

**In the Matter of:**

**Hilary Kozikowski, et al**

**v.**

**Monroe RE, LLC, et al**

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**Transcript of Proceedings**

February 21, 2023

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*Casamo*

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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.,

Petitioners,

v.

CL220002838

MONROE NEWPORT, RE, LLC, et al.,

Respondents.  
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Leesburg, Virginia  
Tuesday, February 21, 2023

The above-entitled matter came on to be heard  
before THE HONORABLE PAUL F. SHERIDAN, Judge, in  
and for the Circuit Court of Loudoun County,  
commencing at approximately 10 o'clock, a.m.,  
when there were present on behalf of the  
respective parties:

APPEARANCES:

On Behalf of the Petitioners:

Gifford R. Hampshire, Esquire  
Blankingship & Keith, PC  
4020 University Drive  
Suite 300  
Fairfax, Virginia 22030

On Behalf of the Respondents:

John Wilburn, Esquire  
McGuire Woods  
1750 Tysons Boulevard  
Suite 1800  
Tysons, Virginia 22102

Other:

Nicholas J. Lawrence, Esquire  
Loudoun County Government  
1 Harrison Street, Southeast  
Leesburg, Virginia 20175  
(On behalf of the Board of Supervisors)

\* \* \* \* \*

C O N T E N T S

Proceedings

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1 P R O C E E D I N G S

2 (Whereupon, the court reporter was

3 sworn.)

4 THE COURT: Are we ready to go?

5 MR. HAMPSHIRE: Yes, Your Honor. One

6 second.

7 THE COURT: How do you wish to start?

8 MR. HAMPSHIRE: Your Honor, I'm Gifford  
9 Hampshire for the petitioners. Thanks for having  
10 us here today.

11 We regard this as a status conference to  
12 let the Court know what has happened since we  
13 were here with you last and ask, at least from  
14 our perspective, that the appeal that we just  
15 filed to the board of zoning appeals decision  
16 from issuance of the zoning permit should be  
17 consolidated with the existing case and another  
18 round of briefing, perhaps argument, and then  
19 ultimately a decision, and consistent with the  
20 Court's previous rulings, that would be a way of  
21 getting a full record before the Court on all --

22 THE COURT: You're saying a full record

1 because you filed something Friday?

2 MR. HAMPSHIRE: Yes, sir.

3 THE COURT: On a long weekend?

4 MR. HAMPSHIRE: Yes, sir. And I hope  
5 you got it. I sent it on --

6 THE COURT: The filing didn't get in the  
7 way of the long weekend?

8 MR. HAMPSHIRE: No, it did not. We got  
9 it done on Friday.

10 THE COURT: So procedurally, you don't  
11 believe we're here for a decision today?

12 MR. HAMPSHIRE: That's my feeling.

13 THE COURT: Let me hear from the other  
14 side.

15 MR. WILBURN: Good morning, Your Honor.  
16 John Wilburn from McGuire Woods on behalf of  
17 Newport. We have a different view.

18 We were here last time and the Court was  
19 heading into that hearing prepared to render a  
20 decision. At that time, the petitioners asked  
21 the Court to hold off yet one more time while the  
22 BZA appeal on the permit was heard. And that's

1 been done.

2           The Court I think reluctantly agreed,  
3 but in doing so, the Court informed the parties  
4 you didn't want this to drag out and there was a  
5 promise made by the parties that we would be back  
6 in front of you early February on that matter.

7           The BZA heard their appeal of our permit  
8 and decided in our favor, that the permit was  
9 properly issued.

10           THE COURT: Split vote.

11           MR. WILBURN: Split vote, but as those  
12 things go, 3 to 2.

13           THE COURT: At least some support for  
14 that.

15           MR. WILBURN: At least some support. On  
16 Friday, the petitioners filed an appeal of that  
17 permit and what they're asking the Court to do is  
18 to delay a decision in a case that's already been  
19 fully briefed, our case here, tried and argued I  
20 think post-trial a couple times in favor of what  
21 I assume will be -- they'll serve that complaint.  
22 They haven't served it yet, to my knowledge, on

1 the County, and there would have to be a writ  
2 issued by the circuit court for a record, to then  
3 go up from the BZA to the circuit court.

4 THE COURT: Say that again.

5 MR. WILBURN: Well, they filed an appeal  
6 of the BZA decision. That's what they filed on  
7 Friday.

8 The next steps in that case, which is a  
9 separate case from this case, would be the  
10 circuit court would have to issue a writ down to  
11 the BZA to produce the record. That would  
12 presumably happen.

13 Thereafter, the petitioners say that  
14 they would file a motion with the circuit court  
15 -- it hasn't happened -- to consolidate that  
16 action, a totally separate action, with this case  
17 that's already been briefed and tried and ready  
18 for decision, and they want the Court to withhold  
19 its decision here pending that separate case  
20 which will have a separate record there.

21 And we'd suggest to the Court that there  
22 really are two separate cases. I understand that

1 they relate to the same property, but the  
2 petitioners chose to file this action in May.  
3 The County cautioned them repeatedly that the  
4 action wasn't ripe, that the Court lacked  
5 jurisdiction, and asked the case to be dismissed,  
6 and the petitioners repeatedly urged this Court  
7 to decide this case and that the Court could  
8 decide this case.

9           And our client, and all the parties,  
10 have spent significant time and money at trial  
11 and briefing to get to a decision point, and now  
12 the petitioners want that not to happen.

13           Sort of the challenge with this is,  
14 these truly are two separate cases. The  
15 petitioner filed an action for a determination as  
16 to three parcels that we own, three parcels.  
17 Only one of those have been permitted, two have  
18 licenses. There's now an appeal of the permit.

19           And I asked counsel, what happens if the  
20 Court accepts your invitation and we wait for the  
21 writ of cert to issue and for a motion to  
22 consolidate, which may or may not be granted, and

1 then we come back, and then what if we apply for  
2 a permit on property number 2? They would appeal  
3 that to the BZA.

4 And so we end up in the endless loop  
5 where they're asking the Court to withhold  
6 adjudication on a case they filed while they  
7 pursue administrative appeals either through the  
8 BZA or through the Commonwealth on the licensing.

9 And that was our objection from the very  
10 beginning, that there was a mechanism, not in  
11 this action, but to appeal things  
12 administratively through the Commonwealth and to  
13 appeal things by statute from the permit.

14 The petitioners insisted that they had a  
15 right and wanted to get a resolution to this  
16 venue and now here we are, heading on eight  
17 months later, and they're asking the Court to not  
18 rule while they pursue these appeals and these  
19 administrative processes. And this cycle is  
20 likely to continue because we likely will file  
21 for a permit on property number 2 and property  
22 number 3.

1                   So, Your Honor, you know, we've asked  
2 the Court, you know, to take this issue up and  
3 issue a decision. I think it would provide  
4 guidance. The BZA appeal can proceed in the  
5 ordinary course, we understand that, but there's  
6 just -- the way this has been structured by the  
7 petitioners, there really is no end because, as  
8 they now do what we suggested they should have  
9 done almost a year ago, which was wait for permit  
10 and appeal the permit, they're starting that  
11 process but they're asking the Court to simply  
12 put this case on hold.

13                   The second point on consolidation, look  
14 briefly at the statute, Your Honor, typically  
15 that's done when there's cases of similarity, and  
16 this case does have similarity with what we're  
17 talking about here and the BZA appeal, same  
18 property, some of the same legal arguments, but  
19 procedurally, they're very different.

20                   This case has already matured through  
21 briefing and trial. That case hasn't even been  
22 served yet on the Commonwealth, nor has there

1 been an order by any Court consolidating it with  
2 this case.

3 And so I suggest that they're, to some  
4 extent, putting the cart before the horse. It  
5 has not, in fact, been consolidated. It hasn't  
6 even been served. So that's our concern, Your  
7 Honor.

8 The other way to approach this, we think  
9 that Newport has compelling cases as to why the  
10 petitioners are wrong. The legal arguments they  
11 asserted have been rejected by the zoning  
12 administrator in Loudoun and Fairfax, by boards  
13 of zoning appeals in Loudoun and in Fairfax, and  
14 recently by a judge in Fairfax, the same exact  
15 arguments.

16 But there's another way to deal with  
17 this, and that is to dismiss and take up the  
18 County's -- the County's position all along has  
19 been that this matter was not ripe, that there  
20 wasn't an appealable decision from the zoning  
21 administrator because no rights were conveyed at  
22 least until the permit was issued.

1 I think, in retrospect, the County's  
2 view on this has been borne out, and so we've  
3 litigated this case and --

4 THE COURT: That helped drive an earlier  
5 decision that if I was finding in favor of  
6 standing, I was not seeing the finality of issues  
7 that were ripe for judicial consideration.

8 MR. WILBURN: That's correct. You find  
9 that the lower bar of standing was met, but you  
10 didn't find that the zoning administrator's  
11 letter was, in fact --

12 THE COURT: I made no finding, because I  
13 found that the health people, the state-wide  
14 health people had to grant maybe -- that all  
15 these other things had to happen later and it  
16 looked to me like there was no finality for an  
17 appeal.

18 MR. WILBURN: That's correct, Your  
19 Honor, and that's really exactly what has  
20 happened.

21 At that point, there was no licensing,  
22 there was a permit.

1 THE COURT: They're attempting to stress  
2 finality still has not been reached; right?

3 MR. WILBURN: That's correct, Your  
4 Honor. There is a case now where a permit was  
5 issued and they've appealed it.

6 THE COURT: That's in January of this  
7 year?

8 MR. WILBURN: That's correct, and that's  
9 the action that was filed on --

10 THE COURT: Which was a very significant  
11 absence in previous hearings.

12 MR. WILBURN: That's correct. That's  
13 correct. And they filed an appeal of that on  
14 Friday, which hasn't been served yet on the  
15 County, but that's a separate action.

16 What they're asking the Court to do is  
17 to delay a ruling in this case and eventually,  
18 with the hope they'll be consolidated, but as the  
19 Court knows, that later case doesn't merge into  
20 this one and somehow solve the infirmities of,  
21 you know, that early decision.

22 It doesn't just become --

1 THE COURT: There's been overlap in the  
2 interpretation of what the determination letter  
3 said versus the state-wide -- the Commonwealth's,  
4 you know, state-wide rules and all that. The  
5 issues are inseparable.

6 MR. WILBURN: The issues are inseparable  
7 but I wondered, and I've expressed this to both  
8 counsel, what does this case, particularly when  
9 the party doesn't the Court to advance to a  
10 decision, what does this case do?

11 THE COURT: I don't think it's his  
12 desire to stop the Court. It's desire to stop  
13 you.

14 MR. WILBURN: Well, I understand. I  
15 understand that. I mean, in terms of rendering a  
16 decision.

17 But, Your Honor, they've now have filed  
18 an action to appeal the BZA decision, which there  
19 was a permit issued, the BZA has ruled on that,  
20 and they have a right of appeal. And that should  
21 advance in an ordinary course.

22 But they're asking the Court here, when

1 we've already been litigating for eight months  
2 and already effectively tried the case, to do  
3 nothing and then eventually they hope these cases  
4 will be consolidated, and then I'm not sure what  
5 that does for them.

6           You know, we still have to decide the  
7 two cases independently. They're separate cases.  
8 They have separate records. For example, the  
9 case before you has a -- they're suing on a  
10 zoning determination that was speculative at that  
11 point, there was no transfer of rights, there was  
12 no permit granted, there was no license granted,  
13 and there was no decision by the BZA, other than  
14 saying it wasn't actionable. That's the record  
15 before you on this case.

16           There's an entirely different record now  
17 that's been generated out of the permit  
18 application, and that is, there was a decision to  
19 issue a permit, we had a license, we had a  
20 hearing before the BZA who took up everything on  
21 the merits, and they decided it our way.

22           And even the standards, Your Honor, are

1 different. In that case, we're entitled to a  
2 presumption of correctness on appeal to the  
3 circuit court. Here, there's a presumption of  
4 correctness but there was no decision by the BZA.  
5 And so they don't neatly match.

6           And so I really do -- it was not a  
7 rhetorical question, it was an honest question,  
8 I'm not sure what's done out of this case,  
9 particularly if we just let it sit, just sort of  
10 sit out there while this other one matures. We  
11 still would have to take up the two cases at some  
12 point with separate decisions. Even if they're  
13 consolidated, they have different records.

14           And so I'd ask Your Honor to -- we think  
15 if the Court believes that the zoning  
16 administrator's decision was appealable, then we  
17 think that the zoning administrator made the  
18 correct decision for the reason we briefed. I  
19 won't go through that unless Your Honor wants me  
20 to --

21           THE COURT: Do you believe it's ripe for  
22 a decision today?

1 MR. WILBURN: I think it's ripe for a  
2 decision today. I do.

3 THE COURT: Let me ask you this, let me  
4 rephrase it, I don't believe I'm going to hear  
5 anything I haven't already have heard  
6 exhaustively.

7 MR. WILBURN: That's correct.

8 THE COURT: Or have read exhaustively.  
9 However, the right of appeal and the time of  
10 appeal and the nature of the decision of that  
11 appeal are different. The permit is a totally  
12 different issue than previously existed.

13 MR. WILBURN: As is the license.  
14 Everything, when the zoning administrator made  
15 that first determination, it has changed.

16 For example, we were applying or it was  
17 speculating on I think eight inhabitants, we were  
18 allowed, five; we didn't have a license at the  
19 time, we now have a license with certain  
20 restrictions.

21 You know, it's just, you know, things  
22 have ripened, to use sort of -- I hope I'm not

1 misusing that legal concept -- things have  
2 ripened in the way the County said that they were  
3 not ripe before.

4 And so I think, I really would urge the  
5 Court to take -- I guess there's three  
6 approaches, one is to not render a decision today  
7 and to see what happens with their other appeal.

8 They'll presumably serve it on the  
9 County, a writ will issue, and they'll file a  
10 motion with the Court to consolidate, and then  
11 see what happens with that. That's one option  
12 which we would urge the Court not to follow.

13 The other two is to decide the case on  
14 the merits, and that could be done one of two  
15 ways.

16 THE COURT: One or both?

17 MR. WILBURN: What's that? I'm sorry.

18 THE COURT: You're not saying I could do  
19 the merits on the one that was filed Friday, are  
20 you?

21 MR. WILBURN: No. No. I'm sorry.  
22 Yeah, that one is not even served yet. We

1 accepted service on Friday, but I don't think the  
2 County has been served yet. But as to -- and  
3 that case hasn't been consolidated.

4 But I think as to our case, the Court  
5 could find that the petitioners were incorrect  
6 and that we have the rights under the statute  
7 that we've argued we do.

8 But the Court could also decide that the  
9 BZA in our case, in this case, was correct in  
10 finding the zoning administrator's decision was  
11 not appealable and simply affirm that, that it  
12 was not an appealable decision, and then the  
13 petitioners aren't out anything. They can pursue  
14 all of the rights, and they can pursue the appeal  
15 they filed on Friday.

16 But I just don't see the legal --

17 THE COURT: How does that benefit your  
18 client? They've still got to wait, don't they?

19 MR. WILBURN: No. Either way, we don't  
20 have to -- do you mean in terms of operations?

21 THE COURT: Right.

22 MR. WILBURN: No. The statute doesn't

1 stay our ability to operate once we have a  
2 permit.

3 The petitioners filed a motion for a  
4 temporary restraining order, and Judge Plowman  
5 denied that. But there's no stay on our ability  
6 to operate, there hasn't been since the BZA  
7 issued its decision, nor would there be if the  
8 Court withheld its decision today.

9 I don't know whether they will begin to  
10 operate or not. I don't know where they are in  
11 that process, but they have a right to operate  
12 once the permit issues.

13 I guess my -- and I'm being a little bit  
14 repetitive here -- my concern is, the path that  
15 the petitioners offer is sort of a  
16 never-ending cycle of --

17 THE COURT: Don't make your's  
18 never-ending. I've got that. I've got that  
19 argument.

20 MR. WILBURN: Well, I apologize. If  
21 Your Honor has any questions --

22 THE COURT: My first reaction when I

1 heard it was filed Friday, I thought this is  
2 playing on timing. There are separate merits,  
3 separate reasons, but on the other hand, it does  
4 dramatically affect timing.

5 MR. WILBURN: It does, Your Honor.

6 Thank you.

7 Unless you have any questions, I'll end  
8 my remarks.

9 THE COURT: It impacts you in one way,  
10 it impacts me in another, because I was ready to  
11 rule Friday morning.

12 Okay.

13 MR. WILBURN: And I think the Court has  
14 within it the authority to rule.

15 THE COURT: I know I do.

16 MR. WILBURN: Yeah.

17 THE COURT: I can go ahead and rule.  
18 But there are factors that dictate against that.

19 MR. WILBURN: Okay.

20 THE COURT: Sit down, please.

21 MR. WILBURN: Thank you.

22 MR. LAWRENCE: Your Honor, Nicholas

1 Lawrence on behalf of the Board of Supervisors.

2 The issue Mr. Wilburn is concerned about  
3 is this issue of intentional delay and  
4 deliberately prolonging the cost and expense to  
5 his client.

6 THE COURT: Right.

7 MR. LAWRENCE: And I'm sympathetic when  
8 he talks about the coming cases, the ones that  
9 aren't even filed yet, because as you may recall,  
10 there's three properties. The opinion or letter  
11 from the deputy zoning administrator addressed  
12 all three in general. That's the case that we're  
13 here on now.

14 The permit that the BZA heard the appeal  
15 of in January is for only one of the three  
16 properties. So they didn't simultaneously gain  
17 licenses and file permits on all three.

18 The way I had in my head that it would  
19 make sense for this case to go would be for Mr.  
20 Wilburn's clients to get their licenses, apply  
21 for the permits, and then both this case and the  
22 permit case could proceed up to the appellate

1 court together, because I think given the time  
2 and the resources that the parties have spent on  
3 this, it's pretty clear that's where this is  
4 ultimately headed.

5 I don't think it's to anybody's benefit  
6 to spend the money, the time, the effort on two  
7 sets of appellate briefs, two separate arguments,  
8 you know, maybe you get the same panel, maybe you  
9 get the same date, maybe you don't, when there's  
10 so much overlap between the issues.

11 But now we're in this posture where  
12 they've only filed for one permit, the BZA has  
13 heard the appeal on one permit, there's  
14 apparently two more coming at some point. I  
15 don't know when that will happen.

16 THE COURT: Do you have any guess as to  
17 that process, how long it will take?

18 MR. LAWRENCE: Well, it's up to them  
19 when they want to file for the permit. I don't  
20 control that. And then each property, I suspect,  
21 is going to be looked at individually.

22 So the one where the permit has been

1 granted, one of the more significant issues that  
2 came to my attention is this question of the  
3 septic capacity, and that involved a review, you  
4 know, not by the zoning department but by the  
5 health department to determine capacity, and  
6 that's why Mr. Wilburn's client was only allowed  
7 five occupants as opposed to the eight they  
8 wanted, because the health department thought  
9 eight would potentially overpass the capacity of  
10 the septic field.

11 So I don't know what the condition of  
12 the septic field is on the other two parcels. I  
13 don't know, you know, what the health department  
14 is going to make of that. So I have no idea. I  
15 mean, if they have to do some kind of work to  
16 address the capacity or whether it will just sail  
17 through with no issues from the health  
18 department. So those are the considerations that  
19 I think the Court ought to consider.

20 Whether you decide them independently of  
21 one another, whether you allow them, you know,  
22 perhaps to be consolidated so that they can go up

1 on appeal together, you know, the County will  
2 handle that either way. But there are people  
3 here who are paying, you know, their attorneys.

4 And from an efficiency standpoint, it  
5 certainly would make sense to me if they went up  
6 together, this case and at least one of the  
7 permit cases, you know, so that we would know  
8 they'll be heard by the same appellate panel and  
9 you're not going to get perhaps different  
10 appellate panels, you know, one may be hearing  
11 the argument before the other has decided, and we  
12 could just have sort of a mass at the appellate  
13 level. What we've always wanted is to get this  
14 resolved and to get it final. And so that's what  
15 I would ask the Court to consider.

16 Our position on this case is the same as  
17 it's always been, it wasn't ripe for appeal, the  
18 BZA was correct in its determination, the Court  
19 ought to affirm that, but whether you do it today  
20 or, you know, tomorrow or whether you wait to  
21 allow the case that was filed at 5:30 on Friday  
22 to be consolidated with it, you know, that's --

1 it's a tangle, Judge, quite frankly. I don't  
2 know that there's a clean, super efficient way to  
3 do it. There's pros and cons either way.

4           What I can tell you, the County is ready  
5 to proceed with the appeal that was Friday. I  
6 gave direction for the record to be prepared  
7 weeks ago. So as soon as the Court issues the  
8 writ authorizing us to file the record, we'll  
9 have that filed within 24 hours. There won't be  
10 any delay on our side.

11           THE COURT: How do you visualize a  
12 hearing or a review by the Court?

13           MR. LAWRENCE: Well, I think it depends  
14 on whether it's consolidated or not. If it's  
15 heard by a different judge, then I think there's  
16 going to be --

17           THE COURT: I think at the moment, see  
18 tabs? That's the law clerk helping me. I think  
19 it would be in appropriate waste of judicial time  
20 to have another judge have to learn all this,  
21 too.

22           MR. LAWRENCE: I don't disagree.

1 THE COURT: I intend to keep it. If  
2 this is going to be around a while, I intend to  
3 keep it until somebody overrules me.

4 MR. LAWRENCE: I don't disagree with you  
5 about that.

6 THE COURT: I'm trying to make it as  
7 efficient as possible, even though there's an  
8 inefficiency staring at us.

9 MR. LAWRENCE: Right. So I think if  
10 they were consolidated, I suspect Your Honor  
11 probably has a pretty good idea of what you're  
12 going to do with this present case. You know,  
13 whether you agree with me or not, I'm sure you  
14 well know what you think about it.

15 THE COURT: I will tell you, I was ready  
16 to rule today.

17 MR. LAWRENCE: And then on the other  
18 case, you know, as far as I'm concerned, there's  
19 no bar for the Court reaching the merits on that  
20 case.

21 You know, it went through the  
22 administrative process, the permit was granted,

1 it was appealed to the BZA, the BZA held a public  
2 hearing. That case, you know, the parties  
3 disagree about whether the BZA was correct, but  
4 that case, unquestionably, the Court can reach  
5 the merits and decide it.

6 THE COURT: Okay.

7 MR. LAWRENCE: I think you probably know  
8 what you think about that, too. But if you  
9 require additional briefing, then that could be  
10 done, certainly more efficiently with you than  
11 with somebody stepping in and handling that case  
12 independently and getting up to speed from the  
13 start.

14 So I don't often not take a position,  
15 Judge, but I see benefits and unfortunately costs  
16 either way you go.

17 THE COURT: What you're saying is  
18 fair-minded.

19 MR. LAWRENCE: That's what I think you  
20 ought to keep in mind, those factors, Judge.

21 THE COURT: What do you foresee as the  
22 time it will take if we consolidate these cases?

1 MR. HAMPSHIRE: Your Honor, I would  
2 think that we could -- we just need another round  
3 of briefing, and has it has been indicated,  
4 there's really not much more to say.

5 THE COURT: Keep your voice up.

6 MR. HAMPSHIRE: Sorry. I think we just  
7 need another round of briefing and another  
8 argument. I don't think there's much more to  
9 say, as indicated.

10 We very strongly disagree that these are  
11 two different cases. These are the same case  
12 precisely because they are both based upon the  
13 zoning determination, as we have argued that that  
14 is what --

15 THE COURT: Well, they missed something  
16 that I called missing. I said lack of finality  
17 was a part of my rule in standing but not  
18 anything else. So we had at least a piece of  
19 finality in the zoning permit.

20 MR. HAMPSHIRE: Correct. And it's not  
21 really us that chose to file the second appeal.  
22 We viewed that the zoning determination, being a

1 zoning determination, was appealable. We still  
2 take that position.

3 That's one of the issues that is before  
4 the Court, because it's a zoning determination,  
5 it's not a permit that allows one to commence  
6 work. However, we have not yet prevailed on that  
7 position, and therefore, we were forced to file  
8 an appeal of the zoning permit.

9 Taking the County at its argument and  
10 taking the BZA at its previous ruling, we said,  
11 well, now that there's a permit issued, that,  
12 under their theory of the case, makes that zoning  
13 --

14 THE COURT: That sounds like finality.

15 MR. HAMPSHIRE: Finality, and therefore,  
16 we were compelled to file an appeal, otherwise,  
17 we'd be stuck with it, and we are likewise  
18 compelled to file an appeal to this court within  
19 the 30 days.

20 We have no intent to delay here, but  
21 we're not the ones that chose to take the  
22 position that the zoning determination was not

1 final. The County did. The BZA did.

2 So we now recognize that, under their  
3 theory of the case, the zoning determination was  
4 final by virtue, and appealable, by virtue of  
5 there being a zoning permit issued.

6 That's why we had to spend the money to  
7 go through a second BZA hearing, and that's why  
8 we had to spend the money to file a second appeal  
9 within the 30 days that we're allowed to do so.  
10 So there's no intent to delay.

11 But the issues, because of the position  
12 that the zoning determination, from our  
13 prospective, is ripe under 15.2-2291 I believe it  
14 is, under the zoning statute 2203 I think,  
15 because it's ripe, because it's a determination,  
16 because there's a zoning permit that has been  
17 issued, it's appropriate that this case now be  
18 taken together and all the pieces assembled,  
19 there's no issue as to whether it's ripe anymore,  
20 even under the theory that the BZA espoused and  
21 the County espoused, and the Court can decide it  
22 all together.

1 THE COURT: Okay.

2 MR. HAMPSHIRE: So to answer your  
3 question, I think that we could have another  
4 round of briefing and then we could be back  
5 before the Court in a month or two and since  
6 there's not much more to say, have a short  
7 hearing, short argument --

8 THE COURT: How long would it take?

9 MR. HAMPSHIRE: I think two months. I  
10 think we could be done in two months.

11 THE COURT: You think that it would be  
12 positioned, everything involved would be  
13 positioned for finality of decision in two  
14 months?

15 MR. HAMPSHIRE: Yes, sir. And that's --

16 THE COURT: Why do you oppose that?  
17 What's your estimate as to how long things will  
18 take?

19 MR. WILBURN: I'd like to have it heard  
20 sooner than that. And if Your Honor wants to put  
21 it out to two months, if we could get a date and  
22 set the briefing, we'd like to do that.

1                   One question I did have for counsel  
2                   though is how this process plays out when we  
3                   apply for the second permit. Previously, when we  
4                   applied for the permit, the petitioners came to  
5                   the Court and said, hold off on this case while  
6                   that permit plays out and then they're going to  
7                   appeal that permit.

8                   And we're in the same spot. So the  
9                   logic of saying, don't decide this case until we  
10                  play out the appeal on the first permit, does  
11                  that extend to permits number 2 and 3? Because  
12                  then this continues to circulate.

13                  I ask counsel, would you agree then that  
14                  if the Court does this and consolidates, that the  
15                  decision on this case would bind you as to those  
16                  other two properties? And they've sued on all  
17                  three properties. And I think he said it would  
18                  and that they would --

19                  THE COURT: Is that true?

20                  MR. HAMPSHIRE: Well, it is our  
21                  position, Your Honor, as I stated a second ago,  
22                  that the zoning permits are nothing more than

1 pieces of paper that are administratively granted  
2 based upon a determination set forth in the  
3 zoning determination. That's always been our  
4 position.

5           So if we have a ruling from this Court  
6 on the zoning determination, that is the basis  
7 upon which all the zoning permits would be  
8 issued, and therefore, yes, if there's a decision  
9 from this Court on the zoning determination, now  
10 that it's ripe, even under the County's and the  
11 BZA's theory of the case, then that judicial  
12 ruling would bind whether or not any future  
13 zoning permits could issue, subject to any appeal  
14 through the Court of Appeals.

15           THE COURT: That's all I needed to hear.

16           We're not going to go forward today.  
17 We're going to proceed with that agreement, that  
18 this case, on the permit issue, will be cover the  
19 two pieces of property not yet ripe enough. The  
20 lawyers can write that up for me.

21           The case was set and the Court was ready  
22 to do a decision today. The parties have spent a

1 lot of time, money, energy, hopes in getting this  
2 thing one way or another, both sides. I'm sorry  
3 I haven't delivered at least partial closure to  
4 you.

5 But that's one reason I'm saying that  
6 these cases stay with me unless I'm overruled by  
7 some higher court or some chief judge here that  
8 tells me they want somebody else to do it, I  
9 think I owe it to everybody having invested,  
10 learning, being taught by counsel what it's all  
11 about, that we do not need to start over with  
12 another judge.

13 In terms of what we're going to do then,  
14 you're asking really for a continuance. That's  
15 granted.

16 You object. That's noted.

17 When do we set this? Do we aspire to  
18 setting a date two months from now?

19 MR. WILBURN: I would actually hope we  
20 could do it a bit sooner. All the arguments are  
21 going to be the same --

22 THE COURT: Wait a second. I'm setting

1 a date.

2 MR. WILBURN: Oh, yes. Okay.

3 THE COURT: I'm asking about the picking  
4 of a month and day now, rather than waiting two  
5 months to decide that.

6 MR. HAMPSHIRE: I don't know what Mr.  
7 Wilburn's and Mr. Lawrence's schedule is, but I  
8 think we could pick a date in, today is late  
9 February, late April, somewhere in there.

10 THE COURT: Everybody involved work on  
11 your calendars. Try and work it out. We don't  
12 have to do it right now, but we're going to  
13 target two months as our outer limit. If it ends  
14 up being a few days off, that's okay, but in  
15 essence, within two months, we're going to have a  
16 hearing date.

17 What's your guesstimate as to the length  
18 of a hearing?

19 MR. HAMPSHIRE: Your Honor, I'll go  
20 first, I think given the briefing that we've  
21 already done, I think at the most, two hours. I  
22 think we've really argued everything there is to

1 argue. There's some slight variations in this  
2 case that we didn't argue before, so --

3 THE COURT: A hearing would not include  
4 each property owner testifying?

5 MR. HAMPSHIRE: No, sir. No, it would  
6 be legal argument.

7 THE COURT: I could question the answer,  
8 what the "no" means.

9 MR. HAMPSHIRE: It would not involve  
10 testimony.

11 THE COURT: Okay. Good.

12 MR. HAMPSHIRE: It would involve legal  
13 argument.

14 THE COURT: Because that's one of the  
15 things I've been worried about, whether you had a  
16 right to or wanted to hear testimony from  
17 everybody.

18 The allegations are very similar, and I  
19 assumed everybody has the same factual basis for  
20 their legal attack on this thing.

21 MR. HAMPSHIRE: There is a slight --  
22 there's one additional set of facts that are

1 emphasized in this case and that is -- and you'll  
2 see it in the current petition -- and that is  
3 that the evidence, from our perspective, show  
4 that, all the legal arguments aside, that  
5 factually the evidence was, before the BZA, that  
6 the houses were intended to be used together, and  
7 therefore, more than the eight that would be  
8 allowed. But that --

9 THE COURT: There's a key debate, a key  
10 part of the decision process as to whether the  
11 Commonwealth and the code section, by defining it  
12 as a single-family residence or other language  
13 overturns the -- it's hard to say the word --  
14 congregated -- did I say it right?

15 MR. HAMPSHIRE: The congregate housing  
16 facility determination by the --

17 THE COURT: You know what I mean.

18 MR. HAMPSHIRE: That is set forth again  
19 in this new pleading.

20 THE COURT: Within the determination  
21 letter, there's opinion A and opinion B, and  
22 you've got to --

1 MR. HAMPSHIRE: Right.

2 THE COURT: -- watch how you end up,  
3 what kind of residence this is.

4 MR. HAMPSHIRE: Right. And so the  
5 fundamental issue, and I think Mr. Wilburn would  
6 agree, the fundamental issue that any appellate  
7 court is going to confront is whether or not  
8 somehow Virginia Department of Development  
9 Services licensure controls or redefines, if you  
10 will, what is allowed under the local ordinances  
11 supercedes it.

12 And you will see in the new suit, the  
13 BZA ruled that as a matter of supremacy that it  
14 did so, that the State controlled. We disagree  
15 with that. So that's a fundamental underlying  
16 legal issue in this whole matter in both cases.

17 MR. WILBURN: I would agree. I think it  
18 should not exceed two hours and I don't believe  
19 there will be any live testimony for the record  
20 of appeal.

21 THE COURT: All right. Do you need  
22 right now to outline deadlines for filings?

1 MR. HAMPSHIRE: I think we can do that  
2 or we can just agree to it. We work pretty well  
3 together.

4 THE COURT: That's reflected throughout  
5 the case. You've worked well even while in  
6 competition. You've worked together courteously.

7 MR. HAMPSHIRE: If we can do that.

8 MR. WILBURN: We can work this out.

9 MR. HAMPSHIRE: It would probably be  
10 better to do it back in our offices where we can  
11 kind of look at a calendar at the same time.

12 THE COURT: You work it out and send it  
13 to the Court, an agreed schedule.

14 MR. HAMPSHIRE: All right, sir.

15 THE COURT: I don't need to order it.  
16 You're going to establish it by agreement.

17 MR. HAMPSHIRE: Yes, sir.

18 THE COURT: And what I'm hearing I  
19 think, and the performance of counsel throughout  
20 this thing, has been professional. We'll get  
21 that done.

22 MR. WILBURN: Your Honor, just a matter

1 of process, I understand counsel will submit an  
2 order of consolidation. Do they send that  
3 directly to you rather than file a motion?

4 MR. HAMPSHIRE: Well, it's not so much  
5 an order of consolidation but it's a motion for  
6 leave to amend that I just handed to the clerk.

7 We made a typo in paragraph 22, and this  
8 would be just for correcting a typo for  
9 Mr. Thomas, Mr. and Mrs. Thomas's names, instead  
10 of Mr. and Mrs. Wright, and I've red lined it  
11 there. It would be nice to correct that if we  
12 could.

13 MR. WILBURN: Well, we probably need an  
14 order consolidating, as well.

15 MR. HAMPSHIRE: All right.

16 MR. WILBURN: Don't you think?

17 MR. HAMPSHIRE: Okay.

18 THE COURT: Just a second.

19 MR. HAMPSHIRE: Okay.

20 THE COURT: The unappreciated  
21 participants here, like somebody that hands me a  
22 piece of paper when you say something, are

1 invaluable.

2 MR. HAMPSHIRE: Thank you.

3 THE COURT: Clerks and deputies get  
4 little commentary. But I was just handed the  
5 document. You said paragraph 24?

6 MR. HAMPSHIRE: Paragraph 22. I tabbed  
7 it.

8 THE COURT: 22, is it, it's Mr. and Mrs.  
9 Wright versus Mr. and Mrs. Thomas?

10 MR. HAMPSHIRE: Correct. That just  
11 should be corrected. It's clear from the  
12 context, the whole paragraph, there's a typo  
13 there in the third line that we'd like to  
14 correct.

15 THE COURT: I don't understand. Is it  
16 the name or something else that I change?

17 MR. HAMPSHIRE: It's the name. It  
18 should be Mr. and Mrs. Thomas instead of Mr. and  
19 Mrs. Wright there in the --

20 THE COURT: The line is drawn through  
21 Wright.

22 MR. HAMPSHIRE: Yes. Thomas should be

1 substituted for Wright.

2 THE COURT: There's a marginal line  
3 right there. I'm going to put my initials next  
4 to it, and I'm going to line through the Wright.

5 MR. HAMPSHIRE: I'm sorry. Is yours not  
6 red lined? The person that I --

7 THE COURT: Take a look. You tell me  
8 cosmetically or substantively what you like --

9 MR. HAMPSHIRE: That's fine, Judge.  
10 That's great. That's red lined. That's fine.  
11 Thank you, sir.

12 THE COURT: That's done.

13 What else for today?

14 MR. HAMPSHIRE: I think counsel just  
15 needs to sign that, the order that's attached to  
16 the top.

17 THE COURT: You need to sign this?

18 MR. HAMPSHIRE: Yes, sir.

19 MR. LAWRENCE: Your Honor, I'm not in  
20 that case yet.

21 THE COURT: Say again.

22 MR. LAWRENCE: I'm not in that case yet.

1 If I were in the case, I would not object.

2 THE COURT: You folks work it out if and  
3 when you're put in the case, if and when they get  
4 you in there.

5 MR. HAMPSHIRE: We've asked for service  
6 to be delivered. It's on its way. It should be  
7 there pretty soon, service to the County.

8 THE COURT: Do you have any problem with  
9 the two months concept?

10 MR. LAWRENCE: No, sir. I think it  
11 could be done quicker, but I don't have any  
12 objection to that.

13 THE COURT: You've heard what I've asked  
14 the other two counsel. I understand you're  
15 sharing their thoughts on how to work it out?

16 MR. LAWRENCE: Yeah. We'll work  
17 together, Your Honor.

18 THE COURT: All right. Thank you.

19 MR. HAMPSHIRE: And, Your Honor, in  
20 terms of securing the date, I believe we should  
21 call the clerk's office I guess and make sure  
22 you're going to be here and get the right date?

1 THE COURT: Right. And I think my  
2 calendar is down in the car, but the clerk will  
3 have to ask me my dates. So pick several.

4 MR. WILBURN: Okay.

5 THE COURT: I don't think too much, and  
6 I don't have much going on. My primary calendar  
7 these days is what grandchildren are doing but  
8 it's usually on a weekend.

9 Thank you, counsel.

10 MR. WILBURN: Thank you.

11 THE COURT: I've got to thank the law  
12 clerk for a major league job that doesn't produce  
13 an ending today. Thank you.

14 MR. WILBURN: Thank you very much.

15 THE COURT: Thank you.

16 \* \* \* \* \*

17 (Whereupon, at approximately 10:38 o'clock,  
18 a.m., the taking of the proceedings in the above-  
19 entitled matter was concluded.)

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21

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CERTIFICATE OF REPORTER

I, Sharon D. Akers, the Court Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of February, 2023.

  
Sharon D. Akers

My commission expires May 31, 2024  
Registration No. 268253