66:6 <b>advice</b> 57:14 93:13, 14 94:5 <b>advise</b> 119:10 <b>advisement</b> 113:13 <b>advisory</b> 40:16 41:15 48:13 57:12, 13, 16 66:1, 15 67:5, 16, 19 68:1 87:1 92:18, 19 93:7 <b>advocacy</b> 44:16 <b>affect</b> 45:22 46:6 86:22 <b>affirm</b> 52:11, 18 53:2 56:16 62:16, 19 64:8 67:21, 22 71:1 97:5 <b>affirmatively</b> 54:21 <b>affirmed</b> 53:1 67:16 <b>afford</b> 19:5 <b>afterward</b> 13:22</p>	<p><b>agencies</b> 22:14 45:13 110:14 <b>agency</b> 6:15 7:5 13:6 15:17 21:18 62:4, 5 84:14 90:10 106:18, 19 116:18 <b>age-termed</b> 31:13 <b>aggrieved</b> 20:9 95:4, 6 96:22 <b>agnostic</b> 70:10 87:15 <b>ago</b> 5:8 8:3 105:20 <b>agree</b> 39:9 55:13 56:22 58:9 67:6 70:17 72:15, 16 115:5 119:15 <b>agreeing</b> 71:19 87:17, 19 <b>agricultural</b> 35:4, 16 <b>ahead</b> 7:13 17:12 26:11 46:17 48:22 53:10 57:20 66:21 68:8 73:7 100:4 <b>akin</b> 54:7 <b>AL</b> 1:3 <b>alleged</b> 92:18 <b>ALLEN</b> 2:18 68:13 <b>allow</b> 30:21 40:21 58:14 69:11 70:18 74:8 91:5 <b>allowed</b> 12:5 13:2, 4 14:8 18:5, 9, 13 19:13, 22 21:1 25:5 26:5, 7, 9 28:18 29:16, 18 35:10 40:7 42:14 63:17 69:16 102:12 104:16, 18, 22 105:7, 10, 15</p>	<p>106:4 <b>allowing</b> 105:3, 4 <b>allows</b> 40:20 70:22 72:18 110:14 <b>alternative</b> 67:3 <b>amend</b> 65:11 <b>analysis</b> 10:19 27:22 67:11 <b>analyzed</b> 39:4 86:11 <b>and/or</b> 118:18 <b>answer</b> 88:2 101:18 <b>answered</b> 100:16 <b>answering</b> 28:21 99:5 <b>answers</b> 58:8 <b>anybody</b> 75:7 116:5 <b>anybody's</b> 86:22 <b>anymore</b> 111:14 113:7 <b>anyplace</b> 108:13 <b>anyway</b> 16:8 18:18 21:11 22:17 29:18 <b>APA</b> 84:13 <b>apart</b> 9:20 <b>apologize</b> 81:14 <b>appeal</b> 6:1 8:19 11:10 20:8, 15, 16 21:7 26:18 29:21 38:19 41:13, 15 48:4 51:20, 21 54:1 55:21 56:9 66:6 67:8 72:21 83:19 84:4, 6, 9, 11, 15 86:2 87:5 93:19 95:18, 20 97:1, 18 100:7 101:18, 19 110:7 111:5, 11 116:8 <b>appealability</b> 43:4 52:11</p>
--	--	---	--

<p><b>appealable</b> 9:9 11:19 28:14 40:15 41:19 43:9, 11 47:2,4 49:2 52:3,4,8 53:5,16 55:5 65:18 68:2, 20 70:2,7,9,13, 15 71:3,6 72:13 87:8,12,18,19 94:16 101:1</p> <p><b>appealed</b> 20:10 42:15 47:20 53:15 56:14 65:19 95:3,15 96:14 116:9</p> <p><b>appealing</b> 63:10 110:17,19,21</p> <p><b>Appeals</b> 9:7,14 10:5,6,7 20:17, 18 29:21 41:10 43:13 51:22 55:22 56:4,7 83:11 93:19 95:21 97:22 99:14,19 101:1, 20 110:14</p> <p><b>APPEARANCES</b> 2:1</p> <p><b>appeared</b> 68:14</p> <p><b>appellate</b> 39:4,7, 8 47:22 53:14 56:5 70:20 86:15 91:20 120:2</p> <p><b>apple</b> 9:16</p> <p><b>applicable</b> 19:2,6 22:20 24:8 45:3</p> <p><b>applicant</b> 8:18 17:15</p> <p><b>application</b> 8:17 13:21 15:4 44:6 45:13,14 49:7,9 51:5 58:5,13 61:5,11,13 65:12, 13 75:19 94:3 107:4</p> <p><b>applications</b> 93:22</p>	<p><b>applied</b> 50:10 62:2 115:7</p> <p><b>applies</b> 36:18 59:11</p> <p><b>apply</b> 25:2 36:13 38:5,10,12 54:13, 14 60:7 61:17 69:14 80:5 101:5 105:18</p> <p><b>appreciate</b> 20:19 27:8 34:20 92:15 110:4 118:9</p> <p><b>appropriate</b> 59:7 66:16 119:9</p> <p><b>approval</b> 85:15,18</p> <p><b>approve</b> 116:20</p> <p><b>approved</b> 17:14</p> <p><b>April</b> 121:5</p> <p><b>AR-1</b> 35:14,15</p> <p><b>Aragoss</b> 55:9</p> <p><b>area</b> 29:4,5,6 85:1</p> <p><b>argue</b> 53:22 60:6 111:14 113:6</p> <p><b>argued</b> 12:18 30:4 32:16 77:15 113:19</p> <p><b>arguing</b> 60:3 66:4</p> <p><b>argument</b> 10:13 31:5 35:13 36:13 41:3 55:3 60:15 67:5 75:1 80:8, 10,16 89:2 102:16 107:6 119:21</p> <p><b>arguments</b> 54:22 60:4 61:17 63:19 65:5 69:13 77:17 88:11 113:18 117:6</p> <p><b>armed</b> 62:10</p> <p><b>arrival</b> 99:4</p> <p><b>Article</b> 11:8 30:8</p> <p><b>asked</b> 11:2 12:2, 15 19:8 21:12 22:15 48:11</p>	<p>50:12,14 53:12 99:3 117:20</p> <p><b>asking</b> 48:19 54:21 55:1 57:2, 4,11 59:3 62:10, 21 63:8,14 64:8 65:2 66:14,18 67:1,22 74:3,4 78:22 85:2</p> <p><b>Assembly</b> 11:6 32:15 33:8 75:12 78:10,15,21 79:11,14,17 80:7 94:18,20 103:17 107:7,20</p> <p><b>assert</b> 114:9</p> <p><b>asserted</b> 44:15</p> <p><b>assertion</b> 94:14</p> <p><b>assertions</b> 40:4</p> <p><b>assessment</b> 49:15 50:17</p> <p><b>Assistant</b> 10:13 100:17</p> <p><b>associated</b> 121:10</p> <p><b>ASST</b> 3:3</p> <p><b>assumes</b> 58:4</p> <p><b>Assuming</b> 68:22</p> <p><b>assure</b> 83:12 94:18</p> <p><b>attached</b> 88:19 109:13</p> <p><b>attack</b> 97:2</p> <p><b>attempting</b> 115:8</p> <p><b>attend</b> 24:18</p> <p><b>attending</b> 32:13</p> <p><b>attention</b> 38:17 92:15 118:7</p> <p><b>ATTORNEY</b> 3:3 10:14 68:18 72:9 78:14 88:20 92:6 100:17</p> <p><b>ATTORNEY'S</b> 3:4 119:11</p> <p><b>authority</b> 8:15 11:6 42:4,8,13 47:19 48:1 54:9,</p>	<p>10 55:19 56:1,2, 9,16 60:2 71:6, 18 72:18,20 75:15 78:3 79:20, 21 82:14 89:1 103:2 112:14 115:22</p> <p><b>available</b> 93:18</p> <p><b>average</b> 81:13</p> <p><b>avoid</b> 11:9 19:10 41:5</p> <p><b>await</b> 67:7</p> <p><b>awaits</b> 65:4</p> <p><b>aware</b> 79:3 119:12</p> <p>&lt; B &gt;</p> <p><b>Bach</b> 76:12,13, 16 77:5 88:8 92:7 106:17 115:2</p> <p><b>Bach's</b> 78:1 105:19 108:6 114:21</p> <p><b>back</b> 9:17 13:9 19:8 20:11,12 28:12 33:7 34:13 37:21 48:3 50:7 55:14 86:17 97:8, 18,21 99:14,18 105:20 118:11 119:5</p> <p><b>backwards</b> 41:3</p> <p><b>ball</b> 115:19</p> <p><b>bare</b> 104:16,17 105:1</p> <p><b>barred</b> 100:8</p> <p><b>BARTOLOMUCC</b> <b>I</b> 2:10 5:4 36:7, 9,10 38:10,22 39:6,12</p> <p><b>based</b> 32:19 42:1 108:8</p> <p><b>basic</b> 18:4 19:21 20:20 32:20</p>
---	---	--	---

<p><b>basically</b> 9:11 31:15</p> <p><b>basins</b> 26:13</p> <p><b>basis</b> 37:19 86:7 88:13 89:9 93:21 116:2</p> <p><b>bathrooms</b> 110:22</p> <p><b>baths</b> 26:13</p> <p><b>bed</b> 51:6</p> <p><b>bedroom</b> 25:20</p> <p><b>Bedrooms</b> 25:9</p> <p><b>beds</b> 25:6, 7, 11 110:22</p> <p><b>beg</b> 10:18 100:13</p> <p><b>beginning</b> 110:16</p> <p><b>behalf</b> 1:17 68:11</p> <p><b>Behavioral</b> 6:17 7:21 21:14, 20 22:5, 16 26:19 60:1 75:4, 14 79:19 103:1, 13, 20 104:2 110:7 112:13</p> <p><b>belief</b> 114:15</p> <p><b>believe</b> 6:20 7:11, 17 28:22 36:3 63:3 66:11 71:19 83:15, 22 84:1, 15 85:21 112:10, 16 116:3</p> <p><b>benefit</b> 71:10 76:11 77:13</p> <p><b>benefits</b> 88:6</p> <p><b>Benz</b> 22:2 104:1</p> <p><b>best</b> 5:14 106:19</p> <p><b>better</b> 29:1 90:17 108:4</p> <p><b>betting</b> 64:21</p> <p><b>beyond</b> 28:13</p> <p><b>big</b> 25:9</p> <p><b>bill</b> 78:12</p> <p><b>binding</b> 8:17 40:22 42:14 48:14, 15 57:17</p> <p><b>bit</b> 55:13 59:6</p>	<p>92:17 97:3</p> <p><b>bite</b> 9:16</p> <p><b>black</b> 95:13</p> <p><b>Black's</b> 37:8</p> <p><b>Bland</b> 73:15 104:11 105:9, 18</p> <p><b>blankets</b> 25:13</p> <p><b>BLANKINGSHIP</b> 2:5</p> <p><b>blood</b> 33:19</p> <p><b>Board</b> 3:2 9:7, 14 10:4, 6, 7 20:16, 18 39:15 41:9 50:11 56:4, 6 58:11 59:1, 5 75:3, 7 82:18 83:9 84:1 93:19 95:20, 21 97:11, 21 99:14, 18 101:1, 20 114:11</p> <p><b>body</b> 58:13 77:3 90:6</p> <p><b>borne</b> 30:4</p> <p><b>bought</b> 19:11</p> <p><b>Boulevard</b> 2:20</p> <p><b>bound</b> 28:9</p> <p><b>bounds</b> 44:15</p> <p><b>bread</b> 115:3</p> <p><b>break</b> 68:5</p> <p><b>breast</b> 8:3</p> <p><b>bridge</b> 34:16</p> <p><b>brief</b> 36:11 48:11 55:10 59:9 66:11 71:21 81:6, 7 88:20 92:20, 21, 22 93:8, 12 100:2 104:12 109:13</p> <p><b>briefed</b> 6:3</p> <p><b>briefly</b> 22:21 82:12</p> <p><b>briefs</b> 100:12 104:12 108:9</p> <p><b>brings</b> 76:21</p> <p><b>broad</b> 8:11</p> <p><b>Bruce</b> 114:21 115:2</p>	<p><b>building</b> 14:22 15:15, 17 16:14 23:5, 6, 16 97:13, 14</p> <p><b>built</b> 70:19</p> <p><b>business</b> 53:8</p> <p><b>butter</b> 115:4</p> <p><b>buy</b> 13:16</p> <p><b>BZA</b> 40:1, 14 41:12 42:5, 7, 15 48:12 52:3, 12, 21 53:13 54:10 63:5, 14, 16 64:6, 8 67:15, 22 71:2, 3, 15 72:19 75:8 77:8 87:1, 11 97:6 98:2 99:16 100:2, 10, 15</p> <p><b>BZA's</b> 52:22 62:17 97:5</p> <p>&lt; C &gt;</p> <p><b>calculations</b> 86:10</p> <p><b>calendar</b> 117:22</p> <p><b>call</b> 10:22 11:16 37:5 95:7 115:17, 18 120:2</p> <p><b>called</b> 40:3</p> <p><b>calling</b> 11:10</p> <p><b>calls</b> 12:10 101:18 102:6</p> <p><b>capable</b> 54:2</p> <p><b>capacitated</b> 35:6</p> <p><b>capacity</b> 51:6 53:14 56:5</p> <p><b>care</b> 13:3 27:21</p> <p><b>Caroline</b> 93:3</p> <p><b>carve</b> 104:9</p> <p><b>Case</b> 1:3 5:19 6:1 7:4 9:8 15:13 17:5 18:4 19:15 27:14 28:13 32:5, 17 38:15, 18 42:17, 19, 20, 21 43:1 44:9, 10 45:14</p>	<p>47:21 51:17 55:6, 9, 18 64:20 67:6 69:7, 20 73:10, 11, 13 76:12, 13, 16 77:22 78:1 81:2, 5, 6, 9, 11, 14 82:3 88:8 93:3, 4, 14 94:7, 9, 13 97:4, 9 103:5, 13 104:1, 11, 12, 15 105:11, 18, 19, 21 106:21 108:2, 7, 8 109:4 116:8, 14</p> <p><b>cases</b> 5:9, 12 44:3 47:3, 8, 11 77:21 81:4, 21 82:3 89:13 93:5 94:12 96:18, 21 101:4 105:21 108:2</p> <p><b>catch</b> 20:7 99:15</p> <p><b>caught</b> 99:15</p> <p><b>Cbartolomuccion@sc</b> <b>haerr-jaffe.com</b> 2:15</p> <p><b>center</b> 37:19 54:17</p> <p><b>centers</b> 37:1 38:13</p> <p><b>certain</b> 25:15 106:3</p> <p><b>certainly</b> 29:12 38:19 44:15 54:9 56:15 60:15 91:15 110:18 118:22</p> <p><b>certainty</b> 12:5</p> <p><b>certificate</b> 14:21 16:2 23:7, 10</p> <p><b>certify</b> 121:5, 9</p> <p><b>cetera</b> 15:1 17:19 24:6 31:11</p> <p><b>challenge</b> 101:22</p> <p><b>challenged</b> 30:22</p> <p><b>chance</b> 9:18 14:5</p>
--	---	---	--

<p><b>chances</b> 13:16 20:3 <b>change</b> 65:13 <b>Chapter</b> 110:12 <b>charge</b> 106:18 <b>cheat</b> 41:6 <b>Chief</b> 84:22 <b>children</b> 106:7, 9, 20 109:9 <b>choice</b> 13:13, 14 20:3 <b>choices</b> 52:6 <b>choose</b> 79:14 91:19 <b>chose</b> 79:2 <b>Chris</b> 36:10 <b>CHRISTOPHER</b> 2:10 <b>CIRCUIT</b> 1:2 48:1 75:9 84:7, 10 99:15 106:17 <b>citation</b> 81:18 <b>cite</b> 77:21 81:2, 9 <b>cited</b> 37:7 55:10 73:11 81:6, 7 89:13 96:18 108:9 <b>City</b> 30:13 82:8, 9 <b>CL22-2838</b> 1:3 5:2 <b>clarification</b> 6:9 <b>classic</b> 99:15 <b>classification</b> 23:6 <b>clean</b> 23:22 25:12 38:17 <b>clear</b> 41:8, 10, 13 55:6 66:9, 17 71:13 76:9 80:21 81:11 82:5 96:8 100:1, 11, 12, 14, 17 103:12 109:4 113:2 <b>clearance</b> 17:20 102:8 <b>cleared</b> 46:1, 3</p>	<p><b>clearly</b> 114:20 <b>clears</b> 45:19 <b>CLERK</b> 5:2 <b>clients</b> 95:5, 16 96:12 97:9 <b>close</b> 12:10 101:18 109:6, 12 <b>closed</b> 59:21 <b>closing</b> 41:11 <b>closure</b> 113:16 114:7 116:11 <b>co-counsel</b> 36:8 <b>Code</b> 10:3, 17 11:1, 13, 21 15:15 17:6, 7 20:21 29:18 30:7 31:7 32:14 36:1 38:12 42:4, 7 60:2 70:20, 21 71:12 76:18 82:22 83:20 96:4 97:14 101:2 110:9, 12 112:15 <b>codified</b> 10:2 <b>cold</b> 24:3 <b>collaterally</b> 97:2 <b>colleague</b> 21:6 41:8 <b>collection</b> 27:3 110:2 <b>combination</b> 29:7 <b>come</b> 32:6 36:15 45:6 48:3 62:13 65:10 85:16 90:6 109:7, 11 119:5 <b>comes</b> 9:17 44:1 <b>comfortable</b> 25:12 117:7 <b>coming</b> 32:9 40:10 109:15, 22 <b>commencing</b> 1:15 <b>comments</b> 39:22 44:2, 4, 13 48:5 <b>commercial</b> 16:7 24:16 26:8, 10 27:12, 15, 21</p>	<p>28:11, 15, 16 32:7 33:14 34:2, 4, 6 35:3, 9, 21 60:6, 8, 11 61:18 69:15 77:19 79:9 80:3, 4 88:14 103:10, 11, 15 104:10 105:5 107:13, 17 109:5 <b>Commission</b> 58:11 59:1 121:5 <b>committed</b> 14:3 84:16 <b>common</b> 33:8 46:22 47:15 <b>commonwealth</b> 61:22 77:9 121:1, 4, 18 <b>community</b> 25:3, 4 108:19 <b>commuting</b> 90:17 <b>compare</b> 105:9 <b>compelling</b> 62:19 <b>competitive</b> 118:17 <b>complete</b> 117:9 <b>completely</b> 22:6 26:21 27:10 105:4, 17 111:2 <b>completion</b> 8:19 <b>compliance</b> 23:17 45:18 <b>complicated</b> 115:19 119:18 <b>complication</b> 115:20 <b>comply</b> 94:21 <b>composting</b> 24:4 <b>comprehensive</b> 114:10, 17 <b>concede</b> 108:1 <b>concept</b> 43:3, 4 111:10 113:6 <b>concern</b> 34:17 46:21 100:1</p>	<p><b>concerned</b> 24:15 91:16 <b>concluded</b> 120:8 <b>conclusion</b> 68:1 77:1 <b>concrete</b> 94:4 <b>condition</b> 25:11 <b>conditional</b> 6:18 7:22 <b>conditions</b> 33:18 <b>conduct</b> 96:7 <b>confident</b> 13:16 <b>confirmed</b> 103:22 <b>confusion</b> 116:13 <b>congregate</b> 13:3 27:18, 21 28:6, 9, 17 34:4 38:6, 11 <b>conjunction</b> 80:1 <b>Connecticut</b> 82:8 <b>consider</b> 48:6 59:13 61:5 62:6 65:14 74:15 <b>consideration</b> 56:8 <b>considered</b> 42:17, 18, 20, 21 43:1 78:10 79:10 82:12 <b>considering</b> 58:12 <b>consistent</b> 22:14 <b>consolidated</b> 51:22 <b>constitute</b> 82:6 <b>constitutionally</b> 66:3 <b>constructed</b> 18:22 45:1 <b>construction</b> 33:6 <b>contact</b> 117:17 <b>contacted</b> 50:11 <b>contains</b> 103:5, 8, 9 <b>contemplated</b> 18:22 45:1 <b>contending</b> 107:10 <b>content</b> 49:3 53:10</p>
---	--	---	--

<p><b>contention</b> 106:1  <b>contested</b> 101:16  <b>context</b> 18:15  55:4, 5 80:19  106:12, 13  <b>contradict</b> 116:21  <b>contradiction</b>  11:22 36:1 96:3  <b>contrary</b> 81:22  85:11 88:16  89:20  <b>control</b> 118:7  <b>convened</b> 1:13  <b>convincing</b> 40:11  <b>copies</b> 14:11, 12  <b>copy</b> 23:7 29:1  59:10  <b>core</b> 86:18  <b>correct</b> 9:7 15:16  39:19 40:15 41:7  48:12, 18, 20 49:5  52:2, 3 55:1 56:1,  12, 13, 22 57:8, 15  61:8 62:9 63:9  64:6, 9, 14 65:6, 9  66:21 67:18 77:1  90:15, 22 97:6  99:17 105:12  121:7  <b>correctly</b> 72:9  75:16 87:1  112:10  <b>correctness</b> 66:5  115:10  <b>cost</b> 116:11, 12  <b>counsel</b> 5:11  40:5, 16 68:5, 7,  12 80:10 81:1  113:14, 19 114:2  118:8, 12 119:2,  20 121:10  <b>counsel's</b> 85:11  <b>counterpart</b> 76:18  <b>country</b> 109:10  <b>COUNTY</b> 1:2, 14  3:2, 3, 4 6:21</p>	<p>10:2, 11, 14, 20  11:4, 5, 14, 17  14:18 15:17 16:4  19:2 20:21 21:18  27:1, 13, 15, 16, 20,  22 28:1, 3, 5, 7  29:15 30:13  31:20, 22 33:22  34:21 35:1 37:6  41:4, 5 44:5, 8, 18  45:3, 9 46:5, 6  49:8, 10 57:8  58:1, 18 61:19  63:1 68:18 70:8  72:9 74:20 85:20  86:21 87:3, 19  93:4 94:15 95:7,  17 96:15 100:17  116:19 119:11  <b>County's</b> 8:3  38:5 40:6 41:21  42:1 60:9 62:20  <b>couple</b> 7:17 8:5  15:8 98:6  <b>course</b> 47:12  59:10  <b>COURT</b> 1:2, 16  5:5, 7, 19 6:2, 14,  19 7:2, 10, 13 8:1  9:5, 11 11:3  14:11, 12, 13  16:21 17:1, 12  20:13 21:6 25:16,  18 26:11, 22 27:3  29:1, 4, 20, 21, 22  31:3 32:16 34:20  36:4, 5 38:9, 21  39:3, 11, 13 40:11  41:2, 6, 20 42:4,  16 43:13, 16  44:12, 16 46:7, 10,  12, 14, 17, 20 47:3,  5, 9, 17, 21, 22  48:8, 17, 21 49:3,  4, 6, 12 50:3, 19,  22 51:3, 7 52:5, 8,</p>	<p>13, 19 53:2, 6, 8,  18, 20, 22 54:6, 16,  20 55:11, 22  56:17 57:6, 13, 20  60:22 61:6 62:1,  10, 12, 18 63:12,  19 64:4, 12, 21  65:2, 7, 16 66:4, 8,  17, 20 67:12, 14  68:3, 5, 7, 9, 15, 16  70:18, 22 71:12,  22 72:4, 13 73:7,  13, 16 74:3, 11  75:9, 20 76:13  77:6 78:1, 7  83:11, 16 84:7, 9,  10, 21 85:7, 9, 21  86:13, 16, 18 88:5  89:22 90:9, 13, 20  91:5, 9, 11, 12, 14  92:7, 12, 20 93:6,  16, 20 94:1, 18  95:5 96:18 97:5  98:10, 13, 17, 22  99:3, 12, 16 100:4  102:17 103:7  104:21 106:12, 17  109:17 110:1  111:4, 14, 20  112:1, 3, 7 113:6,  11 117:13, 17, 19  118:5, 10, 14, 20  119:5, 9, 13, 17  120:1, 7  <b>courthouse</b> 1:14  <b>courtroom</b> 84:18  <b>courts</b> 39:4 43:5  60:13 66:2 80:18  118:18  <b>Court's</b> 6:8, 20  37:10 39:20 48:1  71:18  <b>covered</b> 62:21  <b>crafted</b> 103:18  <b>crafting</b> 103:17</p>	<p><b>create</b> 24:5 79:14  116:13  <b>created</b> 116:4  <b>Creswell</b> 121:3  <b>cries</b> 116:8  <b>critical</b> 18:16  <b>cross</b> 40:4  <b>Crucible</b> 42:21  43:17  <b>crystal</b> 41:8, 10  <b>cul-de-sac</b> 53:19  <b>cultural/rural</b>  29:7    &lt; D &gt;  <b>D.C</b> 2:13  <b>daily</b> 90:18  <b>data</b> 85:19 86:11  101:10  <b>date</b> 71:7 83:15  118:13 119:4  <b>day</b> 41:6 99:11  121:14  <b>daylight</b> 63:13  <b>days</b> 81:12, 16  82:6, 16 84:15  89:11, 14, 16  95:15 96:14 97:1  117:21  <b>de</b> 71:14 72:19  87:21, 22  <b>deal</b> 5:9 93:5  111:1  <b>dealing</b> 53:8  107:9, 10  <b>deals</b> 24:19  <b>dealt</b> 45:6 106:1  <b>debate</b> 62:2  <b>December</b> 117:21  <b>decide</b> 14:7  57:16 70:11, 12,  19 71:13, 18  72:10, 13 73:2  86:20 87:3, 4, 5,  13, 16 88:1 94:15</p>
--	--	---	--

99:13 103:3  
110:2  
**decided** 56:8  
75:3 97:5 99:17  
116:14  
**decides** 72:19  
77:9  
**deciding** 58:13  
71:10 97:6  
**decision** 9:10  
10:16 11:1, 2, 11,  
18 12:9, 10, 14  
13:8 18:17 28:13  
40:14 42:5 43:15,  
17 50:7 52:10  
53:13, 17 55:2, 4,  
5 56:6, 15 59:4  
60:22 61:1, 2, 15,  
22 62:4, 6, 7, 11,  
13 63:6, 11 65:7,  
20 67:19, 21  
68:20 69:8 70:2,  
7, 14 71:1, 4, 11  
72:12, 22 73:6, 15  
74:13 75:6 76:14  
78:7 81:8 82:17  
84:14 86:22 87:8  
90:1 92:9, 19  
94:10, 22 95:1, 9,  
14 96:9, 11, 13  
98:9, 18, 20, 22  
99:1, 8, 20 100:21,  
22 101:11, 13  
105:20 106:8  
107:8 108:6, 21,  
22 110:19 114:10,  
14, 19 115:13, 21  
116:2, 19 117:8,  
18 119:12 120:4  
**decisions** 40:11  
42:9, 14 93:7, 9,  
12, 17 98:3, 4  
101:3, 5, 6, 9, 14,  
17 102:2, 11  
115:4

**decisive** 54:16  
**defend** 67:11  
**Defendants** 1:3  
2:16  
**defer** 68:7 71:7  
**deferred** 69:7  
**deferring** 62:3  
72:3  
**defers** 70:16  
**defined** 114:20  
115:6  
**definition** 37:12,  
17 77:12 79:14  
80:2, 9, 11, 15  
81:15, 16, 17  
82:16 88:4, 16, 17  
90:10, 14 106:5  
110:3  
**definitions** 80:6  
**delay** 5:10 49:19  
114:16  
**delays** 113:13  
**deliberate** 114:16  
**demonstrably**  
69:16  
**demonstrate** 69:20  
**denied** 20:11  
58:20  
**denies** 43:19  
65:21  
**density** 35:17  
**Department** 6:17  
7:21 15:15, 17  
21:9, 14, 17 22:3,  
4, 15 26:19 27:1  
34:9 45:15, 20  
50:11 51:10  
59:22 69:6 73:21  
75:14 76:19  
79:19 99:10  
102:22 103:6, 13,  
19 104:2 110:7  
112:13  
**Department's**  
49:15  
**depend** 6:13

**depending** 5:18  
46:5  
**deputy** 66:13  
**describe** 83:2  
**described** 43:22  
76:1  
**designed** 16:10  
17:14 45:10  
**designs** 18:7  
**detailed** 39:4  
**details** 17:17  
18:7, 13 23:3  
26:6, 14  
**detected** 70:3  
**determination** 9:8  
10:8 12:3, 16, 17,  
21 13:12 17:8, 9,  
11 18:1, 4, 12  
19:9, 15, 16, 19, 20,  
21 20:1 21:3  
22:11 27:16  
48:15 52:3 53:1,  
16 62:17 63:9  
64:10 67:7 91:12,  
22 95:12 96:22  
99:13 103:18  
**determinations**  
11:15  
**determine** 30:12,  
14 33:10 49:22  
54:6, 10 55:18  
56:1 64:2 77:3  
106:19  
**determined** 28:16  
31:4 34:3 35:11  
63:5 64:7 69:5  
**determining** 9:8  
28:17  
**d'etra** 21:19  
**developed** 71:9  
**Development**  
15:16 16:14 29:7  
35:17 45:21  
97:14  
**Developmental**  
6:17 7:21 21:9,

15, 21 22:5, 16  
26:19 27:1 31:10  
59:15 60:1 75:14  
79:20 103:1, 14,  
20 104:2 112:13  
**developmentally**  
30:22  
**developments** 6:14  
**Dick** 96:20  
**dictate** 71:22  
100:20, 21  
**dictates** 77:2  
94:21  
**Dictionary** 37:8  
**differ** 10:18  
100:13  
**difference** 93:11  
**different** 7:19  
22:7 26:22 27:10  
30:6 44:5 47:10  
48:21 56:18, 20  
57:1, 14 65:12  
66:22 93:9 94:8  
95:10 105:4, 17  
111:2  
**difficulty** 28:21  
**dimensional** 34:12  
**dimensions** 23:13  
**direct** 36:1  
**directing** 46:8  
**directly** 27:13  
**director** 16:14  
22:3  
**disabilities** 23:22  
32:1 59:15  
**disability** 31:4, 5,  
10 32:2 59:15  
83:3  
**disable** 30:17  
**disabled** 30:18, 22  
31:13 33:1 73:20  
**disagree** 31:19  
64:15 67:9  
119:15  
**disappeared** 5:12

<p><b>disappointed</b> 84:14 119:13</p> <p><b>discretion</b> 14:6, 7, 9 72:1, 2, 15 73:1 87:20 101:22</p> <p><b>discretionary</b> 12:10, 14 13:12 21:2 91:20 101:14, 17 102:4, 11</p> <p><b>discriminate</b> 30:15, 19 31:16</p> <p><b>discriminated</b> 108:18</p> <p><b>Discuss</b> 31:3 93:2</p> <p><b>discussed</b> 6:22 9:5 93:2</p> <p><b>discussion</b> 21:5 57:22</p> <p><b>discussions</b> 16:11</p> <p><b>dismiss</b> 52:14 72:21 87:5</p> <p><b>dismissed</b> 53:1</p> <p><b>disposal</b> 24:4, 13</p> <p><b>dispositive</b> 77:7, 8</p> <p><b>dispute</b> 60:4</p> <p><b>dissatisfaction</b> 78:9</p> <p><b>dissatisfied</b> 84:5</p> <p><b>distance</b> 109:17, 20</p> <p><b>distinct</b> 9:20</p> <p><b>distinction</b> 31:3, 6 60:7 101:7, 8 107:6, 19, 20 108:10</p> <p><b>distinctions</b> 20:19</p> <p><b>distinctly</b> 56:17</p> <p><b>distinguish</b> 101:2</p> <p><b>distinguished</b> 93:20</p> <p><b>district</b> 35:14 69:11 74:7 92:5</p> <p><b>districts</b> 17:22 74:1 102:9</p>	<p><b>DMH</b> 76:21</p> <p><b>document</b> 51:5</p> <p><b>documents</b> 27:6 62:20</p> <p><b>doing</b> 114:4</p> <p><b>dollars</b> 95:19</p> <p><b>domicile</b> 80:18</p> <p><b>door</b> 35:19</p> <p><b>drafted</b> 108:17</p> <p><b>drawn</b> 17:15</p> <p><b>Drive</b> 2:6</p> <p><b>driven</b> 86:9</p> <p><b>drives</b> 70:3, 4</p> <p><b>drive-ups</b> 90:21</p> <p><b>drug</b> 59:17</p> <p><b>duration</b> 5:14</p> <p><b>dwelling</b> 16:18</p> <p>&lt; E &gt;</p> <p><b>eagerness</b> 91:13</p> <p><b>earlier</b> 66:8 96:10, 19 99:3 100:9</p> <p><b>easiest</b> 110:1</p> <p><b>easily</b> 81:17</p> <p><b>East</b> 1:14</p> <p><b>economies</b> 35:16, 17</p> <p><b>economy</b> 46:22 71:9, 22</p> <p><b>Edition</b> 37:8</p> <p><b>educated</b> 5:19 55:13</p> <p><b>effectively</b> 111:6</p> <p><b>effluent</b> 34:17</p> <p><b>effort</b> 54:17 114:9 120:3</p> <p><b>efforts</b> 107:8</p> <p><b>eight</b> 31:8, 9, 13 33:1 36:19 50:15, 19, 22 51:1, 8 59:14 73:19 74:6, 16, 20 90:5 104:20</p> <p><b>either</b> 46:4 64:11 65:20 87:17 90:6</p>	<p>91:19 102:5 114:7</p> <p><b>elected</b> 117:10</p> <p><b>elegant</b> 39:5</p> <p><b>eligible</b> 33:3 77:4</p> <p><b>empowered</b> 11:14</p> <p><b>enabled</b> 10:1 11:6 20:21</p> <p><b>enabling</b> 10:2, 21 11:1 30:1, 9 42:1 82:21</p> <p><b>enacted</b> 41:22</p> <p><b>enacts</b> 10:11</p> <p><b>endorse</b> 119:14</p> <p><b>enforcement</b> 10:10 95:3</p> <p><b>engage</b> 34:5</p> <p><b>engaged</b> 68:17</p> <p><b>engineering</b> 85:19 86:10</p> <p><b>enjoy</b> 118:15</p> <p><b>enormously</b> 51:16</p> <p><b>enter</b> 46:21 48:11 55:20</p> <p><b>enterprise</b> 77:20</p> <p><b>Enterprises</b> 96:20</p> <p><b>entire</b> 64:9</p> <p><b>entities</b> 40:9</p> <p><b>entitled</b> 47:13 92:5</p> <p><b>entitlement</b> 19:20</p> <p><b>entity</b> 76:1 77:10</p> <p><b>environment</b> 23:19</p> <p><b>ESQUIRE</b> 2:3, 10, 17, 18</p> <p><b>essentially</b> 32:5 60:11 61:9</p> <p><b>estimate</b> 99:4</p> <p><b>ET</b> 1:3 15:1 17:18 24:6 31:11 110:9</p> <p><b>evaluate</b> 49:21</p> <p><b>evaluated</b> 13:11</p> <p><b>evaluating</b> 34:9 61:21</p>	<p><b>event</b> 70:22 71:15 121:11</p> <p><b>everybody</b> 41:12 67:8 108:20 117:6 120:7</p> <p><b>Everybody's</b> 117:13</p> <p><b>evidence</b> 6:8, 13 17:4 21:22 44:14 115:11</p> <p><b>exact</b> 79:8 90:16</p> <p><b>exactly</b> 41:3 74:2 76:15 88:5</p> <p><b>examined</b> 40:4</p> <p><b>example</b> 89:21 90:2, 3</p> <p><b>exception</b> 7:17 58:16 79:10</p> <p><b>exclude</b> 74:5, 7</p> <p><b>excluded</b> 73:22 88:15</p> <p><b>excludes</b> 77:19</p> <p><b>exclusive</b> 83:8</p> <p><b>excuse</b> 26:22 30:9, 17 92:21</p> <p><b>exercise</b> 72:1</p> <p><b>exercising</b> 87:20</p> <p><b>EXHIBIT</b> 4:11, 13 27:4, 7 66:10, 11</p> <p><b>exist</b> 49:22</p> <p><b>existence</b> 21:19 42:8</p> <p><b>existing</b> 65:4 66:5</p> <p><b>exotic</b> 6:1</p> <p><b>expand</b> 104:9</p> <p><b>expansive</b> 42:13</p> <p><b>expect</b> 24:21 51:15</p> <p><b>experience</b> 12:12</p> <p><b>expert</b> 86:9</p> <p><b>expertise</b> 12:12</p> <p><b>expires</b> 121:5</p> <p><b>explain</b> 69:16</p> <p><b>explained</b> 87:9</p>
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<p><b>express</b> 63:16 79:4</p> <p><b>expressed</b> 84:20</p> <p><b>extent</b> 107:3 120:1</p> <p>&lt; F &gt;</p> <p><b>facets</b> 117:6</p> <p><b>facilities</b> 24:2 34:3, 5 38:11 61:18 77:4 103:15, 16 107:17</p> <p><b>facility</b> 8:1 13:3 27:18 28:6, 9, 17 29:13 31:12 32:3 33:1, 21 34:14 36:16, 18 59:13, 21, 22 60:20 63:17 69:3, 4, 10 73:9 74:5, 15, 19 75:1, 11, 13 76:5, 6, 11, 19, 21 77:13 79:15, 18, 19 80:2, 3, 4 84:2, 19 88:2, 18 89:7 92:2, 4 102:21, 22 103:4, 11 104:6 109:5 112:11, 12, 21</p> <p><b>fact</b> 6:18 38:3 71:12 76:12 77:7, 8</p> <p><b>factfinding</b> 117:8</p> <p><b>factor</b> 31:4 62:5</p> <p><b>factors</b> 15:22 108:11</p> <p><b>facts</b> 8:18 12:2 62:11 65:12, 13 90:22 91:11 92:7 94:7 105:20 116:15 118:7</p> <p><b>factual</b> 6:14</p> <p><b>factually</b> 115:20</p> <p><b>Fair</b> 32:18 78:17 82:4, 12 94:19 108:16</p>	<p><b>Fairfax</b> 2:7 27:13, 15, 16, 20, 22 28:5 29:12 44:5 76:15, 17 81:7, 14 103:10 106:17</p> <p><b>fall</b> 15:5 19:18 106:15</p> <p><b>families</b> 16:19 17:1, 9 30:16, 17 31:2 32:8 34:6</p> <p><b>family</b> 30:15 33:4 59:16 74:18, 21 76:7 85:1</p> <p><b>far</b> 54:4 57:8 62:20</p> <p><b>farm</b> 29:8, 9 35:19</p> <p><b>fashion</b> 100:16</p> <p><b>favorable</b> 12:16 96:11</p> <p><b>favorably</b> 20:12</p> <p><b>federal</b> 32:17, 18 78:17</p> <p><b>fee</b> 58:5</p> <p><b>feel</b> 13:16</p> <p><b>feels</b> 49:18, 19</p> <p><b>fell</b> 106:4</p> <p><b>fewer</b> 74:5, 20</p> <p><b>field</b> 85:14 86:7, 9</p> <p><b>fields</b> 85:8</p> <p><b>Fifth</b> 37:8</p> <p><b>file</b> 6:20 8:8 14:12 58:5 97:18</p> <p><b>filed</b> 49:9</p> <p><b>final</b> 43:13, 15, 17 47:4, 5 48:19 49:1 53:5, 17 55:4, 20 56:15 63:6, 21 64:1, 5 65:20 68:1 72:22 88:21 91:22 95:15 96:13, 15, 16, 17 114:10, 19</p>	<p>115:13, 21 116:9 119:7 120:4</p> <p><b>finality</b> 43:3 47:1 65:7 114:11 116:2, 15 117:4</p> <p><b>finalized</b> 117:8</p> <p><b>finally</b> 107:22</p> <p><b>find</b> 19:13 50:7 57:7 59:3 62:22 66:4 71:6 79:15 80:3 81:18 89:3, 5 91:21 116:1, 14</p> <p><b>finding</b> 34:4 114:19</p> <p><b>fine</b> 13:19</p> <p><b>Fire</b> 25:1</p> <p><b>first</b> 5:20 6:5 7:10, 11 8:7 13:1 14:20 18:5, 10, 14 19:9, 14 21:1 25:5 26:5 39:7, 20 40:13 42:7 54:19 55:2 68:17 69:15, 22 73:8 74:10 75:8 77:18 82:2 83:9 84:13 86:19 104:4 106:6</p> <p><b>fit</b> 39:9 80:9</p> <p><b>five</b> 50:15, 19, 22 51:1, 6, 9 82:20 90:4</p> <p><b>flawed</b> 86:7</p> <p><b>floor</b> 23:12</p> <p><b>focused</b> 9:11 44:7</p> <p><b>folks</b> 36:15 37:2 62:2</p> <p><b>following</b> 38:20</p> <p><b>follows</b> 59:12 73:17 76:17</p> <p><b>food</b> 24:7</p> <p><b>footnote</b> 104:13 106:8</p> <p><b>forbidden</b> 38:7, 13</p> <p><b>force</b> 116:7</p>	<p><b>foregoing</b> 121:6</p> <p><b>foreign</b> 30:6</p> <p><b>foremost</b> 39:21 40:13</p> <p><b>forfeiture</b> 116:5</p> <p><b>form</b> 114:16</p> <p><b>Foster</b> 108:22 109:1</p> <p><b>foul</b> 23:22</p> <p><b>found</b> 10:3, 5 19:5 20:13 27:20 28:4, 5, 8 52:21 72:7 81:16 82:6 87:2 89:16 93:6 94:1 95:5 96:12</p> <p><b>four</b> 5:9 25:19</p> <p><b>frankly</b> 34:20 70:10</p> <p><b>Fredericksburg</b> 30:13</p> <p><b>free</b> 23:22 120:7</p> <p><b>Friday</b> 50:6</p> <p><b>friend</b> 21:5 71:19</p> <p><b>frivolous</b> 60:16</p> <p><b>front</b> 20:4, 6 68:16 85:9, 21 86:3 89:22 91:14</p> <p><b>full</b> 113:14 121:7</p> <p><b>fullness</b> 6:11, 12</p> <p><b>function</b> 40:7</p> <p><b>fundamental</b> 28:12 29:19 93:11</p> <p><b>fundamentally</b> 93:9 94:7 96:2</p> <p><b>further</b> 29:17 32:4 34:2 55:13 63:16 113:9 121:9</p> <p><b>future</b> 62:12</p> <p>&lt; G &gt;</p> <p><b>garbage</b> 24:4</p> <p><b>general</b> 7:8 11:6 32:15 33:8 75:12 78:10, 14, 15, 21</p>
---	--	--	--

79:11, 14, 17 80:7 92:6 94:18, 20 103:17 104:21 107:7, 20 110:13 <b>General's</b> 88:20 <b>getting</b> 28:13 61:1 97:10 120:4 <b>Ghampshire@bkla wva.com</b> 2:9 <b>GIFFORD</b> 2:3 6:5 92:16 <b>gist</b> 7:3 <b>give</b> 42:7 66:2 111:7 116:12 117:5 119:7 <b>given</b> 7:12 8:11, 15 40:2 83:7 121:13 <b>gives</b> 42:4 114:7 <b>go</b> 7:11, 13 15:7, 22 17:12 18:3, 8 22:21 25:21 26:11 32:4 34:1 37:20, 21 46:17 47:16 48:22 53:9 55:14 57:20 63:16 64:2 66:21 68:8 73:7 84:13 86:17 92:17 97:1, 8, 18, 19, 21 99:18 100:4 106:11 108:2, 13, 14 109:2, 3, 15, 16, 21 120:7 <b>goal</b> 31:18 <b>goes</b> 7:10 29:17 92:10 108:7 <b>going</b> 5:9 9:15, 18 10:21 11:1, 9 13:15, 18, 19 14:16 16:4, 9, 11 20:5 24:14, 17 28:11 30:11, 14 33:3 38:21 40:8 47:16 51:10, 15 58:14, 19, 20, 21	62:19 64:19 67:4 79:1 81:18 88:16 90:11 91:6 97:16 98:2, 14 100:6 109:9, 10 114:9, 15 115:14 116:5 118:1, 2, 20 119:5 <b>Good</b> 5:4, 5, 6, 7 24:22 25:3 34:21, 22 39:13, 14 102:16 113:19 115:3 <b>gotten</b> 57:19 <b>govern</b> 38:6 <b>government</b> 30:12 35:11 103:21 <b>governments</b> 33:9 <b>grading</b> 16:12, 13 <b>grant</b> 43:22 46:8, 13, 19 48:9 <b>granted</b> 58:19 98:1 <b>grants</b> 43:19 65:20 <b>great</b> 117:11 <b>group</b> 25:21 59:21 60:20 73:18 75:12 76:2 77:4 79:18, 22 102:21 112:12, 19, 22 113:1 <b>groups</b> 30:20 <b>guess</b> 5:14 50:3 52:9 105:20 <b>guessing</b> 61:21 <b>guesstimate</b> 114:13 <b>guest</b> 37:5  < H > <b>half</b> 5:8 <b>halls</b> 26:15 <b>halting</b> 100:16 <b>hammer</b> 119:7 <b>HAMPSHIRE</b> 2:3 6:4, 5, 16 7:9,	11, 14 11:4 14:14 16:22 17:4, 13 25:17 26:3, 12 27:8 31:6 36:6 40:17 44:2, 19 45:5 58:2 68:18 71:20 83:10 85:6 87:9 92:14, 16 98:11, 15, 19 99:2, 5 100:3, 13 109:20 110:4 111:13, 16, 19 112:3, 8 118:9, 19, 22 119:22 120:6 <b>Hampshire's</b> 39:22 86:6 119:4 <b>hand</b> 21:8 29:1 121:13 <b>handed</b> 7:16 34:11 35:14 44:19 51:5 110:15 <b>handled</b> 41:9 <b>handout</b> 7:19 44:19 <b>handouts</b> 7:15 <b>happen</b> 5:7 97:17 99:11 <b>happened</b> 42:11 44:9 91:1 97:4 99:9, 10 104:14 117:19 <b>happens</b> 13:5 99:12 <b>hard</b> 34:11 <b>Harrison</b> 3:5 <b>head</b> 81:19 <b>Health</b> 6:17 7:21 16:3 21:9, 14, 20 22:5, 16 26:19 31:4 34:9 45:15, 20 49:14 50:11 51:10 60:1 69:6 73:22 74:6 75:4, 7, 14, 22 76:2, 20 79:19 82:18 83:9	84:1 99:10 103:1, 14, 20 104:2 106:18 110:7 112:13, 19 <b>hear</b> 48:22 53:6 56:20 72:8 77:18 112:1 114:21 <b>heard</b> 10:13 57:6 63:19 66:8 75:2 86:13, 14 91:14, 17 <b>hearing</b> 1:12 7:16 37:7 41:12 62:5 75:17 92:22 103:7 113:14 <b>hearings</b> 15:18, 20 <b>heartbreaking</b> 106:9 <b>held</b> 1:12 73:17 93:16 104:21 106:17, 18 121:6 <b>Help</b> 53:18 62:7 <b>HILARY</b> 1:3 <b>history</b> 79:5 88:21 <b>home</b> 23:3, 20 30:18 32:6 37:21 59:21 60:20 73:18 75:13 76:2 77:4, 12 79:18, 22 80:12, 18 102:21 106:11, 22 107:1, 3 108:14 109:3, 16, 21, 22 112:12, 19, 22 113:1 <b>homes</b> 25:21 28:10 31:1, 2 107:15, 16 108:18 109:6, 13, 15 <b>Honor</b> 5:6, 18 6:4 7:12, 14, 18 12:22 21:4 23:1 26:17 28:20 34:10 36:3, 8, 9 37:7 38:16 39:1, 6, 9, 14, 17 40:6
--	---	---	---

44:7 48:10 50:21  
54:18 55:18  
57:22 59:2, 10  
60:17 61:3 63:2  
68:4, 10, 14 69:7  
70:3 72:6, 7 73:5  
74:9 75:16 78:7  
79:3 81:9, 18  
83:12, 18 84:7, 17  
85:5, 6, 17 86:4, 8,  
17 89:19 91:19  
92:10, 14 97:3  
99:6, 22 100:3, 14  
102:15 110:5, 13  
111:19 113:8  
117:15 118:4  
119:10, 16 120:5,  
6  
**HONORABLE**  
1:15  
**Honor's** 38:20  
**hope** 8:8 38:16  
39:9 41:2 85:18  
**hoped** 62:13  
**hospital** 38:2  
82:8 103:10  
**hot** 24:3  
**hotel** 38:2  
**hour** 5:8, 17  
**house** 26:1, 7  
28:4, 8 33:2  
104:18 105:10  
**housing** 27:18  
28:6, 9, 17 31:1  
32:18 34:4 38:6,  
12 78:17 82:4, 13  
108:16  
**hyper** 118:17  
**hypothetical**  
98:16 99:16  
**Hypothetically**  
64:12 65:10

< I >

**idea** 18:9 22:7  
24:22 25:3 33:9  
108:17 110:6  
**identical** 27:19  
**identification** 27:7  
**Ignore** 95:16  
**ill** 73:19 106:6,  
14, 20 107:3  
111:20 112:5  
**illegal** 78:16  
**illness** 31:9  
36:19 59:14  
74:16  
**illustrated** 96:10  
**illustration** 35:7  
**imbued** 101:21  
**immediately** 43:11  
**implication** 86:5  
**implied** 83:10  
**important** 15:2  
18:1 24:10 44:21  
59:19 73:10, 11  
79:7 87:10  
102:18 105:21  
**imposed** 33:18, 20  
80:6  
**improvidently**  
98:1  
**inapposite** 94:13  
**inappropriate**  
111:4 116:22  
119:17  
**include** 17:1  
78:18  
**included** 78:19  
**including** 94:21  
**incorrect** 67:18  
69:21 80:3 83:12  
**indicate** 89:20  
**indifferent** 7:5  
**individuals** 25:19,  
22 31:9 59:14  
74:16 83:3, 6  
89:3  
**indulgence** 37:10

**information** 50:12  
89:19  
**initial** 72:12  
92:22  
**initially** 68:19  
**inquiry** 51:13  
**inserting** 60:11  
**inside** 26:14  
28:11 33:3  
**inspection** 23:6  
**inspections** 24:11  
25:1  
**instance** 75:9  
83:9  
**instant** 19:6  
**instructed** 60:19  
**instruction** 60:21  
**instructive** 8:5  
**insurance** 37:20  
**integrated** 108:19  
**intellectual** 31:10  
32:2 59:15  
**intellectually** 65:2  
118:6  
**intend** 116:7  
**intended** 16:15  
35:10 60:7 112:5  
**intent** 37:13  
**interest** 27:13  
40:6 71:8 110:21  
**interested** 91:15  
121:11  
**interesting** 23:19  
29:20  
**interim** 116:8  
**interpretation**  
8:17, 19 10:9, 15,  
22 11:10, 18  
94:17 95:8, 9  
**interpretations**  
8:16 9:22 11:15  
101:3  
**interrelationship**  
119:18  
**introducing** 6:7

**invitation** 91:5  
**involved** 44:10  
**irrelevant** 114:22  
**Island** 82:9  
**issuance** 18:18, 20  
19:4 50:4 88:3  
98:8  
**issue** 8:15 9:3, 6,  
21 29:19, 21  
32:21 38:16, 19  
39:10 40:21  
42:14 43:12  
45:12 46:7 47:1,  
2 50:17, 18 52:9,  
10 57:3 60:17  
61:4 62:4 68:20  
69:2, 9 70:1, 6, 11,  
14 71:11 72:13  
73:3 79:7 85:22  
86:10 87:16, 18  
88:22 91:18 94:9  
105:17 108:3  
116:8, 9  
**issued** 6:18 7:22  
14:22 15:14 16:2,  
14 17:8 18:21  
41:13, 15 44:22  
45:19, 22 46:3  
47:6 48:8, 13  
60:21 62:20  
64:11 75:21, 22  
78:14 79:21  
83:14 84:8 90:10  
92:19 93:14  
97:11, 12, 13  
101:11 103:6  
**issues** 6:2 12:11  
46:7 49:22 63:1  
65:15 68:15, 22  
72:3 74:6 90:1  
91:14 92:15  
110:2 111:18  
**issuing** 21:11  
114:5  
**its** 6:18 7:22  
14:12 20:3 21:18,

19, 20 31:22  
38:12 42:8 44:6  
54:7 58:4 67:16  
76:17 86:2, 15  
94:21

## &lt; J &gt;

**JAFFE** 2:11  
**JAMES** 2:4  
**Jay** 22:2 104:1  
**job** 117:11  
121:18  
**JOHN** 2:17 21:6  
68:10  
**JR** 2:4  
**judge** 1:16 42:10  
47:15 48:6 49:17  
50:5 54:5 56:18  
64:12, 17 66:10  
76:12, 13, 16 77:5  
78:1 84:7 88:8  
92:7 105:19  
106:17 108:6  
113:20 115:15  
117:22 118:3  
**judges** 120:2  
**judicial** 41:5  
46:22 47:12, 13  
66:22 71:8, 22  
113:17 114:6  
**judicially** 48:18  
**jurisdiction** 10:7  
53:3 54:3, 6, 7  
62:22 63:6, 20  
64:2 72:5, 8, 10,  
11 97:7 98:3  
114:8 115:14  
116:3 117:2, 3  
**jurisdictions** 44:4  
45:8  
**justices** 47:18  
**justiciable** 53:7,  
22 54:11 62:11  
**Jwilburn@mcguire  
woods.com** 3:1

## &lt; K &gt;

**Kaleidoscope**  
76:14 88:9  
105:19 108:21  
**keep** 12:8 30:5  
62:18 97:8  
115:14 116:3  
**KEITH** 2:5  
**Kelly** 96:20  
**kept** 24:21  
**key** 24:21 45:11  
62:3 65:4  
**kids** 106:13  
**kind** 26:1 32:10  
39:5 48:8 100:16  
**kindly** 114:1  
**know** 44:9 48:2  
51:10, 12, 15, 18  
52:1 60:13 64:21  
65:3 67:4 75:5  
80:14 85:16 89:4,  
6 91:8, 9 95:11,  
13 113:19, 22  
114:4 115:6, 16  
**knowledge** 73:12  
**knows** 9:5 110:13  
**KOZIKOWSKI**  
1:3 5:2  
**Kozikowskis**  
34:13

## &lt; L &gt;

**L.L.P** 2:11, 19  
**labeling** 94:16  
**lack** 63:20 90:17  
**Lakeside** 82:2  
**landowners** 41:1  
**language** 33:6, 13,  
17 41:17, 18  
73:20 91:20 96:5,  
6, 13 106:15  
**LARGE** 121:1, 4,  
18  
**larger** 45:21

**law** 17:5 19:2, 6  
32:17 36:14 37:8  
45:3 69:19 71:14,  
17 72:19 74:8, 9  
87:21, 22 103:12  
104:19  
**LAWRENCE** 3:3  
10:14 39:14, 15  
46:11, 14, 18, 21  
47:7, 10 48:10, 20  
49:1, 5, 7 50:5, 21  
51:2, 4, 8 52:7, 10,  
17, 21 53:4, 12  
54:5, 18 55:1, 17  
56:22 57:11, 15,  
21 61:3, 8 62:9,  
15 63:2, 13, 21  
64:6, 18 65:1, 6, 9  
66:7, 9, 19 67:1,  
13, 15 68:4 93:2  
94:15 99:11, 22  
100:5 101:8  
117:11 118:4  
119:10, 16  
**laws** 94:21  
**lawyer** 39:7  
**lawyered** 39:3  
**lawyers** 95:20  
97:20 114:4, 5  
118:15  
**leadership** 5:11  
**leaving** 118:10  
**led** 20:16  
**Leesburg** 1:14  
3:6 46:4  
**left** 103:18  
**legal** 6:2, 12 35:7,  
9 36:12 48:14  
66:5 89:9 91:18  
115:10  
**legally** 62:19  
64:13 65:3 66:21  
101:16 118:6  
**legendary** 115:2  
**legion** 81:21

**legislation** 10:3,  
21 11:2 20:21  
30:1, 10 42:2  
82:21 107:21  
108:16  
**legislative** 58:10,  
13 79:5 88:21  
101:9  
**legislatively**  
101:12  
**legislature** 60:14  
**lengthy** 51:16  
**lets** 97:1  
**letter** 21:22 22:2  
40:15 41:18  
43:20 48:12  
53:17 56:14  
57:12 61:9 64:4,  
13 65:4 66:12  
96:6 104:1  
115:10 116:21  
119:14  
**letters** 40:22  
**level** 25:15 75:7  
85:14 113:16  
118:7  
**liaison** 25:3, 4  
**license** 7:22 13:5  
22:9, 12 50:10, 13,  
15 60:21 61:4, 10,  
13 69:5 75:18, 20  
76:4, 10 77:9, 11  
79:21 80:1 83:1,  
2, 14, 16, 17 84:8,  
18 88:3, 6, 17  
92:2 103:14  
112:18, 22 113:1,  
2  
**licensed** 25:7  
69:9 73:21 74:5  
76:1 77:11 84:19  
91:2 112:18, 21  
**licenses** 21:11  
103:15  
**licensing** 22:3  
50:11 51:14 59:5

60:2 61:21 75:15  
79:20 90:6 103:2  
104:6 112:14  
**licensure** 76:19  
103:4  
**light** 13:11  
116:22 117:5  
**lighting** 18:6  
24:4 26:15 111:1  
**Lilly** 42:20 43:17  
93:3, 20 94:1, 13  
101:4  
**limited** 39:21  
56:11  
**line** 34:12, 15  
96:18, 21 101:4  
**lines** 17:18  
**linger** 111:9  
**linkage** 55:16  
**litigating** 116:13  
**litigation** 113:15  
**little** 20:7 28:21  
34:15 53:18 59:6  
79:6 82:5 89:14  
92:17 97:3  
**live** 104:17  
**living** 30:18  
**LLC** 1:3 5:3  
**local** 22:6 23:18  
30:12 33:9 35:11  
61:19 85:14  
103:21 104:3  
105:10 106:2  
**localities** 94:20  
104:22  
**located** 17:21  
46:5  
**location** 18:11  
25:7 37:13 83:4,  
5, 7 102:10  
**locational** 17:20  
**lock** 24:21  
**logic** 12:20 77:2  
**Lohr** 40:16  
41:16 56:14 61:9

**London** 82:8  
**long** 96:21 105:22  
**longer** 14:12 50:2  
**look** 7:8 9:13, 19  
11:12 17:16  
18:15 21:10, 15  
33:7, 13 34:10  
41:11 42:3, 6  
43:20 44:18  
47:18 50:13, 21  
51:4 59:4 82:21  
84:8 105:21  
112:18  
**looked** 22:17  
80:11 81:14  
85:13, 20  
**looking** 14:18  
16:5 31:20 51:12  
107:19, 21  
**looks** 33:2 43:18  
**lose** 38:14  
**loss** 114:7  
**lot** 13:18 16:9  
35:1 39:17 40:9  
44:2 75:1 85:5  
98:3, 5 102:4  
115:2  
**lots** 19:12 29:9,  
12 43:6  
**LOUDOUN** 1:2,  
13 3:2, 4 10:2, 11,  
20 11:4, 5, 13, 17  
14:18 15:17 16:4  
28:3, 7 29:15  
30:13 31:20, 22  
33:22 34:21 35:1  
37:6 38:5 44:8,  
18 45:9 46:4  
94:15 95:7  
**Loudoun's** 38:11  
**low** 35:17  
  
< M >  
**maintained** 24:1  
**maintenance** 24:1

**manner** 58:3  
**marked** 27:6  
**Market** 1:14  
109:8, 12  
**marriage** 33:20  
**match** 119:3  
**materials** 27:17  
34:16 93:3  
**matter** 1:12  
36:14 40:14 41:9  
48:1 72:8 95:22  
96:7 109:18  
**matters** 96:5, 6  
109:21  
**mattresses** 25:13  
**mature** 52:16  
62:11  
**MCGUIRE** 2:19  
68:10  
**meals** 90:18  
**mean** 26:6 43:8,  
11 51:1 58:17, 19  
63:2 72:4 89:4  
95:13, 17, 22  
110:18 117:20  
119:14  
**meaning** 69:19  
82:7 89:11  
111:20  
**meaningful** 79:5  
89:15  
**means** 11:16  
30:1, 2, 3 58:7, 21  
59:21 75:12  
79:18 95:18  
102:21 112:11, 22  
**measurements**  
86:10  
**meet** 80:15 82:16  
102:5  
**meetings** 93:15  
**MEIZANIS** 2:4  
**members** 32:9  
**memorandum**  
93:1  
**memory** 84:16

**mental** 31:4, 9  
36:19 59:14  
73:22 74:6, 16  
76:2, 20 106:18  
112:19  
**mentally** 33:1  
73:19, 20 106:6,  
14, 20 107:3  
**mention** 21:4  
**mentioned** 7:18  
20:22 87:15  
110:9  
**merely** 37:14, 15  
**merit** 60:4 72:3  
**merits** 7:8 54:11  
55:20 56:9, 19  
57:5, 18 59:7  
61:17 62:7 63:11  
64:3 66:16 67:10,  
17 70:5, 14, 16, 19  
71:11 72:17 73:2,  
5, 8 87:4, 13 88:1  
**met** 6:12 9:4  
81:17  
**MICHAEL** 2:18  
68:12  
**Michelle** 40:16  
56:14 61:9  
**middle** 35:21  
**miles** 109:19  
**million** 13:17  
19:11  
**mind** 12:8 30:5  
95:22 97:9  
115:20  
**minimum** 104:16,  
17  
**minimums** 105:1  
**minute** 16:17  
102:15 111:22  
112:6  
**minutes** 39:18  
57:7  
**mirror** 77:5  
**misleading** 15:11

<p><b>misread</b> 113:4  <b>missed</b> 54:18  <b>mission</b> 26:22  27:10  <b>misunderstanding</b>  57:9 63:3  <b>modification</b>  23:17  <b>modifications</b>  23:16  <b>modify</b> 52:18  71:1, 10 72:17, 18  <b>Monday</b> 119:3  <b>money</b> 13:18  14:3 19:12 97:19  <b>MONROE</b> 1:3  5:2 68:11, 12  <b>months</b> 118:2  <b>morning</b> 5:4, 5, 6,  8 39:13, 14 90:21  <b>motions</b> 97:19  <b>mountain</b> 102:9  <b>move</b> 102:14  <b>movies</b> 118:18  <b>multiple</b> 47:2  <b>municipal</b> 46:2</p> <p>&lt; N &gt;  <b>name</b> 15:16  68:10 89:6  <b>names</b> 39:5  <b>natural</b> 60:10  <b>nature</b> 18:8  27:12 28:10 29:3,  16 37:14, 16  57:13 58:1 80:13  108:15 115:6  117:2  <b>near</b> 103:10  <b>necessarily</b> 97:10  <b>necessary</b> 28:2  <b>need</b> 7:7 25:9  30:21 44:7 46:2  49:3, 20 68:5  70:4 80:21 91:2  102:17 113:6</p>	<p>116:10, 19 117:4  118:10  <b>needs</b> 102:17  108:11, 12 109:1  <b>neighbor</b> 104:18  106:13  <b>neighborhood</b>  63:18  <b>neighborhoods</b>  104:10  <b>neighbors</b> 20:13  34:19 106:2  <b>neither</b> 121:9  <b>net</b> 52:5  <b>never</b> 95:22  <b>Nevertheless</b> 77:16  <b>New</b> 13:4 65:12  82:8  <b>Newport</b> 9:17  11:2 12:2, 15  13:13, 15 19:8  20:2, 10 36:15, 22  37:4, 18, 22 38:1,  11 44:6 69:2  73:9 96:8  <b>Newport's</b> 40:16  60:8  <b>NICHOLAS</b> 3:3  39:15  <b>Nicholas.lawrence</b>  @loudoun.gov 3:8  <b>Nick</b> 10:14  <b>noble</b> 31:18  <b>noble</b> 31:18  <b>noncommercial</b>  78:12 79:2  <b>nondecision</b> 52:9  97:6  <b>nonprofit</b> 78:5, 11  79:1 107:8, 11, 16,  18  <b>nonpublic</b> 24:12  <b>non-related</b>  104:17  <b>nonresident</b> 74:17  <b>non-ruling</b> 7:3</p>	<p><b>Northern</b> 109:7,  11  <b>Northwest</b> 2:12  <b>notably</b> 75:21  77:21 81:1  <b>notarial</b> 121:13  <b>Notary</b> 121:3, 14  <b>noted</b> 29:20  <b>notes</b> 81:20 82:19  <b>noteworthy</b> 78:6  <b>notice</b> 1:13 15:20  40:2 97:10, 15, 16  <b>November</b> 1:10  66:12 118:12  <b>novo</b> 71:14 72:19  87:21, 22  <b>nowadays</b> 29:21  <b>nuisance</b> 24:5  <b>Number</b> 5:8 7:2  16:18 17:9 18:6,  11 25:7 26:12  53:21 54:2 83:6  89:8, 9 90:16  102:9 108:11  110:21, 22 113:12  114:8, 9</p> <p>&lt; O &gt;  <b>objecting</b> 26:9  <b>obscure</b> 114:2, 3  <b>obtained</b> 75:18  <b>obviously</b> 106:19  <b>occupancy</b> 14:22  23:8, 10 26:1  59:16 74:18, 21  76:7  <b>occupants</b> 106:4  <b>occupied</b> 15:1  31:2 33:19  <b>occurred</b> 6:15  <b>October</b> 49:11  75:21 83:14  <b>odors</b> 23:22  <b>OFFICE</b> 3:4  22:2, 3 88:20</p>	<p>97:14 119:11  <b>officer</b> 10:9 95:2  <b>officers</b> 102:6  <b>official</b> 16:3  <b>Oh</b> 36:7 98:13  112:2  <b>Okay</b> 46:17 49:6  51:3, 7 55:17  63:12 66:19 67:1,  12, 13 94:2 97:17  119:8  <b>omitted</b> 111:21  112:4  <b>once</b> 63:11 76:9,  10 114:13 119:20  <b>ones</b> 108:4  <b>ongoing</b> 49:16  113:15  <b>opened</b> 89:7  <b>opening</b> 81:6, 7  <b>operate</b> 25:6  32:7 69:11 84:3  85:1 92:5  <b>operates</b> 36:22  <b>operations</b> 75:22  <b>operative</b> 33:17  75:6  <b>operator</b> 32:6  <b>operators</b> 34:2  <b>opinion</b> 9:14  13:1 41:15 64:4,  13 66:1, 5, 14  67:16 78:15  88:20 97:2 99:4,  6, 7 105:22  114:22  <b>opinions</b> 40:22  114:5  <b>opportunity</b> 20:2,  14 66:6  <b>opposed</b> 55:5  <b>opposite</b> 33:12  <b>option</b> 70:18  <b>options</b> 52:17  <b>oral</b> 93:12, 17  94:2, 5 101:5</p>
--	--	---	--

<p><b>order</b> 9:9 22:12 28:14 43:13 46:8, 12, 18, 22 48:8, 11 53:5 54:12 55:20 63:22 64:1, 5 70:13 71:8 87:5 117:10</p> <p><b>ordinance</b> 8:13, 16 9:4 10:10, 15, 17 11:16 12:11 13:2 14:8 18:5 19:1, 2, 22 30:8 31:22 40:19 41:17, 22 42:12, 18 44:6, 8, 18 45:3, 9, 19 76:17 95:3, 10 98:5 102:13 105:8, 11, 13, 14, 16 106:2</p> <p><b>ordinances</b> 59:12 74:1, 14</p> <p><b>ordinary</b> 29:8 35:19</p> <p><b>original</b> 86:18</p> <p><b>ought</b> 44:17 49:18, 19, 20</p> <p><b>outcome</b> 66:22 70:12</p> <p><b>outside</b> 24:6 33:2 81:22</p> <p><b>overall</b> 22:22</p> <p><b>overlay</b> 17:21 102:9</p> <p><b>overstand</b> 99:21</p> <p><b>owner</b> 19:5</p> <p><b>owners</b> 15:20</p> <p>&lt; P &gt;</p> <p><b>P.C</b> 2:5</p> <p><b>p.m</b> 120:9</p> <p><b>p5</b> 4:3</p> <p><b>PAGE</b> 4:11 51:5 71:21 92:21, 22</p> <p><b>pages</b> 41:11</p> <p><b>Palmers</b> 34:14</p>	<p><b>papers</b> 5:22 27:3 44:11</p> <p><b>paragraph</b> 13:4</p> <p><b>parallel</b> 116:17</p> <p><b>Pardon</b> 87:13</p> <p><b>parking</b> 18:11</p> <p><b>part</b> 9:13 13:1 21:18 30:7, 9 54:19 66:17, 20 85:10</p> <p><b>partial</b> 54:3</p> <p><b>partially</b> 115:9</p> <p><b>particular</b> 42:3</p> <p><b>particularly</b> 49:14</p> <p><b>parties</b> 1:17 48:16 71:10 73:3 96:7 116:6</p> <p><b>parts</b> 109:10 119:19</p> <p><b>party</b> 84:15 121:10</p> <p><b>passed</b> 85:6</p> <p><b>patient</b> 37:18 82:15</p> <p><b>patients</b> 24:18 32:8 37:4, 5 51:2, 4 69:18 74:20 81:12 109:6</p> <p><b>PAUL</b> 1:16</p> <p><b>pause</b> 16:21</p> <p><b>pay</b> 38:16 58:5 97:19</p> <p><b>paying</b> 118:6</p> <p><b>pending</b> 69:7 93:22 94:3</p> <p><b>people</b> 16:9 17:2 23:21 30:17 32:1, 13 36:19 50:19, 22 82:10 90:3, 5, 16 91:8, 16 105:10 106:22 107:2 108:17 113:13 116:11</p> <p><b>perceive</b> 114:1</p> <p><b>percent</b> 114:7</p> <p><b>perfect</b> 40:8</p>	<p><b>period</b> 8:20 51:16 53:1 89:15</p> <p><b>periods</b> 32:8</p> <p><b>permanent</b> 80:22</p> <p><b>permanently</b> 80:14</p> <p><b>permissive</b> 104:22</p> <p><b>permit</b> 6:18, 22 8:3 9:17 13:7, 10, 19, 21 14:5, 10, 15, 19, 21 15:1, 2, 4, 11, 12, 14, 21 16:12, 13 18:21 19:4, 10 20:22 23:9 24:15 26:20 29:14 41:13, 14 44:1, 22 45:10, 12, 19 46:9, 13 47:6 48:7 49:9 58:6 61:11 63:1, 7 64:11 67:20 85:15, 18, 22 97:8, 10, 22 99:10 100:7 101:10 103:6 117:18</p> <p><b>permits</b> 9:3 18:19 20:20 44:3 101:14</p> <p><b>permitted</b> 24:5</p> <p><b>permitting</b> 85:10, 11</p> <p><b>person</b> 73:20 74:17 89:5</p> <p><b>personnel</b> 77:3</p> <p><b>persons</b> 30:22 31:14 33:1, 19 104:17</p> <p><b>petition</b> 66:12 82:1</p> <p><b>petitioner</b> 7:12 36:10 79:9</p> <p><b>Petitioners</b> 2:2 4:13 6:6 7:19 9:15 26:18 27:7 69:12 70:6, 17 72:15 73:11 74:2</p>	<p>77:16 78:21 83:19, 22 87:7, 18 89:22 91:6, 15 92:17, 22 119:2</p> <p><b>petitioner's</b> 71:21 82:15</p> <p><b>physical</b> 21:13 23:19, 21</p> <p><b>picture</b> 34:10 85:7</p> <p><b>piece</b> 117:13</p> <p><b>pillows</b> 25:13</p> <p><b>place</b> 5:20 11:13 15:5 18:5, 10, 14 19:9, 14, 18 21:1 25:5 26:5 82:10 89:17 104:4 106:6 109:2</p> <p><b>places</b> 10:5</p> <p><b>plain</b> 33:6</p> <p><b>plainly</b> 74:9</p> <p><b>Plaintiffs</b> 1:3</p> <p><b>plaintiff's</b> 82:1</p> <p><b>plan</b> 17:14 23:12</p> <p><b>plane</b> 118:11</p> <p><b>planned</b> 5:16</p> <p><b>planning</b> 6:7 58:11, 22</p> <p><b>play</b> 54:17 97:3 98:15</p> <p><b>playing</b> 27:11 34:7</p> <p><b>plays</b> 16:16</p> <p><b>please</b> 23:12 36:8 68:9</p> <p><b>pleasure</b> 119:1</p> <p><b>plot</b> 17:14</p> <p><b>point</b> 32:20 33:8 35:7, 8, 9 40:10, 13 41:17, 18 55:9 59:2 60:17 63:9 65:22 69:20 72:16 81:10, 21 82:19 84:17 90:12 92:20 98:20 104:15, 16</p>
---	---	--	---

**pointed** 22:1  
110:8  
**pointing** 89:5  
**points** 6:11, 13  
7:1 62:3 72:9  
85:4  
**policies** 35:15  
**pollution** 40:1  
85:8 86:7  
**popped** 81:19  
**posed** 62:2  
**posit** 118:10  
**position** 6:15  
41:21 49:12 52:1  
57:17 59:3, 7  
61:3, 20 63:17  
67:10 70:6, 8  
100:7  
**positions** 71:16  
**positives** 118:14  
**possibility** 7:4  
**power** 53:19  
64:16  
**powers** 8:9, 11  
9:21  
**practical** 34:8  
35:6, 22  
**practice** 39:8  
**precipe** 6:19  
**precisely** 10:12  
12:4 93:16 96:10  
**predecessor** 73:14  
**pre-existing** 55:15  
**preliminary** 9:6  
**premature** 52:15,  
19 55:14 87:6  
90:2 116:1  
**premised** 108:17  
**preparation**  
119:21  
**present** 1:17  
111:11  
**presentation**  
40:17 110:17  
**presented** 6:19  
8:1, 18

**preservation**  
113:15  
**presupposes** 21:1  
**prevent** 63:10  
**previous** 53:10  
75:17 83:11  
**previously** 72:7  
**primary** 9:6  
**principles** 11:20  
71:22  
**prior** 37:7  
**privacy** 25:14, 15  
**private** 40:9, 22  
**probable** 50:4  
**probably** 39:1  
89:13 111:20  
116:9  
**problem** 35:22  
**procedural** 61:6  
110:10  
**procedural/substan  
tive** 70:1  
**procedure** 61:6  
**proceeding** 27:5  
115:1 121:11  
**Proceedings** 4:3  
120:8 121:6  
**process** 40:7, 8,  
10 51:14 60:22  
61:12 76:14 84:6  
85:10, 11, 12 86:9,  
15 110:11 113:17  
116:13  
**processes** 62:1  
83:20 84:12  
**professional** 58:18  
**professionals**  
49:21 58:22  
**profit** 77:20  
88:15 107:17  
**profitable** 107:12  
**prohibited** 66:2  
**project** 91:16  
**promote** 24:1  
35:16

**proof** 95:11  
**proper** 8:16  
**properly** 70:3  
86:20 87:12  
116:4  
**properties** 13:17  
109:18  
**property** 12:5, 6  
14:3 15:20 17:18,  
21 19:11 23:4, 15  
24:17 34:12, 15  
43:19 65:21  
103:8, 9, 10  
**proposal** 44:8  
**proposal's** 45:18  
**proposed** 78:13  
**proposition** 78:4  
82:15  
**protection** 19:5  
76:21 106:5  
**protections** 84:22  
88:7  
**proves** 7:7  
**provide** 25:14, 15  
76:18  
**provided** 49:8  
83:6  
**provides** 73:18  
74:14  
**provision** 10:1  
40:20 76:18  
102:19  
**provisions** 8:6  
19:1 40:18 45:2  
110:15 111:1  
**prudent** 12:7  
20:5  
**prudently** 12:15  
**public** 15:18, 19  
24:11 78:8 121:3,  
14  
**purchased** 12:6  
**purchaser** 20:5  
**pure** 89:7  
**purports** 40:21

**purpose** 31:5  
102:20 109:5, 14  
**purposes** 35:15  
59:13, 17, 20  
74:14 75:10 76:8  
112:10  
**pursuant** 1:13  
10:2 29:13  
112:14  
**purview** 21:20  
83:9  
**put** 35:3 54:17  
61:20 66:20  
75:12 83:5  
**puts** 35:21  
**< Q >**  
**qualified** 77:3  
**qualifies** 69:2  
73:9  
**qualify** 84:2 88:1  
**quality** 39:22  
**question** 20:20  
21:12, 13 28:12,  
21 54:11 55:7, 20  
64:9 70:16 71:5,  
17 73:6, 8 74:22  
79:8 87:21, 22  
91:18 100:15  
**questions** 5:18  
6:9 36:4 55:12  
70:4 71:13 72:19  
86:18 89:14  
92:11 101:18  
113:10  
**quicker** 5:17  
**quickness** 118:1  
**quote** 37:14, 15  
59:20, 21  
**quotes** 75:12  
76:5 112:11  
**< R >**  
**R-1** 92:5  
**raise** 36:12

<p><b>raised</b> 40:3  <b>raises</b> 117:6  <b>raison</b> 21:19  <b>rare</b> 79:4  <b>ratio</b> 26:12  <b>rationale</b> 9:14  108:21  <b>reach</b> 55:7, 19  59:8 66:16 67:17  116:2  <b>reached</b> 82:18  <b>reaching</b> 62:12  77:1 115:13  <b>read</b> 74:12 78:22  79:9 80:1 102:18  106:9 112:9, 10,  16  <b>reading</b> 33:6  60:10 105:6, 7, 13  111:21 112:4  <b>ready</b> 40:12  <b>real</b> 109:6 111:7  <b>reality</b> 11:22  <b>really</b> 7:15 45:11  59:3 95:22  113:19 114:1  <b>reason</b> 10:12  21:19 47:15 50:9  96:17 101:19  <b>reasons</b> 65:17  84:3 93:8 96:10  108:5  <b>recall</b> 12:22 31:7  35:13  <b>recalling</b> 62:1  <b>received</b> 49:10  50:14  <b>recognize</b> 72:2  102:18 116:10  <b>recognized</b> 76:14  <b>reconvene</b> 117:18  <b>record</b> 12:2  14:22 21:22 22:1  27:17 28:22  39:18, 21 40:1  44:14 73:4 81:11</p>	<p>86:3 88:19 91:4  95:14 96:8 100:1,  10, 18 103:5, 13,  22 109:4, 14  117:9  <b>recruit</b> 90:4  <b>recycling</b> 24:4  <b>reference</b> 85:7  <b>referring</b> 73:17  <b>reflected</b> 14:9  22:10  <b>refreshing</b> 113:21  <b>regard</b> 116:5  <b>regardless</b> 33:2  45:17 71:15  <b>Registration</b>  121:14  <b>regular</b> 30:16  <b>regularly</b> 118:2  <b>regulation</b> 19:2, 7  45:4  <b>regulations</b> 21:8  22:19 23:18  26:16 102:5  <b>regulatory</b> 40:7  <b>reiterate</b> 36:12  <b>rejected</b> 78:21  79:10 80:17  88:21 107:7  <b>related</b> 33:19  101:5 121:9  <b>relates</b> 43:4  <b>relation</b> 17:18  <b>relative</b> 27:13  <b>rely</b> 44:17 108:4  <b>remain</b> 37:13  68:15  <b>remains</b> 87:22  <b>remarked</b> 29:4  <b>remedy</b> 93:19  <b>remember</b> 23:9  24:14 105:11  <b>render</b> 7:5  <b>renovating</b> 13:18  19:12  <b>repeat</b> 37:10</p>	<p><b>repeatedly</b> 33:16  58:2  <b>reply</b> 92:21  104:12  <b>report</b> 86:11  <b>represent</b> 39:15  <b>representation</b>  100:5  <b>represented</b> 21:6  <b>request</b> 14:5  54:20 58:15  116:20  <b>requested</b> 96:9  115:9  <b>require</b> 12:11  <b>required</b> 46:9  111:11  <b>requirement</b>  31:15 61:7 90:8  <b>requirements</b> 9:3  <b>reread</b> 5:21  <b>researched</b> 21:13  22:17  <b>reside</b> 31:11, 14  36:19 59:16  69:19 74:16  80:10, 11, 19  81:15 82:7, 10, 16  89:11 90:9, 13  91:7 106:22  107:2, 22 108:10  109:1  <b>resided</b> 83:4  <b>residence</b> 80:22  110:1, 3 113:7  114:20 115:6  <b>residences</b> 33:19  37:1  <b>residency</b> 26:10  <b>resident</b> 17:2  37:9, 12 74:17  89:6 109:2  <b>residential</b> 16:7  28:18, 19 29:9, 11,  12 30:15 31:12  32:3 33:10, 15</p>	<p>35:4, 10, 12, 17  36:18 54:17  59:13, 16, 20, 22  60:6, 19 69:3, 4,  10, 11 73:9, 22  74:7, 15, 18, 19, 21,  22 75:11, 13 76:2,  3, 5, 6, 7, 10, 19  77:12, 13 79:15,  16, 17, 18, 22 80:2  83:7 84:2, 19  85:1 88:2, 18  92:2, 4 102:21, 22  103:4, 15, 19  104:4, 5, 6, 10  105:4 107:15, 16  112:11, 12, 19, 21  113:3  <b>residents</b> 32:12,  13, 14 36:16, 17,  20 37:6, 9 74:6  82:20 91:2, 3  108:12 109:12  <b>residing</b> 73:21  82:12 108:18  <b>resist</b> 116:20  <b>resolve</b> 38:17  <b>Resorts</b> 82:2  <b>respect</b> 8:12 10:6  16:3 18:13 21:10,  19 23:4 32:20  45:15 98:8  102:14 106:3, 4  107:22 118:15  <b>respectfully</b> 10:18  <b>respective</b> 1:17  <b>respondent</b> 68:11  69:12  <b>respondents</b> 70:10  <b>responding</b> 6:8  <b>response</b> 40:22  88:11  <b>restrict</b> 107:8  <b>restrictive</b> 33:18  <b>result</b> 52:5 78:19</p>
---	--	--	--

<p>87:11 114:6  <b>Retardation</b> 76:20  <b>retarded</b> 73:20  <b>retought</b> 115:16  <b>retired</b> 117:22  <b>return</b> 89:17  <b>reverse</b> 52:18  71:1  <b>review</b> 8:4, 5  39:20 41:5 42:5,  9 44:12 45:13, 16  46:1, 3, 9 47:12,  13 48:1 49:11, 14  50:1 51:16 53:13,  22 54:9 56:1, 11  58:1  <b>reviewed</b> 45:14  <b>reviewing</b> 6:21  56:6  <b>rewrite</b> 60:13  <b>rezoning</b> 58:15  <b>Rhodes</b> 43:1, 17  <b>Richmond</b> 47:17  <b>right</b> 8:4 13:14  14:16, 17 16:4  21:7 24:14 26:2,  18 30:8 31:1  34:5, 7, 14, 16  35:21 39:1 43:19,  22 47:9 48:16  49:3, 5 51:6 54:4  55:11 57:21 59:5  60:5 65:1, 21  68:7 70:19 83:19  84:4, 15 95:13  109:13 111:16  117:8  <b>rights</b> 83:11  84:21 87:1, 8  <b>ripe</b> 28:13 62:17  70:15 72:21  <b>risky</b> 14:1  <b>river</b> 17:21 102:8  <b>ROBERT</b> 2:4  <b>Robin</b> 121:3</p>	<p><b>robust</b> 85:12  <b>rocky</b> 34:22  <b>Rogers</b> 108:8  <b>role</b> 58:12  <b>room</b> 23:13 25:22  <b>rooms</b> 25:19  <b>rubber</b> 58:4  <b>rule</b> 38:6, 12  39:7 52:2 53:9  54:13, 21 55:15  57:2, 4, 11 59:17  63:8 64:13 65:3  66:14 67:2, 4  99:16  <b>ruled</b> 20:14 55:8  56:8  <b>ruling</b> 7:2, 4  52:11 53:10, 15  55:18 67:20  117:16  <b>run</b> 43:13  <b>running</b> 24:3  34:18, 19  <b>runs</b> 34:15 37:20  <b>rural</b> 29:3, 5, 6,  16 35:4, 16  <b>rush</b> 49:18</p> <p>&lt; S &gt;  <b>safe</b> 106:11  115:18  <b>sanitary</b> 24:2  <b>saw</b> 28:20 96:12  <b>saying</b> 32:22  48:12 50:20 53:6  54:2, 3 72:5  78:15 79:9 87:5  106:13 107:13  116:17  <b>says</b> 9:2 10:4, 6  13:1 14:21 18:20  19:4 23:7 30:11  31:13 37:12 51:6  59:12 75:6, 10  76:4 77:8, 22  81:2 86:21 87:3</p>	<p>88:3, 17 90:4  92:6 94:22 95:18  98:7 99:12  102:20 104:1, 20  105:14, 16 112:10,  21 113:2  <b>scale</b> 17:15  <b>SCHAERR</b> 2:11  <b>schedule</b> 91:10  119:4  <b>Schwartz</b> 82:9  <b>scope</b> 56:2  <b>scrupulous</b> 49:17  <b>seal</b> 121:13  <b>sec</b> 110:9  <b>second</b> 8:2 16:21  25:16 42:8 46:10  61:21 66:20  69:18 80:8  <b>secondarily</b> 5:21  <b>Secondly</b> 114:19  <b>Section</b> 8:9, 14  9:13, 19 10:4, 11,  17 12:9 13:9, 11  14:15, 20 15:3  16:16 17:6, 7  18:16 23:5, 11, 16  24:8, 10, 19 25:6,  10, 11, 14 29:18  31:7 41:1 42:4  59:17 73:17  74:12 98:8 104:7  110:9 112:8  <b>sections</b> 11:8  15:6 31:16 36:1  42:7  <b>see</b> 7:14 8:7  12:20, 21 13:10  14:9 16:1 22:22  27:11 29:8, 11  33:13, 15 34:7, 11  35:18 39:9 46:15  51:18 63:13  81:19 103:22  118:18  <b>semi</b> 80:14</p>	<p><b>sense</b> 33:8 46:22  47:5, 15 79:13  <b>sensible</b> 115:3  <b>sensory</b> 23:21  <b>sent</b> 40:16  <b>sentence</b> 19:3  59:19 74:10 75:5  88:4 112:9  <b>separate</b> 9:20  <b>September</b> 7:20  14:17  <b>septic</b> 16:3, 5, 10  24:16 32:10 34:8  35:2, 5 45:15  49:15 50:12, 17,  18 85:8, 14 86:7,  9 102:7  <b>septics</b> 34:18  <b>serious</b> 47:2  <b>serve</b> 83:7  <b>service</b> 46:3 76:2  112:19  <b>Services</b> 6:18  7:22 21:10, 15, 21  22:5, 16 24:7  26:20 27:2 60:1  75:15 79:20 83:2  103:1, 14, 20  104:3 106:19  112:14  <b>set</b> 59:9  <b>sewage</b> 24:12  <b>sewer</b> 24:11  <b>share</b> 25:19, 22  <b>SHERIDAN</b> 1:16  <b>short</b> 22:22 32:8  <b>short-term</b> 36:22  109:16  <b>show</b> 12:2  <b>showed</b> 29:2 85:7  <b>showers</b> 26:13  <b>showing</b> 90:17  <b>shows</b> 29:3 81:11  88:19  <b>side</b> 6:10</p>
--	--	---	--

<p><b>significant</b> 12:19 13:8 19:16, 22 34:17 <b>significantly</b> 8:14 <b>signs</b> 102:10 <b>similar</b> 27:18 92:7 <b>simply</b> 26:20 40:4 67:15 71:7 74:8 78:3 82:10, 14 88:12 91:4 94:13 101:4 <b>single</b> 28:4, 8 30:15 59:16 74:18, 21 76:7 81:2 85:1 <b>sir</b> 6:16 7:9 16:22 17:5 26:3 27:8 46:11 111:13 118:19 <b>sit</b> 56:5 84:17 <b>site</b> 17:14 <b>sitting</b> 47:22 53:13 64:12 118:3 <b>situation</b> 7:6 12:1 49:15 56:4 67:3 105:17 107:5 <b>size</b> 18:6, 11 102:9 <b>skip</b> 19:3 <b>sleep</b> 90:18 <b>slip</b> 95:8 <b>slow</b> 25:16 <b>smile</b> 114:21 <b>smoking</b> 24:5 <b>snarling</b> 118:17 <b>soil</b> 39:22 <b>soils</b> 34:21, 22 <b>solely</b> 71:17 <b>somebody</b> 90:16 91:6 95:4 96:22 116:7 <b>somewhat</b> 7:5</p>	<p>15:11 <b>soon</b> 119:11 <b>sophisticated</b> 6:2 <b>sorry</b> 36:7 54:18 69:12 112:2 119:6 <b>sort</b> 17:19 54:2 86:17 92:9 107:1 113:15 <b>sorts</b> 8:12 102:10 111:2 <b>Southeast</b> 3:5 <b>speak</b> 34:9 <b>special</b> 29:14 58:16 <b>specific</b> 8:18 <b>specifically</b> 80:16 83:5 <b>speculation</b> 89:7 <b>spend</b> 13:17 85:4 95:18 111:22 <b>spent</b> 14:2 19:12 <b>spoke</b> 68:18 <b>SR</b> 3:3 <b>staff</b> 32:9 49:8 58:18, 22 74:17 86:11 <b>stamp</b> 49:10 58:4 <b>stand</b> 47:8, 11 <b>standards</b> 18:18, 20 38:1 98:8 <b>standing</b> 20:14 47:17 50:8 <b>standpoint</b> 56:18 113:20 <b>stapled</b> 27:4 <b>start</b> 14:21 22:13 92:18 115:15 119:3 <b>started</b> 40:17, 20 <b>starting</b> 5:13 <b>starts</b> 44:20 48:4 96:20 <b>state</b> 6:15 7:5 10:17 11:1 13:5 20:21 21:17</p>	<p>29:17 50:10, 11 51:8, 13 59:5 60:18, 21 61:1, 4, 10 62:4, 5 75:7 85:14 86:12 90:10 93:8 104:19 106:18 116:18 <b>stated</b> 54:20 67:10 74:9 <b>statement</b> 81:1 83:11 <b>statements</b> 57:7 <b>state's</b> 50:17 <b>statewide</b> 83:16, 17 <b>status</b> 77:4 <b>statute</b> 30:6 33:17 36:13, 17, 21 55:19 59:9 60:10, 12 72:15, 18 73:2, 13, 14, 17 74:10, 11 75:6, 10 76:4, 5, 11, 22 78:4, 5, 12 79:2, 10 80:20 82:7 84:20 87:20 88:7, 15 89:12 90:4 91:21 92:3, 5 96:5 103:17 105:1 106:5, 16 111:21 112:4, 21 113:5 <b>statutes</b> 60:13 <b>stay</b> 37:2 38:3 44:7 51:18 52:15 81:12, 13 <b>stepped</b> 112:3 <b>stream</b> 17:21 34:15 102:8 <b>streams</b> 34:18 <b>Street</b> 1:14 2:12 3:5 18:11 <b>stress</b> 32:10 34:8 <b>strict</b> 33:5 <b>strike</b> 115:19</p>	<p><b>structure</b> 14:22 18:21 45:1 <b>structured</b> 12:21 45:10 <b>structures</b> 17:18 <b>struggling</b> 111:6 <b>stuck</b> 99:21 <b>stuff</b> 114:12 118:17 <b>subject</b> 17:10 20:8 86:2 101:18, 22 103:4, 8 104:6 111:3 <b>submit</b> 13:14 15:7 16:8 23:7, 12 39:20 44:7, 16 51:17 61:11, 16 94:12 <b>submitted</b> 13:21 14:4 61:14 75:20 85:19 103:7 <b>submitting</b> 19:10 <b>subpart</b> 83:1 <b>Subsection</b> 9:2 10:12 12:9 13:10 14:7 16:1, 12, 15, 18, 20 17:13, 20 18:6, 15 19:13 23:12 31:8, 12 59:11, 20 75:11 102:3, 19, 21 112:11 <b>subsections</b> 15:8 <b>subset</b> 9:20 <b>substance</b> 57:4 76:20 102:15 <b>substantial</b> 43:18 <b>substantially</b> 73:14 <b>substantive</b> 29:19 32:21 <b>sued</b> 104:18 <b>suffering</b> 113:13 <b>sufficiency</b> 16:5</p>
---	---	--	---

<p><b>sufficient</b> 24:3 39:1 82:6 89:16 91:21 102:7 <b>sufficiently</b> 71:9 <b>suggest</b> 20:18 31:18 <b>suggested</b> 55:12 88:12 111:20 112:3 <b>suggesting</b> 41:4 54:8 56:3, 11 <b>suggestion</b> 85:12 86:6 113:4 <b>suggests</b> 41:18 <b>suitable</b> 86:6 <b>Suite</b> 2:6, 12 <b>summer</b> 82:11 <b>superb</b> 119:20 <b>superior</b> 31:1 34:5 <b>Supervisors</b> 3:2 39:16 58:12 59:1 97:12 <b>supposed</b> 52:19 59:4 62:6 95:16 <b>supremacy</b> 11:20 41:3 <b>Supreme</b> 6:1 29:22 42:16 43:16 47:3, 17 71:12 73:12, 16 74:11 76:13 77:6, 22 78:7 84:21 88:5 92:6 93:6 104:21 <b>sure</b> 20:6 25:17 41:20 49:18 112:5, 7 <b>surprised</b> 50:2, 6 77:18 <b>suspect</b> 18:2 <b>system</b> 16:5, 10 24:13, 16 32:10 34:8 35:5 102:7 <b>systems</b> 34:18</p>	<p>35:2 <b>&lt; T &gt;</b> <b>T.V</b> 118:18 <b>tabbed</b> 27:4 <b>take</b> 13:15 20:3 36:20 48:5 49:20 55:3 69:22 70:6 90:18 91:19 94:19 100:7 113:12 <b>takes</b> 50:2 70:8 <b>talk</b> 16:17 <b>talked</b> 8:6, 9 25:18 36:2 78:7 101:7 <b>talking</b> 17:7 25:18 66:10 69:4 73:18 74:11 76:15 90:20 104:7, 8 113:20 <b>talks</b> 15:4, 5 32:17 35:14 82:22 <b>taught</b> 115:16 <b>telephone</b> 93:15, 17 94:6 <b>tell</b> 49:12 50:1 55:11 65:11 68:5 70:4 91:9 98:14 117:22 <b>telling</b> 53:3, 4 57:10 <b>tells</b> 43:20 <b>temporarily</b> 37:3 <b>temporary</b> 37:19 38:3 <b>temptation</b> 113:12 <b>ten</b> 57:6 89:13 90:3, 5, 13, 20 <b>term</b> 15:10 69:3 90:17 107:22 108:10 <b>terms</b> 21:15 107:21 108:12</p>	<p>109:2 115:12 118:6, 12 <b>terribly</b> 106:10 <b>test</b> 39:5 89:18 <b>testimony</b> 121:7 <b>Thank</b> 14:14 27:8 36:5, 6, 9 39:11, 12 68:3, 4 92:13, 14 113:8, 11 117:15 118:4 119:16, 20, 22 120:3, 5, 6 <b>theme</b> 22:22 <b>theory</b> 74:4 89:10 <b>therapists</b> 32:9 <b>thereof</b> 121:12 <b>thing</b> 9:1 12:7, 8 14:1 17:19 32:11 55:15 57:21 88:8 107:1 110:5 115:8 <b>things</b> 5:7 8:12, 21 15:5 19:17 21:13, 15, 20 23:4 32:7 43:4, 6, 7 45:6 48:21 54:5 56:18, 21 57:1 85:13 102:8, 10 110:2 111:2 114:18 115:2 <b>think</b> 5:16, 17 15:16 30:2, 3 33:5 38:22 39:4 42:11 46:15 47:7, 8, 11, 12 48:19 52:7, 22 55:6 58:4 59:7 62:15, 16 63:21 64:1, 18 65:18, 19 67:6 71:8, 16 72:20 73:1, 3 78:6 83:10 85:20 87:17 92:9 98:19 100:19 101:8, 16 102:16 108:4, 22 109:20 110:1</p>	<p>111:15, 16, 18 114:17, 20 115:12 117:15 118:14 119:17 <b>thinking</b> 53:19 98:17 <b>thinks</b> 43:21 45:18 87:9 <b>third</b> 69:9 116:7 <b>thoroughness</b> 117:5 <b>thought</b> 5:8 44:5 62:1 98:13 111:12 <b>thousands</b> 95:19 <b>three</b> 28:6 52:20 68:15 69:1 <b>till</b> 109:8 <b>time</b> 5:13 6:11, 12, 21, 22 7:3 8:2, 6, 10 9:6, 12 10:14, 20 12:18 21:5 22:1 26:21 28:20 29:4 30:4, 5 32:9, 16 49:20 50:4 53:7 78:14 83:7 85:5 89:15 90:5 93:22 94:3 100:9 111:5, 10 113:14 116:4 117:12 <b>timeliness</b> 56:20 57:2 <b>times</b> 62:22 117:3 <b>Title</b> 110:12 <b>today</b> 5:15 39:2 40:3 48:6 50:7 64:13 68:12, 16 69:13 70:21 73:18 79:8 84:18 86:20 102:1 116:14 117:19 119:6 <b>today's</b> 27:4 113:18 114:22 <b>toilets</b> 26:13</p>
---	---	--	--

<p><b>told</b> 24:7 25:1 39:7 43:16 45:5 <b>tomorrow</b> 65:10 <b>tonight</b> 118:11 <b>total</b> 116:15 <b>totally</b> 114:22 <b>touch</b> 57:22 110:5 <b>touching</b> 119:15 <b>Town</b> 46:4 104:15 <b>traditional</b> 30:16, 17 31:2 32:7 33:4 34:6 <b>traffic</b> 45:22 <b>transcript</b> 41:12 100:11 121:7 <b>transient</b> 80:13 <b>transitory</b> 37:14, 15, 19 38:4 <b>Treasure</b> 82:9 <b>treat</b> 32:1 60:19 74:5, 20 <b>treated</b> 33:4 76:7 108:20 <b>treating</b> 32:9, 14 <b>treatment</b> 17:3 36:16 37:1, 19, 22 54:17 89:17 109:5, 16 <b>trial</b> 47:21 119:3 <b>Tribble</b> 73:15 74:12 77:6 78:8 84:21 88:5 104:11 105:9, 18 <b>tried</b> 118:5 <b>trouble</b> 35:1 111:7 <b>troubled</b> 106:15 <b>true</b> 7:7 12:17 26:20 121:7 <b>truly</b> 83:22 <b>trying</b> 41:5, 6 98:15 116:10 <b>turn</b> 73:2, 5</p>	<p><b>turning</b> 59:6 71:11 <b>turns</b> 89:14 <b>twice</b> 36:17 <b>two</b> 22:14 25:22 30:19 31:16 34:12 48:21 52:6 54:5 56:17, 19, 20 63:4 68:22 69:2, 13 77:16 88:12 89:14 92:1 93:5 <b>type</b> 29:13 <b>Tyson</b> 2:20, 21</p> <p>&lt; U &gt; <b>unanimous</b> 78:20 <b>unappealable</b> 95:15 96:13, 16, 17 <b>unclear</b> 53:21 <b>underground</b> 114:12 <b>understand</b> 46:20 55:16 89:21 91:3, 13 117:16 <b>understanding</b> 42:1 50:16 <b>understands</b> 41:2, 20 <b>understood</b> 108:11, 12 109:1 <b>unfavorably</b> 20:11 <b>Unfortunately</b> 113:18 <b>unhappiness</b> 117:14 <b>University</b> 2:6 <b>unproductive</b> 115:12 <b>unquestionably</b> 55:4 88:2, 10 <b>unrelated</b> 17:2 <b>urging</b> 57:7 <b>use</b> 12:17 13:1 14:7 16:7, 15 18:4, 9, 13, 22</p>	<p>19:13, 21 21:1 22:13 23:4, 8 24:16 25:5 26:5, 8, 10 27:12, 15, 21 28:8, 11, 15, 16 29:11, 16 30:15 32:7 33:14, 15 35:3, 21 38:7 43:22 45:1 58:14 60:8 105:4, 5, 7 106:3 107:12, 13 <b>uses</b> 33:10 34:6 35:9 36:17 104:10 <b>usurp</b> 33:9 <b>utterly</b> 66:17</p> <p>&lt; V &gt; <b>vacation</b> 82:11 <b>vaguely</b> 7:6 <b>valid</b> 62:19 84:18 114:5 <b>validity</b> 54:21 65:3 94:4 115:9 <b>various</b> 62:2 <b>VDOT</b> 46:1 <b>ventilated</b> 24:2 <b>venture</b> 50:3 <b>verify</b> 115:9 <b>version</b> 70:13 71:7 95:10 <b>versus</b> 5:2 50:22 60:6 93:3 104:11 105:9, 18 108:8, 22 109:1 <b>view</b> 33:8 39:2 47:10 49:4 54:15 60:9 67:15 75:16 89:17 94:19 110:4 <b>views</b> 94:20 <b>violate</b> 78:16 90:9 <b>violated</b> 106:3 <b>violating</b> 19:6 104:19</p>	<p><b>violation</b> 11:20 18:22 45:2 90:7 <b>Virginia</b> 1:15 2:7, 21 3:6 6:16 7:20 10:3, 17 11:21 17:6 21:9, 14 22:4, 15 26:18 42:16 47:18 73:12, 16 75:3, 22 76:13, 18 77:6, 9, 22 78:14, 15, 16 79:4 81:2, 22 82:3, 4, 22 83:20 93:5, 6 96:21 99:10 101:2 108:7 109:7, 11 110:6, 9, 10, 13 121:1, 4, 18 <b>visitor</b> 37:5 <b>vote</b> 78:20 <b>vs</b> 1:3 <b>Vulcan</b> 42:17, 19 43:16 93:3, 14, 18, 20 94:2, 13 101:4</p> <p>&lt; W &gt; <b>wait</b> 20:3 41:14 43:12, 14 47:13 51:18 52:4 64:10 67:19 117:17 118:1 <b>waited</b> 13:21 <b>waiting</b> 48:6 118:2 <b>walk</b> 50:7 <b>walking</b> 40:18 <b>want</b> 11:15 23:17 36:12 51:20, 21 54:12 57:22 69:22 70:11 71:20 81:9 89:3, 5, 22 109:7, 8, 11, 12 116:12 117:7 <b>wanted</b> 12:4</p>
---	--	---	---

33:9 51:8  
**wanting** 62:18  
**wants** 32:6 34:1  
**Washington** 2:13  
**watching** 118:15  
**water** 24:3, 11, 12  
 46:2, 4 114:12  
**way** 12:21 22:10  
 32:6 33:4 38:17  
 45:9, 10, 16 50:1  
 54:3 79:4 103:18  
 108:7 114:7  
**ways** 6:3 34:8  
 108:2  
**weapons** 24:19, 20  
**week** 117:20  
**weeks** 118:2  
**weigh** 86:5  
**weight** 87:14  
**welcome** 14:13  
 39:5  
**well** 5:20 6:2  
 9:12 14:20 24:1,  
 2 26:4 35:6 39:3,  
 4, 6 45:8 47:7  
 52:10, 21 53:4  
 64:18 71:9 80:16  
 84:11 98:12, 13,  
 19 99:5, 20 107:2  
 112:17 113:18, 19  
**went** 28:1 82:11  
 102:3 110:16  
**we're** 10:21 11:9  
 13:15, 18, 19 17:7  
 24:7, 15 25:1  
 31:20 47:16 57:2,  
 4 60:19 63:8  
 64:8 66:9, 10, 14  
 70:21 73:18  
 76:15 80:3 85:2  
 91:2, 6 92:4  
 99:13, 14, 21  
 100:13 102:1  
 104:7 107:9, 13,  
 19  
**West** 104:15, 16

**we've** 40:9 47:2  
 48:11 54:4 62:21  
 67:2 88:19 89:13  
 100:11  
**white** 95:14  
**WILBURN** 2:17  
 5:6, 16 21:6  
 46:15 68:6, 9, 10  
 72:6 73:8 83:17  
 84:11 86:14  
 90:11, 15, 22  
 92:13 101:7  
 102:16 110:8  
 111:19 112:2, 8  
 113:8 117:11, 15  
 119:1, 8 120:5  
**Wilburn's** 107:6  
**win** 38:14 39:8  
 114:7  
**wise** 5:13 111:10  
**wish** 48:9  
**wit** 121:1  
**WOODS** 2:19  
 68:11 108:8, 22  
 109:1  
**word** 9:10 12:17,  
 18 17:1 19:17  
 33:14, 15 37:9  
 58:3 60:11  
 112:16  
**worded** 52:13, 14  
**wording** 48:18  
 52:16  
**words** 36:7, 17  
 58:4 78:11 94:1  
 95:8  
**work** 44:3 62:20  
 118:12 119:2, 4  
**workers** 24:17  
**working** 114:12  
**worried** 91:16  
**worry** 9:15 21:7  
 26:17  
**worse** 40:9  
**worth** 89:4  
**write** 79:1, 12

**written** 94:10  
 101:6 113:19  
 115:10 116:21  
**wrong** 32:22  
 33:5 40:10 49:4  
 57:16 64:17  
 69:16 79:4 80:7  
 84:1 85:3 87:11  
 88:18, 22 96:2  
 107:11 117:9  
 120:1  
 < Y >  
**yards** 34:19  
**Yeah** 38:10  
**year** 42:17 75:21  
**years** 105:20  
**yellow** 34:14  
**young** 109:9  
 < Z >  
**zone** 16:8 26:9  
 28:18, 19 35:4, 5,  
 15 105:5 107:14  
**zones** 35:10, 12  
**zoning** 6:22 8:3,  
 10, 11, 12, 15, 21  
 9:1, 3, 7, 8, 14, 16,  
 17, 21 10:1, 5, 6, 7,  
 8, 10, 15, 16 11:5,  
 8, 13, 14, 16 12:3,  
 11 13:2, 6, 7, 10,  
 19, 21 14:5, 8, 10,  
 15, 18 15:1, 4, 9,  
 10, 12, 14 16:2, 13,  
 16, 19 17:8, 10, 15,  
 16 18:5, 16, 19, 20  
 19:4, 9, 10, 19, 22  
 20:17, 18, 20, 22  
 21:3, 16, 21 22:6,  
 8, 11, 12 23:2, 9,  
 15 24:9, 15, 20  
 25:2, 8, 10, 12  
 26:14, 17 27:20  
 28:1, 3, 5, 7, 15  
 30:8, 9 31:22

32:4, 21 34:1  
 38:12 40:18, 21  
 41:9 42:9, 12  
 43:5, 6, 10, 14, 21  
 44:1, 3, 22 45:10,  
 12, 17, 18 46:8, 12  
 47:5 56:4, 6  
 58:18 59:12 61:1,  
 4, 11, 18, 19, 20  
 63:1 64:14, 16  
 65:8, 11 66:1  
 68:19 70:1 71:16  
 72:22 74:1, 7, 14  
 75:8 76:17 77:7  
 86:21 90:6 91:22  
 93:19 94:11 95:1,  
 3, 10, 12, 20, 21  
 96:22 97:8, 12, 21,  
 22 98:5, 7, 11, 19  
 99:2, 13, 14, 18, 19  
 101:1, 10, 15, 20,  
 21 102:12 104:3  
 105:6, 8, 10, 12, 13,  
 14, 16 110:19  
 114:11 115:21