BOARD OF ZONING APPEALS
September 1, 2005

A. ROLL CALL

PRESENT:	ABSENT:
Mr. Fraley	Mr. Wenger
Mr. Rhodes	
Mr. Nice	
Mr. Fischer	

OTHERS PRESENT:
Allen Murphy, Zoning Administrator/Principal Planner
John Rogerson, Senior Zoning Officer
Melissa Brown, Senior Zoning Officer
Clifton Copley, Zoning Officer
Adam Kinsman, Assistant County Attorney

B. MINUTES

On a motion by Mr. Fraley, seconded by Mr. Nice, the minutes of the August 4, 2005 meeting were unanimously approved with no corrections.

C. OLD BUSINESS

1. ZA-09-05 1358 Jamestown Road

Mr. Fraley asked Ms. Brown to summarize the variance proposal for the Board members who were absent from the August meeting. Ms. Brown summarized the variance proposal and noted that Codes Compliance failed to require the foundation survey that Zoning had requested prior to the approval of the second foundation inspection. She noted that the builder was asking for final Certificate of Occupancy (C.O.) when Codes Compliance realized that the foundation survey was never submitted for Zoning approval. When the builder provided the foundation survey, it was discovered that the building encroached into the front and rear setbacks. Ms. Brown added that the footprint of the proposed house on the development plan submitted with the building permit packet did not match the footprint of the house described by the engineered building plans. She stated that because of the builder's error and the oversight of Codes Compliance, the building was allowed to be built to completion and the applicant was issued a temporary certificate of occupancy.

Mr. Fraley asked for questions from the Board. Mr. Fischer asked for clarity on what was submitted to the County. Ms. Brown responded that the builder submitted a set of

engineered construction plans and a development plan, or survey, showing the footprint of the construction in relationship to the property lines with the building permit application. Mr. Fischer asked if anyone noticed the error during inspection. Ms. Brown stated that the engineered plans used for the construction had a different footprint than the site plan. She noted that Zoning now requires a copy of the engineered plans to verify that all features are identified on the site plan. Mr. Fischer asked what the present requirement was by law. Ms. Brown replied that a soil report, a site plan, and engineered building plans were required. She stated that Codes Compliance acts as a clearinghouse in the sense that application is made to them, and then they forward copies of the site plan to the Environmental Division and to Zoning. She stated that neither Environmental nor Zoning had previously received the engineered building plan. Ms. Brown clarified that the plans examiner in Codes Compliance had both the site plan and engineering plan and failed to realize the discrepancy.

Mr. Fischer asked for confirmation that the builder had the wrong site plan. Ms. Brown confirmed that the site plan and the engineered construction drawings did not match. Mr. Fraley opened the public hearing and asked if the applicant wished to speak. Mr. Darl Mann introduced himself as the builder at 1358 Jamestown Road. He stated that the blueprints were revised and the site plan was never revised accordingly. He noted that he met the submittal requirements but shared equally in the error with Codes Compliance and Zoning. He stated that the engineer who did the original survey was called to do a foundation survey and then realized that the revised building would encroach into the front and rear setbacks. Mr. Mann stated that he owns the lot behind the property in question and that it was unfortunate he did not discover the possible encroachment before legally recording the subdivision. He stated that he could have adjusted the lot line to accommodate the structure within the rightful building envelope.

Mr. Fischer asked if the same engineer did the original site plan and the corrected site plan. Mr. Mann answered that the engineer never corrected the site plan but submitted revised building plans nine months after the initial building permit was issued. Mr. Fischer asked for clarification that the site plan was not corrected. Mr. Mann confirmed that the engineered construction plans were sent back to A.D. Potts Engineering and revised, but that the site plan was never revised accordingly.

Mr. Nice asked if the applicant had an engineer lay out the building points before starting the footings. Mr. Mann responded that he did not. Mr. Fraley asked the Board for any other questions for Mr. Mann. He thanked the applicant and stated he would read the intent of the Board of Zoning Appeals. Mr. Fraley read a definition of the purpose of the Board of Zoning Appeals and closed the meeting to public comment at 7:15 pm.

Mr. Fraley asked for discussion from the Board. Mr. Rhodes stated that he felt that it was an honest mistake done in good faith. He noted that the variance from setbacks were only two feet in the front and eight feet in the back. Mr. Nice stated that only small portions of the structure encroached and it was not detrimental to the neighborhood or adjacent property owners. He agreed with Mr. Rhodes that it was an honest mistake and stated he

had no problem granting the variance. Mr. Fischer voiced concern regarding mistakes on the part of the County and the builder, and expressed his belief in the importance of vigilance in handling initial reviews. He concluded that because mistakes were made, he would support granting the variance.

Mr. Rhodes interjected that according to staff, they had substantially changed procedures to prevent future mistakes. Mr. Fraley asked for confirmation. Ms. Brown confirmed and noted that Zoning now received engineered blueprints in addition to site plans from Codes Compliance. She added that Zoning had notified Codes Compliance that Zoning must sign off on a foundation survey prior to the approval of the second foundation inspection.

Mr. Fraley asked Ms. Brown to state the resolution for the variance. Ms. Brown stated that staff offers a resolution to grant variance to section 24-236, Setback Requirements, to reduce the front setback from 35 feet to 33 feet and to Section 24-238(b), Yard Regulations, to reduce the required rear setback from 35 feet to 27 feet for the continued placement of the existing single family dwelling with no further structural encroachment.

Motion approved 4-0.

2. ZA-17-05 Richardson Addition

Mr. Fraley asked Mr. Murphy to summarize the case, as it had been deferred and continued from the previous meeting. Mr. Murphy stated that the case was an appeal of his decision as Zoning Administrator that a proposed addition to an existing home as designed does not meet the definition of a single family detached dwelling as defined in the Zoning Ordinance and, as such, does not meet the permitted uses in the R-2 General Residential District. Mr. Murphy identified the parcel and noted that the existing home is a one story 1350 square foot home with three bedrooms, a living room, two baths, a kitchen, and a laundry room. He stated that the applicant applied in May to add a two story 1750 square foot addition to the existing home and elaborated that the addition included a family room, laundry, half-bath, kitchen and separate entry on the first floor. He noted that there would be a single door connecting the existing dwelling with the addition.

Mr. Murphy added that the proposed second floor of the addition included three bedrooms, a bath and a closet area. He stated that staff rejected the plan in June because it was arranged and designed with two independent and distinct dwelling units, more specifically, independent living, sleeping, bathroom, laundry areas, kitchen, and entrances. He noted that there was no connection to these independent living areas other than a single doorway, therefore the proposal contained two separate dwelling units. He stated that the Zoning Ordinance defines a single family detached dwelling as a detached structure arranged and designed to be occupied by one family, the structure having only one dwelling unit. He added that a dwelling unit is defined as one or more rooms designed for living and sleeping purposes, and having at least one kitchen.

Mr. Murphy stated that Mr. Richardson submitted a revised drawing identified as Alternate 1, exhibit B in the BZA packet. He elaborated that the revised drawing was the subject of the appeal. He continued that the alternate proposal changed some items on the first floor and that the second floor does not change.

Mr. Murphy stated that the alternate proposal labels the kitchen shown on the original plan as a pantry and a wet bar. He added that the stove has been deleted from the original plan, and the original double-sink replaced with a single sink labeled as a wet bar. The majority of counter space and cabinet space has remained in the new design as has the dishwasher, a full size refrigerator/freezer and space for dining. Mr. Murphy elaborated that the other change was that a washer and dryer noted on the original plan was eliminated in the same area shown as a utility closet. He added that the second floor remains as originally proposed with no interior connection except for one door. He further stated that the plans, in his opinion, do not qualify as a single family detached dwelling.

Mr. Murphy noted that another way of looking at the design is that the dwelling would contain an accessory apartment larger than the maximum allowed by the Zoning Ordinance. He noted that the Ordinance allows accessory apartments in the R-2 zoning district but also establishes a 35 percent floor area threshold. In this case, the two sides are roughly equivalent, therefore neither unit is accessory and rather, two separate dwelling units. He continued, noting that while a kitchen is not defined in the Zoning Ordinance, it should generally and practically be defined as a place for the storage and preparation of food for consumption, as well as facilities and places for the storage and cleaning of utensils and appliances necessary for the serving and consumption of food. Mr. Murphy added that the Ordinance explicitly states that in order to be classified as a dwelling unit, one must have a kitchen. He concluded that in his opinion, the area labeled wet bar/pantry remains designed and arranged to be used as a kitchen.

Mr. Murphy detailed that it was very clear that the proposal was arranged as two distinct and independent living, sleeping, eating, bathroom and kitchen areas and therefore the plans do not qualify as a single family detached dwelling. He stated that the language of the definitions is general enough that a judgment must be made in terms of evaluating a design and arrangement. He stated that as Zoning Administrator, he must pass judgment on whether the structure as proposed, arranged and designed can be easily and practically occupied by more than one family at any time, present or future, by any owner. He added that in his judgment, the proposed addition could be practically occupied by more than one family given its design and arrangement. He added that he did not make the judgment lightly, and that before making a formal decision he consulted the Planning Director, Development Manager, Assistant County Administrator, County Attorney and Assistant County Attorney.

Mr. Murphy stated that he made a point to discuss the intent of the Zoning Ordinance with respect to these definitions. He added that each of these people have supported and

concurred with the decision made. He recommended that the decision be upheld by the Board, and to do otherwise would set an unacceptable precedent and compromise the integrity and be contrary to the intent of the ordinance for single family detached dwellings in residential districts.

Mr. Fraley asked the Board for questions and asked Mr. Kinsman if he had any comments. Mr. Kinsman introduced himself and stated that he was there tonight representing Mr. Murphy as Zoning Administrator. He stated that he viewed the decision in this case of great importance. He added that he whole-heartedly concurred with Mr. Murphy's decision and recommended that the Board uphold that decision.

Mr. Nice asked for clarification of which plan the Board was to consider. Mr. Murphy stated that Alternate one was the plan that his decision was based upon. Mr. Nice inquired whether Mr. Murphy's primary objection to the plan was that it had two kitchens. Mr. Murphy responded that the basis of his objection was that it was designed and arranged to be easily and practically occupied by more than one family. He added that this was his opinion and that the decision was also based on the facilities included in the kitchen area. Mr. Nice asked for confirmation that the primary concern was the presence of two kitchens and that was the basis for deciding it could be occupied by two families. Mr. Murphy stated that given the entire design and arrangement and the fact that there were two kitchens, one on either side of the dwelling, he decided to recommend denial. He continued that if one of the kitchens were removed in its entirety, that side would become dependent on the kitchen on the other side making the design one dwelling unit.

Mr. Nice asked if there were any cooking appliances in the proposed kitchen, because none were reflected in the drawings. Mr. Murphy responded that the stove shown on the first drawing was removed in the revised drawings, but that there was nothing to prevent appliances from being added later, such as a microwave or other cooking appliances. Mr. Nice stated that the plan as presented contained no cooking appliances in the wet bar area. Mr. Murphy stated that it did not have to be shown. Mr. Nice asked how Mr. Murphy made such an inference and added that there was a perfect right to design the home the way the homeowner wants. He further stated that if no kitchen or cooking utilities are present in the plan, it could not be inferred that there is a kitchen. Mr. Nice stated that he could theoretically go home and add a stove in any room, and that he currently had a wet bar in his house. He inquired about the accuracy of criteria used for basing the decision and stated that he did not see two kitchens, but rather a wet bar and sink. Mr. Murphy stated that the plan shows an area with kitchen cabinet space, a refrigerator/freezer, dishwasher, sink and place to eat with a bar and stool arrangement. He added that all of these features are standard components of a kitchen and that although a stove is not shown, the facility could still be used for the preparation of food and that every other thing available in most kitchens is present. He further stated that a stove and/or microwave could be added at any time.

Mr. Nice remarked that he used to build model homes, and that many of these homes

contained rooms that were labeled a saloon for fun, or a wet bar. Mr. Murphy responded that a wet bar would be acceptable, but that what was shown on the plan was not a wet bar, and rather, everything you would need in a kitchen with the exception of a cooking stove. Mr. Nice replied that he had seen many wet bars in many homes that have a sink and refrigerator, similar to what is proposed with this addition. He further stated that he was trying to understand the distinction in the criteria, and expressed interest in hearing from the applicant. He added that if the decision was based on two kitchens then he was hard-pressed to understand. He asked if there was any law preventing two kitchens. Mr. Murphy stated that he thought a dwelling could for example have two kitchens, and that a large dwelling with an area identified for entertainment could conceivably have a kitchen. He continued, stating that the proposed arrangement, considering all the factors, such as the separate sleeping areas, separate living areas, separate food preparation areas with or without a stove, separate bathrooms, and separate entrances (highlighting the fact that the addition had an entirely separate front entrance), it looks, talks, and walks like two separate dwelling units. He added that if the door is closed, then the house could be used as two separate dwelling units, not necessarily by this owner, but by any other future owner.

Mr. Rhodes asked if one side could be an accessory apartment if it were smaller. Mr. Murphy answered that that would be true if one side did not exceed 35 percent of the total floor area. Mr. Rhodes asked how the County arrived at the 35 percent factor. Mr. Murphy stated that the Ordinance was drafted prior to his employment with the County, in the mid to late seventies. He added that in discussing it with Mr. Bill Porter, Assistant County Administrator, he learned that the intent was to set the threshold low enough that the apartment would be clearly accessory to the remainder of the dwelling, so the County picked that number. Mr. Murphy added that the typical accessory apartment does not have a family occupying it, but usually has an individual. Mr. Rhodes asked what would happen if a residence was used without permission as two independent units, and inquired how a violation would be identified. Mr. Murphy responded that it would be identified by a complaint or by staff noticing something unusual. Mr. Murphy added that it would be difficult, if not impossible to defend in Court if any home was used as two dwelling units and the County approved that design. Mr. Murphy stated he would defer to Mr. Kinsman for a legal opinion.

Mr. Nice asked if Mr. Murphy had any objections to the layout of the second floor design. Mr. Murphy stated that he did not have an objection but noted that there was no connection between the two sides except for the downstairs doorway. He added that if there was no kitchen he would find the addition acceptable.

Mr. Fraley requested confirmation on the square footage of the existing home and the proposed addition. Mr. Murphy stated that the proposed addition would add 1750 square feet, therefore making the addition itself about 400 square feet larger than the existing home. Mr. Murphy added that the addition was two stories. Mr. Fraley asked the Board for any more questions from staff.

Mr. Fraley noted that the public hearing for this case was still open from the previous meeting and invited the applicant to speak. Mr. Richardson introduced himself, and stated that he was present to overturn the Zoning Administrator's decision and not for any variance or special use permit, or any special treatment. He referenced Mr. Fraley's comment that at least three Board members would need to vote in his favor to overturn Mr. Murphy's decision. Mr. Richardson noted that he was asked to defer at the August meeting because only three members were present, and that he notified neighbors to advise them of the present meeting date. He added that he was informed there would be a full board as recently as last week, and that because Mr. Wenger was not in attendance, he felt his case could not adequately be heard because Mr. Wenger's absence was essentially a "no" vote already from his side of the bench. He then asked for a deferral until the October 20 meeting. Mr. Fraley apologized for the short notice regarding Mr. Wenger's absence, adding that Mr. Wenger had a last minute scheduling conflict. Mr. Richardson thanked the Board and expressed that he was looking forward to voicing his concerns at next month's meeting.

Mr. Fraley continued the discussion of ZA-17-05 to the October meeting and kept the public hearing open.

3. ZA-18-05 Highfield Drive Breezeway

Ms. Brown summarized the variance proposal and staff's recommendation of approval. Mr. Rhodes asked if there were other non-conforming lots in the community. He noted that it appeared that there were according to the map. Ms. Brown confirmed that the majority of the lots in the neighborhood were less than three acres. Mr. Rhodes asked if the granting of a variance for this particular case would open a floodgate of applications from other property owners. Ms. Brown responded that staff had not had any other inquiries and that each application for variance is to be heard on the merits of that case, but that it was possible that other adjacent property owners might apply with the knowledge that other variances with similar merits were approved.

Mr. Murphy noted that in the past, several applications with similar merits were made by residents in the Racefield Drive area and that approval of those applications had not opened any floodgates.

Mr. Fischer asked if the breezeway was considered a separate structure or entity, and why the variance was needed. Ms. Brown responded that the application was required for non-conforming properties proposing new construction. She added that new construction has to meet the requirements of the current Ordinance. Mr. Fischer noted that the two buildings already there were non-conforming. Ms. Brown stated that the Ordinance required any new construction to conform to the current Ordinance and that the breezeway would be considered new construction.

Mr. Fraley inquired about the current existence of a temporary breezeway. Ms. Brown replied that the space was currently open and that no temporary breezeway existed.

Mr. Nice inquired about the possibility of handling this type of case administratively. Ms. Brown responded that the only way the Zoning Administrator could offer an administrative variance was if the encroachment was existing and less than 18 inches.

Mr. Rhodes asked if the reason for the variance was to allow construction of a future connecting structure. Ms. Brown noted that the notes on the building plan stating that "the breezeway would be constructed at a later date" were made at the time of application so that the applicant could go forward with the internal changes that were connected to the same building permit.

Mr. Fraley asked for comments from the applicant and opened the public hearing at 7:44 pm. The applicant introduced herself as Ms. Lynne Sennett property owner of 101 Highfield Drive and asked for questions from the Board. Mr. Rhodes asked the applicant if she could identify a hardship. Ms. Sennett stated that they need additional space for a family member with a medical condition activated by temperature changes.

Mr. Fraley asked for questions from the public and then closed the public hearing at 7:45 pm.

Mr. Fischer stated that he had no objections. Mr. Nice and Mr. Fraley echoed this statement. Ms. Brown stated that staff would like to offer a resolution to grant variance to section 24-215, Setback Requirements, to reduce the front setback from 50 feet to 35 feet and to section 24-219, Special Provisions for Corner Lots, to reduce the required west side-yard setback from 50 feet to 35 feet for the construction of the addition connecting the existing dwelling to the existing garage consistent with the setbacks in effect at the time of subdivision.

Motion approved 4-0.

4. ZA-19-05 Chickahominy Baptist Church

Mr. Rogerson summarized the variance proposal and clarified the location of the existing building and impervious area in reference to the right-of-way, noting the measurements on the map included in the BZA packet.

Mr. Rhodes asked how the portico would be supported. Mr. Rogerson pointed out the position of the furthermost outline of the portico and deferred specific construction details to the applicant. Mr. Rhodes stated that he found out from the assembly that the church had been there since 1865. Mr. Fraley inquired about takings through eminent domain. Mr. Rogerson noted relevant attachments in the Board packet, and noted a recorded VDOT plat from 1987, referencing existing and proposed right of way. Mr. Rhodes asked if the application had been submitted to VDOT. Mr. Rogerson stated that it had not.

Mr. Rogerson stated that the property line, by his calculation, was 14 feet from the edge of the pavement. He noted that the property line was at the top of the hill behind the fire hydrant for visual reference, with the front property line being 14 feet from the edge of the pavement. Mr. Nice asked for confirmation that the encroachment the church is proposing would not protrude farther than the existing sidewalk and concrete patio. Mr. Rogerson confirmed and noted that the patio and sidewalk were not required to meet setbacks because they were at grade. Mr. Nice asked if the proposal was for a raised patio and not a structure. Mr. Rogerson confirmed and stated that Chickahominy Baptist Church applied for a special use permit for a second door to enter from the front of the building into the new addition contingent upon the granting of the variance.

Mr. Fraley asked if there was a change in the handicap access. Mr. Rogerson stated that the applicant intended to provide additional handicap access and with the current layout of the church, handicapped people must come into the sanctuary and go past the pastor and through the sanctuary in order to access the seating areas. He added that with the granting of the variance, there would be a handicap accessible ramp at the raised portico to enter into the church from the front.

Mr. Fraley opened the public hearing at 7:58 pm and invited the applicant to speak. Ms. Marion Brown introduced herself and explained that they were asking for a variance because the church's use of the property would be counterproductive if satisfaction of current setbacks was required. She explained that the purpose of the expansion was to enable the church to serve its growing membership, provide better access for the handicapped and allow the church to improve its design for the 2007 Jamestown events.

The reverend of Chickahominy Baptist Church introduced himself and explained the restrictions of the current building. He noted that the community rallied around the church because it was the only social-spiritual establishment in the neighborhood and that they were at capacity. He described the hardships of exiting and entering the building given the current set up and noted that if they were required to set back 35 feet, they would lose rather than gain space in the sanctuary. He stated that the most important factor was to maximize the amount of space in the sanctuary in order to accommodate the congregation.

Mr. Rhodes inquired about the portico. Mr. Willy Jones, contractor, described the portico. Mr. Rogerson provided a schematic of the portico after construction from the road. Mr. Fraley asked for questions from the public.

Mr. Christopher Mills commented on the definition of portico and noted that the structure being referred to for the variance was a raised entrance platform with a portico, housing the bell as a centerpiece.

Mr. Fraley closed the public hearing at 8:09 pm and asked the board for discussion. Mr. Fraley stated that he was in favor of granting the variance, that the pad already existed and that a new dwelling or structure was being asked for. Mr. Nice stated he had no

objection. Mr. Rhodes stated that he was impressed with the depth of possibilities looked at by the church and would have no opposition to granting the variance. Mr. Fischer added that he was happy to hear about the youth coming in and that the church needed the space to accommodate them. Mr. Fraley asked Mr. Rogerson to state the motion.

Mr. Rogerson stated that if the Board so chooses, staff would like to recommend a motion for a variance to section 24-351 Setback Requirements to reduce the required front yard setback from 35 feet to 3 feet at its most extreme point to allow for the construction of the addition, raised patio and portico.

Motion approved 4-0.

D. NEW BUSINESS

1. ZA-22-05 8445 Hicks Island Road

Ms. Brown summarized the variance request and noted documents added to the packet from the applicants shortly before the meeting including a FEMA certificate identifying types of damage on the property after the hurricane, letters of support from the landowner, and a verification of compliance letter from the Director of the Environmental Division. She stated that staff would like to withdraw the initial recommendation in the staff report and, under the advice of the County Attorney, alternatively recommend that the Board find that the lot existed as a vacant lot prior to the commencement of construction and that the original dwelling was demolished as a result of damage from Hurricane Isabel. This resulted in a declaration by FEMA that the building was uninhabitable. She added that staff recommends that the Board establish setbacks as permitted by section 24-636 of the Zoning Ordinance for non-conforming lots. She further stated that if the Board saw fit to grant the variance, that they establish the left side setback at 4 ½ feet and the right side setback at 9 ½ feet with the conditions that there be no further structural encroachment and that the dwelling can never exceed 35 feet in height. Mr. Fraley asked if the Board had questions.

Mr. Nice asked if the footprint of the dwelling proposed is larger than the footprint of the dwelling destroyed by the hurricane. Ms. Brown stated that the dwelling is slightly larger and has a second story. She added that the original dwelling's footprint is shown by the solid outline (on the overhead), and referenced a porch area and deck area that were each boxed off to establish the new building envelope.

Mr. Fraley noted that there were again survey issues, but that on the corrected survey the original structure was shown at .33 feet from the left property line and 14.9 from the right, while the new structure was shown to be at 5.03 feet from the left property line and 10.05 feet from the right property line. He further noted that the property owner adjacent on the left gained space while the property owner adjacent on the right lost some space. Ms. Brown confirmed this in terms of the setback.

Mr. Fraley asked for any reasoning behind adding a second story. Ms. Brown stated that it was the wish of the property owner. Mr. Fraley asked how the flood ordinance effected this structure. Ms. Brown stated that the Flood Ordinance states that any new construction must be built at least one foot above the existing 100-year floodplain. She explained that the existing floodplain elevation at this location was 7 ½ feet, in turn raising the foundation to 8 ½ feet. She further noted that ultimately the foundation would appear to be an additional story, but that the ordinance states that the foundation can never be used as living space and that they would be in violation of the County Zoning Ordinance and in turn State and Federal guidelines if they used it as dwelling space.

Mr. Fraley asked if the Board had any further questions and then asked for public comment. He opened the public hearing at 8:19 pm.

Ms. Fran Goss introduced herself as the property owner and detailed the process of elevating a house for damage prevention. She stated that they worked with the County for a year to meet all County requirements and added that the proposed house is no wider than the original house. Mr. Fraley asked for questions from the public.

Mr. William Shewmake, attorney, stated that he represented the residents on both sides of the Goss' property. He stated that his clients vigorously oppose the proposal and that he had both a legal and equitable argument. He noted that it was a bucolic area and that once over the bridge, the area and homes had a distinct feel. He stated that instead of coming to the neighbors when proposing to expand, the Gosses went their own way and submitted a survey that was obviously wrong.

Mr. Shewmake noted that Mr. Hanna, a neighboring property owner currently renting to the Conleys, wrote a letter on May 11 stating that the Goss' newly constructed residence was encroaching. He added that Ms. Conley, as recently as two weeks ago, confirmed Mr. Hanna's opposition by telephone. He added that his clients raised concerns from the very beginning due to the fact that the proposed structure was out of character with the surrounding homes, and further described how the newly constructed structure looms and blocks his client's view. He added that the structure was so close to the property line that one of his client's trees extends into the unfinished building. He noted that the square footage of the building independent of the 8 foot foundation was more than double what the square footage was previously.

Mr. Shewmake stated that the neighbors raised the issue and were told that the County was reviewing the case using a survey provided by the Gosses. He stated that the neighbors then had their own survey done independently because they knew the original was wrong. He stated that when concerns began to come forward, the Gosses kicked the pace of construction into high gear and feverishly began building the structure, presumably because it was better to ask for forgiveness than permission. He stated that the responsibility for the construction done in error should have fallen on the surveyor and that the neighborhood should not rightfully share in the negative impacts of the surveyor's mistake. He added that it was very apparent from the beginning that there was a mistake.

Mr. Shewmake stated that as for his legal argument, there was no question that they had a right to use their property and that they had a right to build on the property. He noted that this was governed by Section 634, which articulates that they can restore it but cannot expand it, and cannot get closer to the lines. He added that this was not a 636 case and that the Gosses could not, under law, increase the encroachment or the nonconforming use. He stated that the reasoning for this can be traced to a series of Supreme Court of Virginia cases heard in 2004, the leading case being Cochran vs. the Fairfax County Board of Zoning Appeals. He explained that in that case they were called upon to construe the Board of Zoning variance statute. He continued, stating that the Supreme Court said it merely construed what you are allowed to do. He added that the Supreme Court of Virginia held that the only time you can grant a variance as the Board of Zoning Appeals is if there is no viable use of the property absent the variance.

Mr. Shewmake stated that the property owner had every right to build in the original footprint based on the law and the language in the Zoning Ordinance, but since they have that viable use, he would respectfully submit that, under Cochran vs. the Fairfax County Board of Zoning Appeals, this Board does not have the legal power to grant the variance. Mr. Shewmake noted that he served on a Planning Commission and that in his experience, there has been a lot of consternation among Boards of Zoning Appeals regarding the Cochran Case because it almost divests Boards of the right to grant variances. He added that a bill was introduced in the last session of the General Assembly in response to that issue, but the statute was never amended to his knowledge.

He restated that the Board does not have the power to grant the variance and that the Gosses have to go back to the original footprint of the house. He added that if that costs them additional funds, their recourse is against the surveyor that incorrectly located the property lines. He stated that his second point is one of equity, pointing out that the new house is so large that it entirely blocks the sunlight from the Conley Residence. He drew attention to the solid wall foundation that had an incredible walling effect to his clients. He stated that the new structure was a huge variance from the scale and appearance of other homes in the area and had a huge impact particularly on his client.

Mr. Fraley inquired about which client Mr. Shewmake represented. Mr. Shewmake clarified that he represented both neighbors but that Ms. Conley had it right on her lot line. He added that Ms. Rosser was impacted visually, but that Ms. Conley suffered the most impact. Mr. Shewmake noted a petition showing overwhelming opposition and submitted it to the Board.

Mr. Shewmake summarized that the second issue is one of equity and that he felt the Gosses should have worked with their neighbors and resolved the dispute civilly in the spirit of friendship. He felt the result did not need to have this type of impact on the neighborhood. He restated that despite awareness of raised concerns, the Gosses persisted in moving forward. Mr. Shewmake stated that he felt it was a bad precedent to fail to resolve issues from the beginning, and noted that the Gosses did not stop when people questioned the survey. He also noted that he felt this particular construction would have a negative impact on the entire area because once it was finished those represented on the petition feared the whole thing could set a precedent for new construction on the island. He concluded that this structure totally changes the character

of the area. He stated that their septic permit had been pulled due to the incorrect location of the boundary line.

Mr. Shewmake asked the Board not to grant the variance based on the above listed reasons. Mr. Fischer asked what statute Mr. Shewmake was referencing that stated the Board did not have the power to grant variance. Mr. Shewmake referenced Cochran vs. the Fairfax County Board of Zoning Appeals and at Mr. Fischer's request cited a section from the case, which read, "Therefore the BZA has authority to grant variances only to avoid an unconstitutional result....even where such an exercise results in substantial diminution of property value, an owner has no right to compensation."

Mr. Fraley asked if the case he was citing was alluding to a non-conforming property. Mr. Shewmake responded that, in his opinion, the case did not differentiate between conforming and nonconforming properties. He expressed that what the Supreme Court case said was that to grant a variance you have to find that if you do not grant the variance you have taken their property. He again restated that the Gosses had every legal right to rebuild the house where it was and that if they did not have the right under that statute then the Board would have the ability to grant variance. He summarized that as long as the owner has legal use of the property and the application of setbacks does not result in a taking, the Board does not have the power to grant the variance.

Mr. Fraley noted that one of his clients gained space as far as the setback. Mr. Shewmake confirmed that the left setback was increased and the right setback was decreased by the location of the new house.

Mr. Shewmake read another passage of the case language verbatim, stating, "A Board of Zoning Appeals has no authority to grant a variance unless the effect of the Zoning Ordinance is applied to the piece of property under consideration, would in absence of a variance, interfere with all reasonable beneficial uses of the property taken as a whole."

Mr. Nice noted that Mr. Shewmake's case was not wholly based on encroachment since one client gains, but rather mainly based on aesthetics. Mr. Shewmake voiced his disagreement in that if it has an impact on an adjacent property owner it is material to the situation, and therefore you can take away from one if another gains.

Mr. Nice asked for clarification on the revised building envelope. Mr. Shewmake stated that this was a substantially larger structure. Mr. Nice concurred. Mr. Fraley stated that that was not a legal argument. Mr. Shewmake stated that if the Board was deciding from an equity standpoint whether to grant the variance, one of the things you do consider is if they have tried to minimize the impacts, and what are the impacts to the neighborhood overall. He restated that you could not have much more impact, and that this impact was not taken into account during the planning phase of the project.

Mr. Rhodes asked how it could have been built to minimize the impact. Mr. Shewmake replied that one possibility would be to build on stilts, allowing some air, and to move it back from Ms. Conley's residence instead of getting closer to the structure. He added that he cannot address motives, but noted that the survey substantially benefited the Gosses. He added that he wished the surveyor was there to defend the survey, and noted that his clients spent money out of their own pockets to have it resurveyed because they knew the

original survey was wrong.

Mr. Shewmake concluded that these suspicions could have been acknowledged and resolved through litigation. He restated that the surveyor should be held responsible to pay for the cost of demolition and reminded the Board that his survey benefited them substantially. Mr. Fraley stated that he understood Mr. Shewmake's point about consistency with the surrounding neighborhood, but, from a legal standpoint, one client went from almost no setback at .33 feet to five feet while the other client had almost 15 feet and lost five feet. Mr. Shewmake stated that both were opposed from an equity standpoint because of the overall negative impact. Mr. Fraley interjected that there may be other objections but none from a setback standpoint for the neighbor that gained space. Mr. Shewmake argued that if you are moving the house and greatly expanding it, you should be entitled to review the overall impact. Mr. Fraley asked for clarification of expanding. Mr. Shewmake stated he meant being three times as tall with square footage, independent of the eight-foot foundation that is more than double what it was before.

Mr. Fraley asked if the Gosses were in violation of any height requirement of the Ordinance. Mr. Shewmake stated he was not contending any violation of the building height requirement, simply stating that the majority of people use stilts as a method of elevation and that the cinder block foundation adds to the larger appearance. He added that if Mr. Fraley's criteria to grant a variance was to make the impact as minimal as possible, which, was in fact one of the legal tests for granting a variance, that building an eight foot wall and then doubling the size of the original square footage on a very small lot could not be viewed as minimizing the impacts.

Mr. Shewmake stated that he hoped that the two parties could come together after this hearing to accommodate some of both side's concerns. Mr. Fischer asked how much of the house was built so far. Mr. Shewmake responded that a lot of work had been done over the last few months. Mr. Fraley asked if Mr. Shewmake's suggested remedy was to tear it down. Mr. Shewmake confirmed and again noted that most of the construction occurred after concerns were raised. He stated that the least the Gosses could have done would have been to bring their surveyor to the hearing.

Mr. Shewmake stated that he appreciated the Board's consideration and asked for questions. Mr. Fraley asked if other members of the public wanted to speak. Mr. Nice asked County staff if the client (Goss) went through the proper channels and procedures to proceed in accordance with County regulations. Ms. Brown confirmed and noted that they had made all submissions that the County required. Mr. Nice asked for verification that the Gosses obtained a legal permit, told the County they were doing it, the County approved their plan, and hired a licensed surveyor to position the house. Ms. Brown stated that they hired a licensed surveyor for the initial survey and that they were required to submit a foundation survey to the County prior to the second foundation inspection. Mr. Nice reiterated that the County required a second foundation survey before the applicant could proceed and therefore the applicant went through the necessary steps and passed the test at each stage before proceeding.

Mr. Fraley asked if any members of the public wished to speak to the case. Ms. Brenda Rosser introduced herself as a 30-year resident of Hick's Island and stated that the house

appeared like it came from the Wizard of Oz in Kingsmill and landed between their two houses. She stated that it will set a precedent and that all of old Hick's Island will eventually look like the house in question. She noted that Mr. Hanna planned to sell all seven of his properties on that end of the island, and that given the precedent set by the Gosses, there would be no more small fishing cottages. She described her disapproval of the size and scope of the proposal and the impact the project would have on wildlife, habitat, and the character of the island.

Ms. Rosser stated that she was upset that her neighbors kept their plans from them and expressed frustration at the Gosses' inability to interpret their deed. She further expressed disappointment over the Gosses' decision to nix the plans to build on stilts and furthermore not build the greatly expanded home in another neighborhood more consistent in character with their proposal. She concluded that it was not decent and asked for questions from the Board.

Mr. Nice asked who in the County Ms. Rosser went to and what their response was. Ms. Rosser stated that she went to everyone involved with the review day in and day out. Ms. Rosser presented documents (highlighting Health documents) that stated the house would be reconstructed over the existing foundation. She presented several letters from the Environmental Division that both halted and enabled the continuation of construction at various stages in the building process. Mr. Fraley noted that Mr. Cook was Director of the Environmental Division for the Board's reference.

Ms. Rosser detailed a series of conversations she had with Mr. Cook and noted inconsistencies in the math. Mr. Nice stated that his earlier questions were posed as an attempt to understand if the applicant proceeded legally through county departments.

Ms. Laura Conley introduced herself and stated that she was concerned about the fact that the deck and patio were constructed in the early 90's without building permits and done-so in the Resource Protection Area. She further stated that she believed that the Gosses should not have gotten credit because the previous property owner failed to get proper permits, and that the Gosses should not get credit for what was illegally there to add on to the new house. She stated that she posed this question to several reviewing agencies including Zoning, Codes Compliance, and the County Attorney's office. She lastly added that she and Ms. Rosser were representing the interests of Mr. Hanna.

Mr. Chris Witty introduced himself as a 20-year resident of Hick's Island and described his concern based on his appreciation of Hick's Island as a unique place and good community. He stated that he did not fault the Gosses for wanting to build their home on the island, but believed they should be held accountable for the mistakes. Mr. Fraley asked if anyone else from the public wished to speak. He then asked if the Gosses wished to speak again.

Ms. Goss stated that the Rossers also had a two-story house plus an attic as well as a 3 ½-foot foundation, and noted that they were not the only house like it on the island. She noted that the error in the survey was not brought up until well after the foundation was laid and the construction commenced. She reiterated that they worked with the County to get everything done in accordance with County procedures and policies. Ms. Goss stated that concerns were not raised until July and that they went to check the progress of the

house on a regular basis and that no one had ever said anything about the survey issue to them on any of their visits.

Mr. Fraley asked if the footprint was the same. Ms. Goss replied that it was exactly the same width and that this was verified by the County. Mr. Fraley asked for any other questions from the public.

Mr. Shewmake stated that his clients did all that they could have to obtain necessary information from the County to involve themselves in the merits of the proposal when it was clear what the Gosses were building. He noted that if the house was in fact in the same footprint than the Gosses would not be here for the variance request, and that they were not in the same footprint. He added that if the Board approved the variance, his clients would have no legal recourse, whereas the Gosses have the remedy to sue the surveyor.

Ms. Kathleen Robins introduced herself and stated that you would have to see the island to understand how special the area is to the residents. She questioned if the County physically inspected the site to verify the documents that they accepted in good faith as being correct and noted that the Gosses were well aware of the neighbor's concerns all along because they were notified in writing by the County. Ms. Robbins stated that she felt that the Gosses ignored their neighbors and were negligent in complying with County regulations and State and Federal laws.

Mr. Fraley thanked Ms. Robins. Ms. Jackson introduced herself as a resident of Hick's Island and detailed the effects the tall structure would have on the Conleys, other area residents, and the environment. She asked the Board to not grant the variance.

Mr. Fraley closed the public hearing at 9:16 pm and asked for discussion from Mr. Kinsman, Assistant County Attorney.

Mr. Fraley inquired about the Cochran vs. Fairfax Board of Zoning Appeals case referenced earlier by Mr. Shewmake and asked for Mr. Kinsman's opinion of its effect on this hearing. Mr. Kinsman replied that it was correctly summarized in that the Supreme Court construed the code section that permits the Board of Zoning Appeals to grant variances. He added that within that section it states what a Zoning Board must find before it can grant a variance, which is a hardship approaching confiscation. He stated that the fore-mentioned case and two others construed this code section very narrowly. He added that it essentially said in order to find a hardship, the hardship must approach confiscation, therefore no viable economic use of the property can be had once you have applied zoning regulations to that property. Mr. Kinsman stated that he did not believe they said the lot in question was non-conforming which could be a distinguishing factor between the current variance proposal and the referenced cases.

Mr. Kinsman stated that the Board of Zoning Appeals does have the ability to grant a variance if the Board works to find a hardship as set forth in the Virginia Code. He stated alternatively that if the Board found the lot to be vacant at the effective date of the adoption of the particular applicable section of the Zoning Ordinance, then the Board could apply different setbacks to that piece of property. Mr. Kinsman re-summarized the facts of the case and concluded that there is no law that states the Board of Zoning

Appeals cannot grant a variance but that they would have to find that there was a hardship before granting the variance.

Mr. Nice referenced the merits of other cases on the agenda and stated he had never understood and had never given any weight to proving undue hardship approaching confiscation. He added that he has been on the Board for many years and stated that they had never voted on a case that met all those rigid standards, and that this Board of Zoning Appeals tried to base decisions on common sense, fairness and neighbors' opinions, but that it had never approached the language mentioned by both attorneys.

Mr. Fischer stated he would like to defer a decision on the case until next month, adding that he would like research done on whether or not there is a difference in this decision based on a conforming lot and a non-conforming lot. He stated that if a decision would have to be made tonight, that he would abstain and that if the by-laws prohibited him from abstaining that he would vote no.

Mr. Nice stated that the by-laws would prohibit him from abstaining. Mr. Fraley stated he understood Mr. Fischer's concern but that the recommendation from staff is that it be considered a vacant lot since the house was destroyed by the hurricane and, therefore, the Board of Zoning Appeals would have authority to establish setbacks on the non-conforming lot. Mr. Kinsman stated that this was consistent with section 24-636 of the James City County Zoning Ordinance and furthermore that the Board may establish setbacks, side and rear yards, in accordance with 24-650c of the Zoning Ordinance.

Mr. Fraley stated that the Board of Zoning Appeals had many times in the past established setbacks on non-conforming lots and that in terms of this case, setbacks were not the main argument in accordance with what he heard from counsel and residents of the island. Mr. Rhodes asked for clarification on the Board's allowances. Mr. Kinsman stated that if the Board was to find that it was an unimproved lot and that no house existed at the effective date of that particular chapter, then the lot could be viewed in a vacuum and the Board could decide appropriate setbacks regardless of the location of previous structures.

The Board discussed which route to take in approaching their decision, either as a variance request or as a hardship. Mr. Kinsman noted that if the Gosses were not finished constructing the house within 24 months of the casualty then they would have to obtain a variance from the Board to complete the construction.

Mr. Rhodes stated that the community's concerns were created not by what the Gosses want to do but by what they are required to do by current standards of the Flood Ordinance. He stated that the issue of impacts to the neighborhood character was not created by the house itself but more so by the regulations of building at a satisfactory level above the floodplain.

Mr. Fraley stated that the new house had the same width as the old. Ms. Brown confirmed and added that the only changes were that the building line was carried over to the corner of the house in two locations and that a second story was proposed. Mr. Fraley stated that the issue of setbacks was moot because the width remained the same. He added that the concerns seemed to focus around the inconsistency of the structure with

others in the area but that this was not a strong argument for the Board of Zoning Appeals.

Mr. Nice stated that the answer to his previous questions proved that the property owner was not in violation of any County, State, or Federal laws. In this sense, he could not find any fault on the property owner's part in failing to comply during the process of pursuing their building permit. Mr. Nice stated that he felt the neighbor's pain and understood their frustration, but that he did not feel a neighbor's rights outweighed a person's personal property rights and that a person had a right to use their property with all due rights and laws accorded to them. He stated that he could not find anything to base a negative decision on given the County's diligence across the Board in continually giving the Gosses the green light based on satisfactory review.

Mr. Fischer stated that he needed more time to reach a final decision because the Board of Zoning Appeals planned to base their decision on the assumption that it is a vacant lot, which is in direct conflict with the County basing their decisions on the assumption that there was a building on site. Mr. Kinsman noted that if the Board finds that there is a hardship, then they could base their decision on that finding and not on the finding that the lot was vacant at the time of adoption of the chapter.

Mr. Fraley noted that they could vote based on the finding that there is a hardship approaching confiscation, since they would have to demolish the house. Mr. Fraley asked Ms. Brown to comment about the process for handling the neighbor's inquiries and complaints. Ms. Brown summarized the series of exchanges between various County departments and the neighbors and noted actions taken by the neighbors and County responses at various stages throughout the process.

Mr. Fraley asked Mr. Murphy if it was within the Board's authority to defer the case if it is reheard within 30 days. Mr. Fraley voiced support for voting on the case using the existence of a hardship as criteria for basing the vote. Mr. Fischer stated he was interested in knowing what the Supreme Court's decision would have been if the lots in the precedent-setting Cochran case had been non-conforming. Mr. Fraley stated that he believed it was a moot point if the Board were to vote on the basis of a hardship, but not if the Board would vote on it as vacant lot. Mr. Nice asked if the neighbor's could appeal the BZA's decision. Mr. Kinsman stated that they could appeal the decision to the Circuit Court.

Mr. Nice stated that he would support Mr. Fischer's request for deferral if it still stood and would otherwise be prepared to vote. Mr. Fraley asked if construction would be permitted to continue if the case was deferred. Ms. Brown responded that the applicant's were advised at the time they made application for the variance that any further construction would be at their own peril, but that no County agency had issued a stop work order.

Mr. Fischer inquired as to whether the County requirement for building the foundation mandated concrete walls. Ms. Brown stated that the Floodplain Ordinance did not specify the type of building materials that had to be used but rather the height. She confirmed that stilts would be acceptable.

Mr. Fraley asked if there were considerations here that the Board needed to take into account in a more profound way about conformity with the surrounding community. Mr. Murphy stated that the decision should be based on either of the two options presented by Mr. Kinsman. Mr. Fraley noted to the public that other impacts are often factored into the decisions of other legislative Boards, such as the Planning Commission, but that it was not in the Board of Zoning Appeals purview to base a decision solely on consistency with the surrounding community. Mr. Nice added that the decision was very subjective.

Mr. Fischer stated he would be willing to vote on a hardship basis. Mr. Fraley asked for Ms. Brown to read the motion. Ms. Brown stated that the resolution to grant variance to section 24-217(a), Yard Regulations, to reduce the required southeast side yard setback to 4 ½ feet and to reduce the required southwest side yard setback to 9 ½ feet for the continued construction of a new single family dwelling with the conditions that there can be no further encroachment and that the dwelling can never exceed 35 feet in height.

Motion approved 3-1.

2. Amendments to the By-laws

Mr. Kinsman stated that there were no changes from the last meeting. Mr. Fraley made a motion to approve the proposed amendments to the by-laws.

The amendments were approved 4-0 by a voice vote.

Arrangements were made for the following meeting and the meeting was adjourned at 9:56 pm.

Jack Fraley, Chairman

Allen Murphy, Secretary