BOARD OF ZONING APPEALS
October 20, 2005

A. ROLL CALL

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

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 Board of Zoning Appeals (BZA) directed staff to revise the minutes of the September 1, 2005 meeting to correct previously noted grammatical errors and omissions.

C. DISCUSSION OF RECENT CASE LAW

Mr. Fraley requested that discussion about recent case law be moved to the end of the agenda.

D. OLD BUSINESS

1. ZA-17-05 Richardson Addition

Mr. Fraley noted that the Richardson case was being continued to the present meeting and the public hearing was still open. Mr. Murphy noted that the case had been deferred at the applicant's request from the last two meetings in hopes of having a full BZA in attendance. Mr. Murphy noted he previously made a full presentation to the BZA on the case and proceeded to restate his opinion and its basis. He stated that he looked at the dwelling and its addition as being designed and arranged to be occupied by more than one family. He stated that the proposal was viewed as a whole entity and not judged solely on the number of kitchens. He added that the addition was not typical and not an expansion of an existing house with an open floor plan clearly designed and arranged to be occupied by only one family. He noted that the proposal had a completely self-contained dwelling

unit with only one internal connection to the existing home by a single doorway. He added that the proposed addition would be larger than the existing home by 400 square feet. He stated further that as staff examined the plans they noted a separate entry door, rear sliding door entry, living room, three separate bedrooms, separate full and half bathroom, utility room and kitchen.

Mr. Murphy emphasized that the zoning issue upon which his opinion was based was deciding if the structure as a whole was designed and arranged to be occupied by more than one family and had more than one dwelling unit. He noted that a single family detached dwelling is defined as a detached structure arranged and designed to be occupied by one family and having only one dwelling unit. He stated that Mr. Richardson, his wife and his pets were the only known occupants of the dwelling and that they intend to use the structure for their immediate needs. He noted that as Zoning Administrator he must pass judgment on whether the structure as a whole entity is designed and arranged to be easily and practically occupied by more than one family at any time, present or future, by any owner. He stated that judgment must be made on the design of the structure at the building permit stage. He added that in his judgment there are clearly two separate and independent dwelling units in the proposal, therefore disqualifying it as a single family dwelling consistent with the permitted uses allowed in the R-2 Zoning District. He recommended that his interpretation be upheld by the BZA and that to do otherwise would compromise the integrity of the Zoning Ordinance and set an unacceptable precedent in the review and approval of all other proposed single family dwellings.

Mr. Fraley asked for questions from the BZA. Mr. Wenger asked if the proposed square footage was in opposition to the present zoning of the property. Mr. Murphy responded that the square footage was not in opposition. Mr. Fischer inquired about the 35% floor area limitation for accessory apartments. Mr. Murphy replied that the zoning district allows for accessory apartments and that the accessory apartment provisions clearly state that an accessory apartment shall not exceed 35% of the floor area of the existing dwelling. He added that this proposal was clearly not an accessory apartment because it was much larger. Mr. Fischer questioned if Mr. Murphy would have considered it an addition based on square footage if no second kitchen was included. Mr. Murphy stated that he looked at the entire design and determined it was two dwelling units and that two kitchens were part of that design. Mr. Fischer inquired if the whole structure with the addition would have qualified had it been proposed with only one kitchen. Mr. Murphy confirmed that it would have qualified with one kitchen.

Mr. Wenger asked if the addition met the square footage requirement if proposed as an accessory apartment. Mr. Murphy stated that it only would have if the addition had met the requirements of the accessory apartment provisions including the 35% limitation. Mr. Nice asked if there were any provisions in the Code that limit the number of kitchens in a single family dwelling aside from the Zoning Administrator's interpretation regarding whether the dwelling design was for two families. Mr. Murphy stated that the Code does allow more than one kitchen in a dwelling.

Mr. Fraley opened the public hearing. He reminded the audience that three votes were required in order to grant a variance. Mr. Fraley invited the applicant to speak.

Mr. Richardson introduced himself and stated that he was there to appeal the Zoning Administrator's decision. He stated that he and his wife wanted to add on to their house to enhance the quality of living and have the amenities that they desire. He stated that they did not recognize that there was a zoning issue at the beginning of the process. He outlined the following five major points: 1) The Zoning Administrator's decision was not based on the plans that were submitted. He stated that they viewed the plans as a contract with James City County and wanted to be judged on exactly what was proposed to be accomplished. 2) The Zoning Administrator's decision was not based on Chapter 24 of the County Code applicable to their situation. 3) If the Zoning Administrator's decision is not based on their plans or the James City County Code, it should be overturned. 4) Many alternatives were offered by he and his wife for compromise and none of the options posed by the County were realistic. 5) They appear with the full support of all of their neighbors.

Mr. Richardson gave a brief history of how he and his wife came to purchase the home, operate businesses from the home and realize the eventual need for expansion. He stated that three years ago they found it impractical to add a second story to their home for various reasons. Yet, the need for additional kitchen, office and storage space to operate home-run businesses and adequately entertain friends and family still existed. He stated that they currently had kitchen related items in their kitchen, laundry room, bathroom closets, attic and garage due to insufficient storage space. He noted that they were limited to entertaining at most two or three individuals at a time comfortably and that due to the absence of a dining room they had to eat in the living room. He stated that they invested considerable time, effort and funds drafting the building plans for the addition and had not even considered zoning because they were intending to continue the single family use.

Mr. Richardson stated that he was first contacted by Mr. Rogerson in May of 2005 with zoning concerns, specifically due to their desire to add a second kitchen. He stated that since that time, the entire focus of discussions centered around the second kitchen. He noted that Zoning told him that eliminating the second kitchen would bring him into compliance and that there would be no other outstanding violations. Mr. Richardson then proceeded to justify his five main points. 1) Mr. Richardson stated that in ongoing discussions, the Zoning Division's position was based on potential alterations to the property after the issuance of Certificate of Occupancy. He cited examples of possible scenarios Zoning posed such as "What someone could do if they bought the house and altered it." He stated that he did not subscribe to this as valid judgment since the Zoning Administrator should not have authority to say this for all of time considering that rules change, uses of buildings change and there are means to obtain special use permits and variances for particular uses. He stated that it was the current use that zoning codes are meant to address.

Mr. Richardson stated that Zoning continues to reference elements that are not shown in the Alternative One plan including the possibility that a stove could be added despite its absence on the plan. He noted that there is only one door that separates the two dwelling units and that he was unsure how many he would need to not be a duplex. He added that the definition of a two-family home requires a separation between the two dwelling units and noted that it would be ridiculous to close off one door and have to access all the other proposed rooms in his house through the back door. He maintained that this was the logic of one alternative option presented by Zoning.

He stated that Zoning's decision was not based on the submitted plans, but on the possibility that future occupants may alter the floor plan to accommodate two families. Mr. Richardson stated that this was not possible because additional doors would have to be added to a second dwelling to comply with fire codes and other regulations. He noted that if the internal door was closed, the addition would not be in compliance with the fire code.

Mr. Richardson elaborated on his justification for the second point. 2) He stated that the Zoning Administrator formed an opinion that the project should not go forward and was not in a position where he should have to manipulate and misinterpret the County Code to justify his opinion. He stated further that the opinion came first and the County Code second. He stated that he believed the opinion should be formed from the County Code and not vice-versa.

Mr. Richardson referenced a paragraph in Article One of the Zoning Ordinance which alluded to the "exclusive" nature of the chapter. Mr. Richardson stated that this should be interpreted as pertaining to the current use of the house, not potential alterations, or potential future uses by future owners. He stated that the language clearly indicates that application should be based on uses, not potential alterations or uses that the Zoning Administrator could imagine for the house. Mr. Richardson read Section 24-4 which states, "This chapter shall be deemed exclusive in nature and only those uses specified shall be permitted in the various zoning districts...if a use is not specified in the zoning district it shall be prohibited in that district...in the event that a use is not permitted in any Zoning District it shall only be permitted upon appropriate amendment to the text of this chapter."

Mr. Richardson stated that they have been very clear from day one about how they intend to use the house and that the plans clearly fit within that definition. He read the definition of a dwelling as defined in the Zoning Ordinance, and stated that they were not a multiple-family home. He noted that the Ordinance defines a two-family dwelling or duplex as a structure containing two dwelling units separated from one another by a single wall or floor. He added that they were not separated and that he did not intend on separating them. He stated that one door was adequate for one family in one dwelling unit. He read the definition of a detached structure and stated that the proposed structure was arranged and designed within the limitations of the site to be occupied by one family. Lastly, he read the definition of a dwelling unit which states, "One or more rooms in a

dwelling designed for living or sleeping purposes and having at least one kitchen." He noted that they want two kitchens and that two kitchens was "at least one". He concluded that he hoped it would have been that simple with judgment passed on the above-referenced statement. He stated that the issue had been clouded by bringing in terms that did not apply such as accessory apartment and two-family dwelling. He stated that the definition of a dwelling unit allows for more than one kitchen and added that he had not been given a straight answer regarding why he had to discuss seemingly inapplicable sections of the County Code.

Mr. Richardson noted that in alternative one, one kitchen, a new pantry and a wet bar is shown. He stated that "kitchen" was not defined in the Code and that he did not ever see a definition committed to in writing until the brief that was brought before the BZA in August. He stated that a kitchen was obviously used for cooking. Mr. Richardson proceeded to read the "kitchen" definition from the dictionary followed by Mr. Murphy's definition as it appeared in the BZA report. Upon reading the definition, Mr. Richardson noted that the definition described a kitchen without including the words cooking, stove, or oven and that it was not what common sense would dictate as a kitchen.

Mr. Richardson stated that Zoning should have been able to approve a plan with two kitchens in good faith because of the definition of a dwelling. He stated that one alternative given by the Zoning staff was that he could have more than one kitchen if he could comply with the definition for an accessory apartment. He noted that he then realized if he added 700 square feet to his proposed addition he could have a second kitchen, keep the door in the middle, and meet all regulations. He stated that he recognized tearing down 500 square feet of the existing structure would also bring him into compliance with regulations. He pointed out that he was caught between alternatives that were unrealistic and restated that he was not proposing an accessory apartment.

Mr. Richardson stated that the Zoning Administrator's decision should be overturned because it is not based on the plan or language stated in the Ordinance. He accused the Zoning Administrator of forming an opinion and then looking to the Code to justify that opinion. He stated that he and his wife repeatedly indicated it was their intent to use the structure as a single family detached dwelling and that his plans indicated neither an accessory apartment nor two-family dwelling.

Mr. Richardson stated that he had offered many suggestions for compromise at various points in the process and none had been entertained by staff as realistic. Mr. Richardson stated that early in the process Mr. Rogerson suggested the submittal of a notarized letter of intent to resolve the issue. He noted that the letter would state that the property owner understood that a special use permit was needed for a two-family dwelling and that they would go through the proper channels to obtain this if needed. He added that they never intended to use the structure in that manner.

Mr. Richardson stated that he felt staff should have accepted their word and permitted them to move forward. He added that they volunteered to widen the door to the

maximum extent possible to make both kitchens (back-to-back) as accessible as possible to one another. He also stated that they offered to turn the proposed kitchen space into strictly cabinets and counterspace with a spot reserved for a freezer or refrigerator. He stated that both alternatives were turned down. He asked that alternative one be accepted by the BZA.

Mr. Richardson summarized that they were here to overturn the Zoning Administrator's decision and asked the BZA's opinion about whether or not the proposal was contingent upon the kitchen and if the original proposal was consistent with the Zoning Ordinance. He asked that the Code be enforced as it was written and not how the Zoning Administrator wished that it be written. He asked for questions from the BZA.

Mr. Fischer asked Mr. Richardson if the intended final use of the original kitchen was indeed as a dining room, therefore eventually leaving one kitchen. Mr. Richardson stated that this was a possible solution but did not want to commit to that expense at this time. He stated further that after renovations were complete he might consider remodeling the original house. Mr. Fischer noted that another compromise could be to do both renovations at the same time resulting in one kitchen. Mr. Richardson stated that Zoning did not care which kitchen was removed as long as the end result was one. He added that Zoning proposed taking the word "kitchen" off the plan and removing the sink and stove connections and that he would not agree to that proposal.

Mr. Fraley clarified that they were voting on Alternative One and that they could not base their decision on what Mr. Richardson might do. Mr. Rhodes asked for clarification about the factors that prevented the Richardsons from building up, noting that the addition was two story. Mr. Richardson responded that the proposed addition was totally different than adding on to the original 1920's home which was built on brick piers and had a cinder block foundation. He added that there were still some outstanding construction issues he was working out with Codes Compliance for the proposed addition and that it may be necessary to lay a foundation capable of withstanding shrink-swell soil.

Mr. Fraley commended Mr. Richardson on his presentation. He then responded to earlier comments from Mr. Richardson and noted that he had never known Mr. Murphy to "manipulate" information. He recommended that the merits of any case be decided on the facts and not upon judgments made about the character of a person. Mr. Fraley voiced his concern about the totality of the proposal, noting that the addition was 130% larger than the existing dwelling and that he was trying to substantiate the need for six bedrooms. Mr. Richardson noted that they would have a master bedroom, two offices, a guest room, and a bedroom incorporated into the living room. Mr. Fraley stated that the need for that many bedrooms for two people puzzled him but that he would not be judgmental. Mr. Fraley asked if there would be two family rooms. Mr. Richardson replied that there would be two living rooms, one formal at the front and one informal at the rear. Mr. Fraley asked if there would be two laundry rooms. Mr. Richardson responded that there would not be two with alternative one and rather a closet with a sink in its place. He stated further that the current laundry room serves as a pantry, closet,

laundry and storage for kitchen. Mr. Fraley asked if a laundry room was shown in Alternative One. Mr. Murphy stated that it was shown but without the washer and dryer.

Mr. Fraley summarized the components proposed with the addition and questioned the second story addition. Mr. Richardson stated that the addition had been discussed in terms of compatibility with the character of the neighborhood. He noted that this issue was not raised as a concern by the Zoning Division and that the Division's main concern revolved around the second kitchen. Mr. Fraley stated that he was not focused on the kitchen but rather the enormity of the addition and how it could be considered two separate units. He noted that the addition was 130% larger than the existing home and appeared as a self-contained living and sleeping area. Mr. Richardson stated that they do not deny that the door could be closed and necessary measures taken to subdivide off a second unit, but that he wanted to be judged on his use of the project, not a future use. He added that he did not see where the Zoning Administrator was granted the authority by the Code to make decisions that all future owners have to be held accountable to. Mr. Fraley responded that he was trying to discern how the large addition would be used. Mr. Richardson stated that they needed more room for storage.

Mr. Wenger asked if there was a complimentary electrical drawing for Alternative One. Mr. Richardson stated that there was not. Mr. Fraley explained that alternative one had the same floor space absent the stove, washer, and dryer. Mr. Rhodes noted that Mr. Richardson would have to agree that the plan submitted gave the appearance of two separate living areas and that the two units could be isolated by closing the door. Mr. Rhodes added that looking at the totality of the proposal, the structure could easily be divided into two separate units by either current or subsequent owners. Mr. Richardson stated that he would expect to be judged on his wife's and his use and intent. He added that he offered to take the internal access door out and widen it to the maximum extent that the floor plans would allow. Mr. Rhodes responded that this seemed to him to be one plausible alternative. Mr. Richardson stated that it was dismissed outright because the addition proposed another kitchen. Mr. Rhodes stated that the Zoning Ordinance did not prohibit a house from having two kitchens.

Mr. Fraley invited members of the audience to speak. Karen Richardson introduced herself and stated that they had the right to have as large a house as they desired. She noted that she currently lived in 1350 square feet, which was smaller than the average apartment size in the United States. She added that the addition would bring the house to just over 3000 square feet which was the average home size in the United States. She stated that the size of the addition was not the issue and that 1350 square feet was very small. She noted that her laundry room also served as her pantry, storage closet and often doubled as her kitchen when she used it to plug in her grill and deep fryer. She added that she had dishes in the garage due to lack of storage. She stated that she offered a compromise by leaving all the current appliances where they were and only adding a refrigerator, sink, and all the counter and cupboard space possible for storage purposes and for ample space to entertain. She stated that Mr. Murphy rejected that compromise and gave an alternative of a sink, mini-fridge and four to five feet of counter space with

no overhead cupboard space and no other kitchen related items in that space. She stated that she could not see enough of a difference in the proposals to distinguish one as a kitchen and the other not.

Ms. Richardson noted that it was humiliating to beg people to add cupboard space to a house that was jammed to the ceiling. She stated that she respected Mr. Murphy's job but that she could not believe her building project could compromise the integrity of the Zoning Ordinance and have broad implications in the County, as stated by Mr. Murphy to the BZA as reason for disapproval. She concluded that this decision did have implications for the County in terms of property owner's rights and recommended that the BZA approve alternative one.

Ms. Kathleen Green introduced herself as a neighbor at 2783 Lake Powell Road and stated that the thought of them sharing their home with anyone else was ludicrous because they were intensely private people. She stated further that she was happy Mr. Murphy was not around when they added their bathroom because based on his kitchen logic their project would have not been approved.

Ms. Robin Brantley introduced herself as a neighbor at 2782 Lake Powell Road and stated that she fully supported the Richardsons' plans to add on to their house. Mr. Wade Moore, resident of 2782 Lake Powell Road, introduced himself and noted that the Richardsons seemed to have made every compromise that they could within reason to meet the zoning laws and that rather than viewing the proposal as a detriment, he encouraged the addition as a homeowner because of the value it would add to the homes in the neighborhood.

Mr. Bill Kassing introduced himself as a neighbor at 2779 Lake Powell Road and stated his support for the Richardsons, noting he viewed them as an asset to the neighborhood and noting that they cleaned up the property when they came.

Mr. Michael Green introduced himself as a neighbor at 2783 Lake Powell Road and stated that he had lived there 49 years. He recommended that the BZA approve their project and reassured the BZA that the Richardsons would not get away with anything in the neighborhood with him there.

Mr. Adam Kinsman introduced himself as the Assistant County Attorney and noted the Court reporter in attendance at the County's request. He explained that she was there in case the County decided to appeal the BZA's decision in the future. He then stated that the case was not only about the number of kitchens and that the BZA must evaluate the application considering the totality of the circumstances, including the presence of two entrances, two sets of bedrooms, two living areas and two bathrooms. He added that the proposed addition was larger than the existing home and that there were in fact two eating areas regardless of what they were named. He noted that taken individually both the original house and the addition were single family detached dwellings, but taken together and coupled with careful observation of the layout of the proposed structure, it was

designed and arranged to be occupied by more than one family. He added further that the affidavit explaining intent could not factor into the Zoning Administrator's determination as he was confined to looking at the proposed plans before him. He added that while the affidavit could be used as evidence in a trial, it could not force the proposed structure to fit into the description of a single family dwelling.

Mr. Kinsman encouraged the BZA to evaluate the accuracy of Mr. Murphy's decision and cited a Virginia Supreme Court statement which read, "A consistent administrative construction of an ordinance by the official charged with its enforcement is entitled to great weight." Mr. Kinsman asked the BZA to determine whether Mr. Richardson presented enough evidence to overcome Mr. Murphy's presumption of correctness. He added that the applicant placed weight upon the argument that because the proposed structure did not meet the definition of a two-family or multi-family dwelling, it therefore was a single family dwelling. Mr. Kinsman challenged that this was incorrect and referenced the exclusive nature of the Ordinance. He noted that the Zoning Administrator made the determination that this use was not explicitly permitted by the Ordinance and therefore was not allowed.

Mr. Kinsman reminded the BZA that the Richardsons do not contest the fact that it could be divided in two and that Mr. Murphy could not base his determination on intent, however genuine. Mr. Kinsman asked the BZA to uphold the Zoning Adminstrator's decision and accept the application for what it was, a structure designed and arranged to be occupied by more than one family. Mr. Kinsman assured the BZA that Mr. Murphy was simply upholding the rules of the Zoning Ordinance and not going after any particular person for any particular reason. He noted that it was better to make a decision at this stage for both parties given that financial consequences could grow considerably if action was not taken until after construction was completed.

Mr. Fraley asked for questions from the BZA. Mr. Rhodes stated he was troubled that Mr. Richardson offered to compromise and was not given much direction by the County to make the proposal acceptable. He added that the County had only told Mr. Richardson what was unacceptable and apparently did not give guidance on what he could do to make it acceptable. Mr. Kinsman replied that he could not speak for the Zoning staff and stressed that the decision in front of them could not be based on any other potential alternatives, but rather, Mr. Murphy's decision based on the plans at hand. Mr. Rhodes asked if the BZA had the authority to direct Mr. Richardson on what he could do. Mr. Kinsman stated that the BZA could defer the case and direct the applicant and staff to discuss the application. Mr. Nice stated that the case was based on opinions, and claimed there were no Zoning laws that stated you could not have two kitchens. Mr. Nice asked why the BZA's opinions were not as valid as Mr. Murphy's. Mr. Kinsman noted that Mr. Murphy was given the powers by law to enforce and administer the Zoning Ordinance as well as the implied power to issue determinations. He added that Mr. Murphy determined the proposal was not a single family dwelling. Mr. Nice responded that it was still an opinion. Mr. Kinsman stated that it was an opinion he was entitled by law to make.

Mr. Fraley stated that as indicated by the case file, there were several discussions that took place in an effort to negotiate a feasible alternative. Mr. Murphy stated that alternatives were suggested and that early on, various scenarios were brainstormed. He concluded that he discussed the nature of the Zoning Ordinance with Mr. Richardson and that they simply disagreed about what a single family dwelling was as defined.

Mr. Richardson stated that contrary to what was inferred from Mr. Kinsman, he was always under the impression that the proposal would be approved if he removed a kitchen. He added that he was under the impression that he would be free to proceed if he were to cross off the word "kitchen" on the plan and substitute "dining room." He noted that he did not design the proposal for two families and stated that he would address questions about design limitations. He asked to be judged not on his intent but on his actual use in accordance with Chapter 24. He added that the argument about two entrances was meaningless because the original house already had two entrances and to not have two entrances would be in violation of fire codes. He stated he was frustrated by staff pushing unreasonable alternatives and added that the proposal at hand was not an enforcement issue because he was not breaking any laws.

Mr. Richardson restated that the only alternative option presented by staff was four or five feet of base cabinet space with a sink and a mini-fridge, which precluded him from bringing in other kitchen related items and from essentially doing things any other resident of the County could do. He added that the Zoning Administrator did not have authority to limit the amount of counters he could have in any room in his house or whether he could plug in a second refrigerator. He stated he was directed to speak with Codes Compliance about these issues and that they had no regulations that denied him those rights.

Mr. Fraley asked what Mr. Richardson's opposition was to applying for a special use permit. Mr. Richardson stated that he did not want a two family house and did not want to have to close off the one doorway in question and access the rear of the house through a separate external entrance. Mr. Rhodes asked why some of the bedrooms intended for offices were not labeled that way. He added that he could see where Mr. Murphy was coming from. Mr. Richardson stated he could label some of the rooms as offices but was not sure at this point how the rooms would be used. Mr. Fraley asked for questions from the public and then closed the public hearing.

Mr. Wenger asked for confirmation that the BZA was voting to uphold or not uphold the Zoning Administrator's decision on Alternative One. Mr. Fraley confirmed and added that intended uses, promises, suspicions are not issues in this case and that they had to vote on Mr. Murphy's decision regarding Alternative One. Mr. Fraley stated that he could not understand why this could not be resolved and added that he had a difficult time justifying six bedrooms for one home. Mr. Fischer asked why the applicant did not replace the word bedroom with office since that was the purpose it would serve. Mr. Fraley responded that he had to judge what was before him on alternative one and that he saw a totally duplicated living area. He added that he did not see any attempt by the

applicant to clarify what was on the plans to help ease his decision.

Mr. Nice stated that they had a citizen before them that had not violated the Zoning Ordinance. He added that it was not his or any of his colleagues business what any citizen wanted to do on the inside of their house. He stated that it did not matter how many bedrooms he wanted and that there was no law that prohibited him from having five kitchens. He stated that he could show everyone at least 200 houses around the County with wetbars as large, or larger, than what was proposed as well as several examples of second laundry rooms added for convenience. He added that the case was based upon one man's opinion of what an applicant intended to do with his dwelling and that the opinion had no bearing on anything. He referenced Mr. Richardson's incapability to add a second floor and stated that if Mr. Richardson wanted a stairwell to the second floor it would preclude the opening between the addition and existing house because it had to have access to the second floor.

Mr. Nice stated that the alternate plan was better than the original, but that at any level of reason the County should have seen fit to approve the alternative plan since the applicant took out all of the kitchen appliances. He added that the discussion was an invasion of the citizen's privacy and had no basis in the building or zoning code. He noted that Codes Compliance could care less if Mr. Richardson had three kitchens.

Mr. Rhodes stated that he felt the case was past the negotiating. He also stated that in looking at the plan and the fact that you could isolate the existing house and addition as two separate units, he understood Mr. Murphy's position. He added that he could not see how the case could have gotten that far.

Mr. Fischer stated that his first impression of the plans indicated two separate dwellings. He stated that after listening to discussion he had faith that the dwelling would be used as a single family residence and that he believed Mr. Richardson would not try to underhandedly put the addition to any use other that what he claimed it was for. Mr. Fraley noted that the BZA had the power to defer if any member advocated that. Mr. Wenger stated that he was against deferring.

Mr. Fraley made a motion to uphold the Zoning Administrator's decision.

Motion was approved 3-2 with Mr. Fischer and Mr. Nice dissenting.

E. NEW BUSINESS

1. ZA-24-05 212 Louise Lane

Mr. Clifton Copley stated that the applicant was requesting variances to the front and rear setback requirements for the construction of a single family dwelling with a front porch and rear deck located at 212 Louise Lane. He summarized background information about

the property, gave staff's recommendation of denial and asked for questions from the BZA.

Mr. Fraley asked if any adjacent property owners had any input. Mr. Copley responded that staff had not heard from any. Mr. Rhodes asked if the property was served by public sewer and water. Mr. Copley responded that the property was neither served by public water nor sewer. Mr. Rhodes asked if the encroachment of the steps violated the setback requirements. Mr. Copley replied that steps can encroach up to three feet into the setback.

Mr. Fischer asked for confirmation that the foundation could be built in the stated building envelope of 26' x 90'. He added that the envelope was over 2,000 square feet and did not see a hardship. Mr. Copley clarified that the building envelope restricts them from building closer than 35 feet from the front and rear property lines and 15 feet from the side property lines. He noted additionally that due to the presence of a reserve drainfield, the building envelope was further restricted, leaving 26 feet of buildable depth and 90 feet of buildable width.

Mr. Rhodes asked if Section 24-636 allowed the BZA to establish setbacks for non-conforming lots and if the property in question fell under that category. Mr. Copley responded that the lot did. Mr. Kinsman stated that the Virginia State Code specified that a BZA did not have the power to simply establish a setback without finding a hardship. Mr. Rhodes inquired about the consistency of this State specification with the County Zoning Ordinance. Mr. Fraley noted that the case before them centered on a non-conforming lot while the Virginia Supreme Court specification dealt with conforming lots. Mr. Kinsman stated that he could not find a law in the Virginia State Code that empowered a BZA to establish setbacks without first finding a hardship.

Mr. Fraley stated that given the non-conforming status, if the BZA found that not granting a variance would interfere with any reasonable use of the property then they could establish setbacks. Mr. Kinsman concurred and added that the non-conforming status could factor into the BZA's decision in evaluating the presence of a hardship. He added that in order to establish a setback that was different than any other property with the same zoning designation, the BZA had to create a variance and in order to do so must prove a hardship. Mr. Fraley asked for confirmation that a non-conforming status could interfere with all reasonable and beneficial use of the property.

Mr. Nice asked if Mr. Kinsman thought most of the cases passed by the BZA approach a hardship. Mr. Kinsman estimated that about 90% do not. Mr. Fischer inquired about the dimensions of the primary and reserve drain fields. Mr. Rogerson stated that drain fields are lot specific and that they did not have that information. Mr. Fraley stated that the property in question was non-conforming with a very small building envelope. Mr. Rhodes noted that the reserve drain field was significantly smaller than the primary drain field and asked if the reserve could be expanded further into the setback. Ms. Brown stated that the Health Department would be able to answer that question but that it was the Zoning Division's understanding that it was approvable as shown.

Mr. Fischer asked what the property owner wanted to build. Mr. Nice noted that the proposed house was 26 feet by 46 feet with the proposed deck and front porch

encroaching into front and rear setbacks.

Mr. Fraley opened the public hearing and invited the public to speak. Mr. RM Hazelwood introduced himself as property owner at 301 Old Stage Road in Toano. Mr. Hazelwood explained that the 90 foot envelope began at the side setback and ended at the beginning of the drainfield. He added that the drainfield ended 35 feet from the left setback line. Mr. Hazelwood noted that the lot was made non-conforming when the Ordinance was amended, not when it was subdivided.

Mr. Hazelwood stated that he was building an affordable home on an affordable lot. He noted that Code Compliance required a four foot platform between the door and steps for both the front and rear door, therefore making a hardship. Mr. Hazelwood pointed out that the deck would likely be built, with or without a building permit, by future owners and that eventually a property owner would realize the need for a variance to meet Code if the variance was ruled out today.

Mr. Hazelwood stated that the house needed a deck and only a mid-sized deck was being proposed. He stated that the porch was only six feet wide and that the four foot platform requirement made the encroachment necessary. Mr. Fraley closed the public hearing.

Mr. Nice stated that it was a non-conforming lot without public water or sewer which further decreased the buildable space. He commended Mr. Hazelwood for designing a house that was only 26 feet in width and stated his agreement with Mr. Hazelwood that a variance application would be imminent at some point in the future anyway.

Mr. Fraley agreed with Mr. Nice's comments and stated that application of the Zoning Ordinance would interfere with reasonable and beneficial use of the property therefore creating a hardship. Mr. Rhodes stated that applying the Zoning Ordinance effectively prohibits and unreasonably restricts the use of the property. He added that granting the variance alleviates a demonstrable hardship that does approach confiscation. He noted that adjacent property owners do not share the hardship because most adjacent lots were already built on.

Mr. Fischer asked what could be done with the lot if the variance was not granted. Mr. Fraley stated the lot would not be very attractive and hardly livable. Mr. Fraley asked Mr. Copley to read the motion.

Mr. Copley stated a motion to grant variance to Section 24-236 Setback Requirements to reduce the required front yard setback from 35 feet to 26 feet and to Section 24-238(b) Yard Regulations to reduce the required rear yard setback from 35 feet to 24 feet to allow for the construction of a single family dwelling with no further encroachment.

Motion approved 4-1 with Mr. Wenger dissenting.

2. ZA-25-05 4284 Hickory Sign Post Road

Mr. Rogerson referenced the staff report and noted that a pending RPA waiver was approved, setting the RPA buffer at 50 feet instead of the previously required 100 feet. Mr. Rogerson described the property and variance proposal. He noted that with the presence of RPA and wetlands, the building envelope of the developable property was

confined to approximately 22 feet in depth. He explained that a house could be built meeting setbacks and RPA buffer requirements without a variance and recommended denial of the variance request.

Mr. Fraley asked for questions from the BZA. Mr. Rhodes asked if other properties in the area were similarly impacted. Mr. Rogerson stated that they were. Mr. Fraley stated that there was an abundance of unbuildable areas in the Hickory Sign Post Road vicinity, but noted that many of the lots had been developed. Mr. Wenger asked for confirmation of the buildable depth. Mr. Fischer inquired about the building plans and asked if they could build the house shown without a variance. Mr. Rogerson responded that they could not.

Mr. Fraley opened the public hearing. Mr. Joe Terrell Jr. introduced himself and gave a brief history of the property. He noted that the property was significantly impacted by the wetlands and Mill Creek running through the rear of the property. He noted that short of rolling a double wide on the property there were few options for meeting the building constraints.

Mr. Rhodes asked what the depth of the proposed structure would be. Mr. Terrell responded that the dwelling was 31 feet deep and 34 total feet accounting for the front porch. Mr. Fraley closed the public hearing.

Mr. Rhodes stated that considering the character of the terrain and RPA restrictions there was a hardship. He added that this was the sort of request that BZAs were set up to handle. Mr. Fraley agreed that the property had severe environmental implications and complimented Mr. Terrell on fitting the design in as best as possible. Mr. Rhodes added that it fit well with the character of the surrounding area. Mr. Fraley agreed and stated that strict adherence to the Ordinance would create an unnecessary hardship and interfere with the beneficial use of the property. Mr. Fischer asked Mr. Fraley to describe the topography. Mr. Fraley summarized the area and noted that it was a hard area to develop.

Mr. Rogerson stated that if the BZA so chose, he recommended granting a variance to Section 24-236 of the Zoning Ordinance to reduce the required front yard setback from 60 feet from the center of right-of-way to 45 feet from the center of right-of-way to allow for the construction of a new single family dwelling.

Motion approved 5-0.

3. ZA-26-05 169 Forest Heights Drive

Ms. Brown explained the variance proposal and gave staff's recommendation of approval. Mr. Rhodes asked what the setbacks for existing homes in the area were. Ms. Brown responded that the setbacks varied but noted that most houses were set closer to the front property line than what setback requirements currently allow. Mr. Fraley asked if staff had heard from adjacent property owners. Ms. Brown replied that they had not.

Mr. Fraley opened the public hearing. Mr. Jason Robbins introduced himself and stated he was a potential future neighbor appearing on behalf of his father, the property owner. He stated that most of the lots in the area were the same size and that the home proposed was consistent in size and placement with other homes in the area. He added that they

were simply trying to conform to the surrounding area and build an affordable structure.

Mr. Fraley closed the public hearing. Mr. Fraley stated that he did not have any problems with the variance proposal, noting the lot would be otherwise unusable.

Ms. Brown stated a motion to grant variance to Section 24-256, Setback Requirements, to reduce the front setback from 50 feet to 27.5 feet from the centerline of Forest Heights Drive and to Section 24-258(b), Yard Regulations, to reduce the required rear yard setback from 35 feet to 20 feet to allow for the construction of a new single family dwelling with no further encroachment.

Motion approved 5-0.

4. ZA-27-05 3712 Shackleton Lane

Mr. Rogerson noted letters of support from the Homeowner's Association and adjacent property owner for the proposed accessory structure. He summarized the variance request and stated that the applicant realized his backyard shed was not in compliance with required setbacks upon surveying his property. Mr. Rogerson gave staff's recommendation of disapproval.

Mr. Rhodes asked if a building permit was required for the shed. Mr. Rogerson responded that it was not since the structure was under 150 square feet and did not need electrical or plumbing permits. Mr. Fraley asked for confirmation that the Homeowner's Association approved the shed when the applicant built it. Mr. Rogerson confirmed that they approved it prior to construction. Mr. Rhodes asked if the applicant's neighborhood had setback requirements. Mr. Rogerson responded that the property was in the R-2 zoning district which had setback requirements but was unaware of what was required by the neighborhood's covenants, codes and restrictions.

Mr. Fraley emphasized that the Homeowner's Association approved this shed before it was built. Mr. Rogerson confirmed and read the approval statement from the Home Owner's Association.

Mr. Fraley opened the public hearing. Mr. Maas introduced himself and gave a brief history of the property. He stated that he placed the shed where it was due to the slope of the property and to avoid removing trees. He stated further that another benefit of the placement was that it was fully blocked from view of the house. He added that the lot was irregular and noted that in order to conform he would have to move the shed 25 feet closer to the house where it in plain view, blocked the path of storm water runoff and where trees currently stood. Mr. Maas stated additionally that due to the elevation of his property it handled runoff from at least one third of the surrounding properties.

Mr. Maas stated that his shed was custom built with metal studs and metal sheeting and set on a concrete slab. He added that the shed could not simply be moved and that he was trying to prepare the property for sale. He stated that due to the irregularity of his lot, the topography and the amount of runoff accommodated, there were unreasonable restrictions on the use of the property. He added that the neighbor that bordered the side where the shed stood submitted a support letter. Mr. Maas then asked the BZA to approve his

variance.

Mr. Fraley closed the public hearing. Mr. Nice stated that the applicant did everything right in working with the County to obtain all proper permits and maintained that the applicant simply made an honest mistake. He stated further that he had no issue with granting the variance. Mr. Rhodes stated that the granting of a variance in this case did not qualify and that a decision would be unlikely to be upheld by the Courts if appealed. Mr. Wenger stated he felt a hardship was justified. Mr. Fraley stated that although it might not meet the strict requirement of a hardship, he would approve the variance considering the Home Owner's Association approval and support of the adjacent property owner.

Mr. Rogerson stated that if the BZA chose to grant a variance he recommended to grant variance to Section 24-258(b) of the Zoning Ordinance to allow the continued placement of the shed with no further encroachment into the rear setback.

Motion approved 4-1, with Mr. Rhodes dissenting.

F. MATTERS OF SPECIAL PRIVILEGE

Mr. Kinsman referenced documents related to the discussion of recent case law. Mr. Fraley noted a threshold had to be met before a hardship could come into play. He noted that the phrase "approaching confiscation" was a nebulous term and that the word "approaching" was completely judgmental. He stated that the case-law documents included as examples did not show emphasis on approaching confiscation but rather on meeting a threshold and then finding unnecessary or undue hardship. Mr. Kinsman stated that the 169 Forest Heights Drive case was a perfect application of the BZA's power to grant a variance.

Mr. Fraley noted he would be more mindful of the threshold but stated he would give much less emphasis on approaching confiscation. Mr. Kinsman stated he felt the Supreme Court's definition of approaching confiscation was getting rid of all reasonable, beneficial use of the property. Discussion ensued about the merits of the term "approaching confiscation."

1. Board of Zoning Appeals By-laws

Mr. Kinsman and the BZA discussed the amendment of the by-laws. Mr. Kinsman informed the BZA that their decision on the Hicks Island case from the previous meeting was being appealed to the Circuit Court. He noted that the Circuit Court stated their intention to hear the case and their request for a writ from the BZA attorney.

Mr. Fraley adjourned the meeting.

Jack Fraley, Chairman

Allen Murphy, Secretary