

1 **MINUTES OF THE REGULAR MEETING OF THE BOARD OF ZONING**
2 **APPEALS OF HENRICO COUNTY, HELD IN THE COUNTY ADMINISTRATION**
3 **BUILDING IN THE GOVERNMENT CENTER AT PARHAM AND HUNGARY**
4 **SPRING ROADS, ON THURSDAY, OCTOBER 25, 2012 AT 9:00 A.M., NOTICE**
5 **HAVING BEEN PUBLISHED IN THE RICHMOND TIMES-DISPATCH**
6 **OCTOBER 8, 2012 AND OCTOBER 15, 2012.**

7
Members Present: R. A. Wright, Chairman
James W. Nunnally, Vice Chairman
Greg Baka
Gentry Bell
Helen E. Harris

Also Present: David D. O'Kelly, Jr., Assistant Director of Planning
Benjamin Blankinship, Secretary
Paul Gidley, County Planner
R. Miguel Madrigal, County Planner

8
9 Mr. Wright - Good morning, ladies and gentlemen, welcome to the
10 October meeting of the Henrico County Board of Zoning Appeals. Please stand
11 and join with me in pledging allegiance to the flag of our country.

12
13 Thank you. Mr. Blankinship, please read our rules.

14
15 Mr. Blankinship - Good morning, Mr. Chairman, members of the Board,
16 ladies and gentlemen. The rules for this meeting are as follows. Acting as
17 secretary I'll call each case. And as I'm speaking the applicant should come
18 down to the podium. We'll then ask everyone who intends to speak to that case
19 to stand and be sworn in. Then the applicant will speak. Then anyone else who
20 wishes to speak will be given the opportunity. After everyone has had a chance
21 to speak, the applicant, and only the applicant, will have an opportunity for
22 rebuttal. After the Board has heard all the testimony and asked any questions,
23 they will move on to the next item on the agenda. They will render all of their
24 decisions at the end of the meeting. So if you wish to know their decision on a
25 specific case, you can either stay until the end of the meeting, or you can check
26 the Planning Department website this afternoon, or you can call the Planning
27 Department this afternoon.

28
29 This meeting is being recorded, so we'll ask everyone who speaks to speak
30 directly into the microphone on the podium, state your name, and please spell
31 your last name so that we get it correctly in the record.

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33 And finally, out in the foyer there is a binder that contains the staff report for each
34 case, including the conditions that have been recommended by the staff. It's
35 particularly important that the applicants be familiar with those conditions.

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Mr. Wright - At this time I want to ask Ms. Harris to join me. Ladies and gentlemen, Ms. Helen E. Harris has served for two years as chairman on our Board. We really appreciate all her efforts and her fine leadership; she did a wonderful job for us. I'd like to present to you this plaque that has been prepared for your service. It reads, "Presented to Helen E. Harris, Chairman, Henrico Board of Zoning Appeals, August 27, 2010 to August 23, 2012."

Ms. Harris - Thank you very much.

Mr. Wright - Mr. Blankinship, are there any deferrals or withdrawals?

Mr. Blankinship - No sir, not that I'm aware of.

Mr. Wright - All right, sir, please call the first case.

CUP2012-00005 WESTHAMPTON MEMORIAL PARK requests a conditional use permit pursuant to Section 24-52(h) of the County Code to expand an existing cemetery at 10000 Patterson Avenue (Parcel 744-742-5871) zoned R-1, One-Family Residence District and A-1, Agricultural District (Tuckahoe).

Mr. Wright - Will the representative of the cemetery please come forward? We've heard all the testimony. I think last time we were working out some agreements or conditions of an agreement. I'd like to hear from you about those.

Mr. Wilson - Yes, Mr. Chairman. Again for the record, my name is Jack Wilson, and I represent the applicant in this application. You're correct, Mr. Chairman, last month we had full discussion of the case and discussed how we had been working with the neighbors very diligently over the last several months. What we needed to do was defer it just one more time so that we could fine tune those conditions, which we have done. Those were submitted, and I think you have copies of those. I believe you'll hear from the neighborhood, the attorney representing the neighborhood that they are in full agreement with these. What we're asking for is that you then, as we discussed last time, recognize the hard work that the neighborhood and the cemetery have put forth to try to come to an amicable resolution, and allow the best interests of the cemetery to proceed economically, as well as the best interest of the neighbors. In the intervening month, we've also met with the neighbors on the site to specifically look at where various plantings could occur to provide the maximum screening for the neighbors. We've put that type of language in the conditions so that as we get ready to actually plant the plantings, that the neighborhood will be involved in making sure that we're maximizing that screen. All of that is now in place. And I believe the homeowners association is here to confirm that they're in agreement with these conditions as well. So we ask for your approval.

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Mr. Nunnally - Are these conditions the ones that were submitted to us? Are these the ones that everyone's in accord with?

Mr. Wilson - I believe so. I forwarded some revisions to Mr. Gidley yesterday. I think those are the ones that you may have. Those were incorporating the final comments from the homeowners association.

Mr. Blankinship - Those are the ones that were passed out this morning.

Mr. Wilson - Correct. They are essentially the same; we just fine tuned a couple of the points in there that the homeowners association requested. We had no problem doing it, so we made those changes and you have those before you this morning. And again, the plat itself I think that was forwarded to you this morning is essentially the same plat that I think had been forwarded to you earlier. This is just a colorized version of it to make it clear where the buffer area is. That's the green hatched area. But there are no changes to that; it just specifically identifies the—and that's what we would ask be the exhibit to the conditions.

Mr. Wright - Is a representative from the homeowners association here?

Ms. Harris - I have a question for Mr. Wilson. In Condition 5 where we talked about the ESC plan, I noticed they mentioned the floodplain information if applicable would be included. Have there been any floodplain concerns in the past with this property?

Mr. Wilson - Not that I'm aware of. Again, this is the standard language that the County requests as its conditions. I'm not aware of any floodplain issues. But that's the standard condition that the County wanted, so we had no problem putting that in. But I'm not aware of any floodplain issues.

Mr. Wright - Any other questions?

Mr. Baka - Question. There were some notes in the staff comments that the graves closest to the Patterson right of way, in that first fifty feet off the Patterson Avenue right of way date back to 1976. The original code is from 1953. So since those graves don't predate 1953, the first code, was there any consideration given to maintaining a fifty-foot setback off of Patterson Avenue also?

Mr. Wilson - We really hadn't had that issue raised because the homeowners association hadn't raised it. I'm not sure.

128 Mr. Baka - I realize it may not be a concern for the homeowners
129 association. Was there any concern in staff's review that there should be a fifty-
130 foot? If I remember right, the statement in the code refers to a fifty-foot setback
131 from all property lines. I don't know the exact citation on that. So was there any
132 need for a fifty-foot setback to also remain from Patterson Avenue?
133

134 Mr. Blankinship - I believe it was our position, Mr. Baka, that they're
135 covered by the language in the code that addresses existing cemeteries.
136

137 Mr. Wright - That was never an issue.
138

139 Mr. Wilson - And I believe the code also talks about from adjacent
140 residential areas, not from—
141

142 Mr. Blankinship - Two different clauses in there.
143

144 Mr. Baka - The other clause was from all residential; this was
145 from all property lines. Okay. All right, thanks.
146

147 Mr. Blankinship - Ms. Harris, there does appear to be a small area of
148 floodplain near the intersection of Patterson Avenue and Westhampton Glen
149 Drive. So they will have to address that. But it's a fairly small portion of the site.
150

151 Mr. Wright - All right, sir. We will hear from the representative of
152 the homeowners association.
153

154 Mr. Burnett - Good morning, Mr. Chairperson and members of the
155 Board. My name is Alex Burnett. I am a resident of Westhampton Glen and an
156 attorney at Williams Mullen. I'm here on behalf of the Board for the
157 Westhampton Glen Homeowners Association. I'd like to confirm what's been
158 said. Just to be clear, I'm not authorized to speak on behalf of all thirty-seven lot
159 owners. I don't have that authority. I'm here on behalf of the board for the
160 homeowners association. The board has reviewed these conditions that have
161 been submitted to you. And the board has authorized me to approve them and to
162 voice our approval of them this morning. I've circulated the conditions throughout
163 the neighborhood and gave folks an opportunity to comment. But again, I don't
164 have approval from all thirty-six of my neighbors, so I can't tell you how
165 everybody feels about it. But the board has approved it.
166

167 Mr. Nunnally - You don't have any negative comments, do you?
168

169 Mr. Burnett - No, no negative comments that I know of.
170

171 Mr. Wright - Any questions?
172

173 Ms. Harris - Yes. Are there members of your homeowners
174 association here today?
175

176 Mr. Burnett - There is one member back here. He may wish to be
177 heard; I'm not sure.
178

179 Mr. Wright - Any further questions for Mr. Burnett?
180

181 Mr. Burnett - Thank you.
182

183 Mr. Wright - Does anyone else desire to speak on this case?
184 Please come forward. You need to be sworn in, please.
185

186 Mr. Blankinship - Raise your right hand, please. Do you swear the
187 testimony you're about to give is the truth and nothing but the truth so help you
188 God?
189

190 Mr. Turner - My name is Brad Turner. I'm an adjacent lot owner,
191 Lot 37, the first lot on the right, I guess the closest to Patterson. I really don't
192 know the zoning laws that well. But I always heard when I purchased the
193 property it was 250 feet from the dwelling. While I think it is in the best interest of
194 the homeowners association to pass this, it has that restricted area. There are
195 wetlands back there. They're going to end up being 100 feet from my house. I
196 just didn't understand why they had the ability to go in less than 250. And if they
197 do, then I'm fine. I just wanted to get an expert opinion of why they have that
198 ability.
199

200 Mr. Wright - I don't understand what you're saying. Why they have
201 the ability to do what?
202

203 Mr. Turner - To put gravesites within 250 feet from a dwelling.
204

205 Mr. Wright - That's the law. Our code says they have to be 250
206 feet from the dwelling.
207

208 Mr. Baka - He's asking why it would be less. Why they are able
209 to go less.
210

211 Mr. Blankinship - There was a disagreement over exactly how to
212 interpret that part of the code. It does have a specific provision about existing
213 cemeteries and how you apply that to an existing cemetery that doesn't have
214 existing gravesites within 250 feet of a house, but the cemetery itself exists
215 within 250 feet of the house and that was the point that we've been debating for
216 the last—
217

218 Mr. Turner - And I understand that. I think there are thirty-seven
219 different lots, or whatever, adjacent lots. There is not a grave within 250 feet
220 from my house. There is a grave within 250 feet from John Doe's house down
221 the street. I don't know why it's not on a per-lot basis. If that guy has a gravesite
222 150 feet from his house, I understand where another grave can be put 150 feet
223 from his lot. But my lot, there's not a gravesite anywhere. Like I said, there are
224 wetlands back there. I don't know if a grave is going to come up. There is a gray
225 area that I'm just not sure of that I was hoping you guys could speak to.
226

227 Mr. Blankinship - That's actually the same interpretation that staff had,
228 from each dwelling. If there were no graves within 250 feet when that dwelling
229 was occupied then they can't come within 250 feet. The applicant disagreed with
230 that. Both sides were presented to the Board, so the Board is resolving that issue
231 as well as issuing the revised conditional use permit.
232

233 Mr. Turner - Okay.

234
235 Mr. Blankinship - That's why we're here.

236
237 Mr. Turner - Thank you.

238
239 Mr. Baka - Your lot, sir, is thirty-seven, the first lot as you come
240 in Westhampton Glen Drive?
241

242 Mr. Turner - Yes sir.

243
244 Ms. Harris - Mr. Turner, what is your address?

245
246 Mr. Turner - 1113 Westhampton Glen Drive, Henrico, 23238.
247

248 Ms. Harris - Thank you.

249
250 Mr. Wright - All right, sir. Anything further?

251
252 Mr. Turner - No sir.

253
254 Mr. Wright - All right. We certainly appreciate your interest and
255 coming to let us know your views.
256

257 Mr. Turner - All right. Thank you.

258
259 Mr. Wright - Thank you. Anyone else desire to speak on this
260 matter? All right, Mr. Wilson, you can give us a little rebuttal.
261

262 Mr. Wilson - Thank you, Mr. Chairman. Just to briefly respond to
263 that. Again, what we were doing here, especially with respect to that property

264 owner, we actually—as a result of some of the discussions—pulled the line
265 further back off of his property to address some of those concerns. And really,
266 one of the things that we did in the conditions is there may be less vegetation in
267 that area, so we want to actually have the ability—which we worked out with the
268 homeowners association—to put increased vegetation and buffering in that
269 buffer to provide further protection to the property owner. And again, we will not
270 be able to impact and get into any of those wetlands for burial sites. So that
271 concern clearly will be addressed at the time of development plans and so forth.
272 So we're really pulling back from that owner and have the ability to put even
273 more vegetation in that buffer to protect those issues. Again, we've worked with
274 the neighbors, the homeowners association, to try to develop a comprehensive
275 compromise for everyone. And we're clearly going to address that owner's
276 concerns when we get to the point we're actually going to plant the trees and so
277 forth. We haven't actually been out there to specifically identify where some of
278 the trees should be placed in his buffer area to provide him the maximum buffer
279 possible, but we actually did pull the line even further back from his dwelling
280 because his dwelling was one that was closer to the property line. Most of the
281 others had a little bit greater setback. When it was built, it was closer to the
282 cemetery property line, so we pulled our line further away from his property just
283 to address those concerns.

284
285 Mr. Wright - All right, thank you. Any further questions?

286
287 Mr. Baka - Yes sir, a question. Adjacent to Lot 37, would that line
288 on the edge feature a grave site? The line is marked in yellow on our first plat.
289 And the entire perimeter there. Would it be marked in the ground somehow with
290 small wooden stakes? Would it be labeled so that years from now there is not
291 further unnecessary encroachment into that buffer we're trying to preserve
292 today?

293
294 Mr. Wilson - It's been staked now. That occurred between the last
295 meeting when were here and today. We actually had the surveyor go out and
296 stake that buffer line. And clearly, then, one of the conditions is that we will
297 record a restrictive covenant prior to any development that protects that buffer
298 area from any encroachment, that all the homeowners would then have the
299 benefit to enforce.

300
301 Mr. Baka - And the follow-up. I've been to the site a couple of
302 time, but I haven't been there to see the recent stakes. Will those wooden stakes
303 remain in the ground for years to come so there's some type of line or
304 demarcation of where the limits are?

305
306 Mr. Wilson - Currently they are just wooden stakes to mark it for
307 the survey, but I guess we could pin that so that it would as any property line
308 would be, so that there would always be a method of being able to determine
309 where that buffer line is. Again, we'll do that. We'll have a restrictive covenant

310 that specifically identifies—. The difference between the plat that you saw a
311 month ago and the plat you have before you today is that that buffer line has
312 been specifically surveyed. A meets and bounds description will then put in the
313 restrictive covenant. And what we will do is just pin that with rods as you would
314 do on any other property line, and mark that as the buffer line so it will be there
315 in perpetuity.

316

317 Mr. Baka - Thanks.

318

319 Mr. Wright - Any further questions?

320

321 Ms. Harris - Just a point of clarification. Mr. Turner has property
322 here or does he reside? I don't see any dwelling on our information.

323

324 Mr. Wilson - I believe he resides on Lot 37. That's my
325 understanding. Yes.

326

327 Ms. Harris - But the question was about Lot 34?

328

329 Mr. Wilson - Thirty-seven, I think, is what he owns and where he
330 resides.

331

332 Mr. Wright - Any further questions? Thank you very much. That
333 concludes the case.

334

335 Mr. Wilson - Thank you.

336

337 **[After the conclusion of the public hearings, the Board discussed the case**
338 **and made its decision. This portion of the transcript is included here for**
339 **convenience of reference.]**

340

341 Mr. Wright - Do I hear a motion?

342

343 Mr. Baka - Based on the information we heard, I would move
344 that we recommend approval of the conditional use permit with the five
345 conditions as proposed in the most recent memo because those five conditions
346 changed.

347

348 Mr. Wright - I think the conditions cover everything.

349

350 Mr. Baka - Yes. The most recent revisions cover everything. The
351 only clarification or question I had is that the line of the edge of the graves would
352 be marked. And that apparently will be marked with a wooden stake and/or
353 stops. As long as there is some marking I think that covers it. So my motion is to
354 approve the case with those five conditions as recently revised. I don't have the
355 date of the most recent memo.

356
357 Mr. Blankinship - That's fine.
358
359 Mr. Baka - Okay.
360
361 Mr. Wright - Motion by Mr. Baka. Is there a second.
362
363 Ms. Harris - Second.
364
365 Mr. Wright - Any discussion on this case?
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367 Ms. Harris - I think that both parties need to be commended on
368 working together for such a long period of time.
369
370 Mr. Wright - There was a real effort. I think they've come up with a
371 pretty good solution.
372
373 Ms. Harris - Right.
374
375 Mr. Wright - All in favor say aye. All opposed say no. The ayes
376 have it; the motion passes.

377
378 After an advertised public hearing and on a motion by Mr. Baka, seconded by
379 Ms. Harris, the Board **approved** application **CUP2012-00005, WESTHAMPTON**
380 **MEMORIAL PARK's** request for a conditional use permit pursuant to Section 24-
381 52(h) of the County Code to expand an existing cemetery at 10000 Patterson
382 Avenue (Parcel 744-742-5871) zoned R-1, One-Family Residence District and A-
383 1, Agricultural District (Tuckahoe). The Board approved the conditional use
384 permit subject to the following conditions:

385
386 1. This approval is only for the expansion of new gravesites within the area
387 shown on the plans submitted with this application as modified by these
388 conditions. This approval is not for the expansion of the mausoleum. Any
389 substantial changes or additions to the cemetery shall require a new conditional
390 use permit.

391
392 2. The plat entitled "Westhampton Memorial Park Proposed Cemetery Area
393 Expansion Plan" by Dean E. Hawkins, ASLA, dated October 1, 2012 (the "Plan")
394 attached hereto as Exhibit 1 shall establish the setbacks for burials in
395 accordance with this conditional use permit.

396
397 3. For the distance along the common property line shared by Westhampton
398 Memorial Park and Lots 30-37 of Westhampton Glen subdivision the Developer,
399 Westhampton Memorial Park, shall and within the designated variable width
400 setback area as shown on the Plan provide additional ornamental landscaping.
401 This additional landscaping in the setback and easement area shall consist of

402 270 Nellie R. Stevens holly or equivalent evergreen plants 5-6' high at the time of
403 their planting. The plants shall be evenly spaced in double rows ten feet apart. At
404 the time of planting, the Westhampton Glen Homeowner's Association may alter
405 the location of the plants to maximize the screening. The plantings shall be
406 placed in consideration of existing vegetation and other facilities within the
407 setback and easement area, which shall be left undisturbed in its existing and
408 natural state. Westhampton Memorial Park shall have the right to remove any
409 diseased or dead vegetation within the setback area and shall be required to
410 replace any of the evergreen plants that it plants pursuant to this condition that
411 die.

412
413 4. Prior to any development in accordance with this conditional use permit, the
414 applicant shall record a restrictive covenant confirming these setbacks and
415 landscaping requirements, such covenant to benefit the Westhampton Glen
416 Homeowner's Association (the "HOA") and each of the 37 parcels in the
417 Westhampton Glen subdivision. The applicant shall also include in this covenant
418 comparable restrictions on burials in the area currently used by the applicant for
419 its maintenance area. The restrictive covenant shall be approved as to form by
420 the HOA and the Henrico County Planning Department, such approval to be
421 reasonably provided, prior to recordation of the restrictive covenant.

422
423 5. Prior to any land disturbance, the applicant shall submit a complete erosion
424 and sediment control (ESC) plan prepared by a licensed professional in the
425 Commonwealth of Virginia, qualified to prepare such plans as determined by the
426 Commonwealth of Virginia Department of Professional and Occupational
427 Regulation, to the Henrico County Department of Public Works (DPW) for
428 approval. This plan must include the necessary floodplain information if
429 applicable. Throughout the life of this permit, the applicant shall continuously
430 satisfy DPW that ESC procedures are in accordance with the approved ESC
431 plan and are properly maintained. Due to changes in site conditions, an updated
432 ESC plan and subsequent revised ESC bond may be required as determined by
433 DPW.

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435
436 Affirmative: Baka, Bell, Harris, Nunnally, Wright 5
437 Negative: 0
438 Absent: 0

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440
441 **[At this point, the transcript continues with the public hearing on the next**
442 **case.]**

443
444 **APL2012-00003 PARK 'N GO OF VIRGINIA, LLC** appeals a decision
445 of the director of planning pursuant to Section 24-116(a) of the County Code
446 regarding the property at 5701 Audubon Drive (Parcel 821-716-8025) zoned A-1,

447 Agricultural District, B-3, Business District and M-1, Light Industrial District
448 (Varina).

449

450 Mr. Wright - Will the applicant please come up and be sworn. If
451 there is anyone else who desires to speak to this case, please stand and we'll all
452 be sworn at one time.

453

454 Mr. Blankinship - Please raise your right hand. Do you swear the
455 testimony you're about to give is the truth and nothing but the truth so help you
456 God?

457

458 Mr. Wright - All right, sir. Please state your name for the record
459 and present your case.

460

461 Mr. Shewmake - Yes, Mr. Chairman. My name is William Shewmake.
462 I'm an attorney with LeClair/Ryan. I represent the applicant in this appeal.

463

464 Mr. Wright - All right, sir.

465

466 Mr. Shewmake - I'll be brief because I think that the staff and the
467 applicant are in agreement now on the major issue that lead to the appeal.
468 Essentially what happened was when the Notice of Violation was issued, it was
469 issued on a previous plan of development that had different language.
470 Essentially what's going on is Park 'N Go is a commercial development; it's been
471 developed in phases where customers park, and then they are transported to the
472 airport. This is phase three. If you see on this property, this is the phase where
473 they're doing the third section of the development of the site. And I don't believe
474 there is an issue that in the first two phases Williamsburg Road was the
475 construction entrance where the construction trucks would come in while
476 developing the site. There are neighbors over here. Someone complained that
477 construction vehicles were still coming out on this part of the road, Williamsburg
478 Road. Essentially it was being shut down to customers. And since the
479 construction vehicles were here, their independent contractor with the owner of
480 the property, obviously the contractor did not want to take all the trucks and stuff
481 through all the vehicles that are being stored there and parked there while folks
482 are using the airport and traveling. So he was continuing to use the road out to
483 Williamsburg Road as both the quickest route and the one with the least
484 interference to what was going on at the site itself.

485

486 The Notice of Violation was issued on I believe a 1999 POD. In that language,
487 the Notice of Violation read that only Park 'N Go vans could use the entrance.
488 That was a major issue for our client, because in the subsequent POD it clearly
489 states that roadway is intended for both vans and customers. And so we couldn't
490 allow the Notice of Violation to stand because then the customers couldn't use
491 the entrance.

492

493 In talking with Mr. Hart and looking at the staff report, I believe there's an
494 agreement that there was an error, that an out-of-date POD was cited, that the
495 County does agree that customers can use that entrance, as well as the vans.
496 We would ask the Board of Zoning Appeals to make it clear in their ruling that
497 both vans and customers can use that as a one-way entrance. That was the
498 major issue that led to the appeal. As I said, I think we've resolved that issue with
499 the County.

500
501 The remaining issue is whether construction vehicles are allowed to use this
502 roadway out to Williamsburg Road. As best as I can tell, the staff concedes in
503 the first two phases they could, but that somehow in this third phase closest to
504 the road, even though it is currently being shut down to customers, that the
505 construction vehicles can't come out to Williamsburg Road; they have to go
506 through all these vehicles and out to Audubon Drive. They're relying upon the
507 language of the plan itself.

508
509 We have Mr. Brian Mitchell, who was the engineer for Park 'N Go, here to
510 explain the intent of this language, which is labeled "Intended Roadway Use." If
511 you read the language, I think it's clear—and Mr. Mitchell can expand upon
512 this—that this was designed to be a permanent condition. When the business
513 was operating and customers were using the road, what was the flow of traffic
514 going to be in and out, that it was going to be one way for the customers, that
515 they couldn't exit. And that's why it says, "Will be used by Airport America vans
516 and customers as an entrance only." It doesn't say no one can use it. It's not
517 anticipating you're going to impact when you're just constructing the property. It's
518 just when it is being used by the customers and the company for commercial
519 purposes, what is the flow of traffic. So that's why it is saying, "used by Airport
520 America vans and customers." It's not applying and it doesn't even reference the
521 construction vehicles. Our point is for purposes of construction it makes perfect
522 sense that this road, which was used to build the rest of this site, should continue
523 to be allowed to be used for the construction vehicles. This notation does not
524 impact that. It was not intended to impact the construction vehicles. As long as
525 we're closing off this road and not letting customers come in while the
526 construction is ongoing—and obviously while this is ongoing this whole area is
527 shut down.

528
529 That's a relatively minor point, we think. For the safety of the cars that are on our
530 site it makes sense. I would note that it's almost moot at the point. When we got
531 the notice, my client gave notice to the contractor, who's independent of the
532 actual owner of the property, of this dispute. And I believe that they've been
533 going out to Audubon Road after receiving the Notice of Violation. But we believe
534 that it's clear that this notation is not designed to apply to constructing the site
535 itself; it's only for the permanent use and how the customers and the employees
536 of Park N Go when they're to and from the airport, how they're supposed to
537 travel and use it. So we would respectfully submit that that is an incorrect
538 interpretation that this somehow applies to construction.

539

540 On a couple of technical matters on the Notice of Violation, we would ask that it
541 be reversed because, as the staff admits, they cited the wrong POD. So what's
542 before you is whether we have violated the 1999 POD. From a legal standpoint,
543 from a construction standpoint, if that's the issue, staff is in agreement there was
544 a 2010 plan that was submitted and approved. So we could not be in violation of
545 the 1999 plan that was cited.

546

547 And finally, the construction company is independent of Park 'N Go. They're an
548 independent contractor. They are not saying that the use of this property by Park
549 'N Go is a violation of zoning; they're saying this is somehow a violation of the
550 POD itself. I would respectfully submit that Park 'N Go should not be held legally
551 responsible if someone who is an independent contractor happens to be going
552 down a road they shouldn't be using. I don't think that's a zoning violation as it
553 relates to Park 'N Go. That's a smaller point. The construction company is not an
554 employee of Park 'N Go, the owner and the operator of the site.

555

556 Mr. Wright - The construction company has no relationship with
557 the County, does it?

558

559 Mr. Shewmake - No, but I think if that's an issue the staff, they can be
560 alerted that this is a problem. We notified them this was the County's concern.

561

562 Mr. Wright - Didn't Park 'N Go employ this construction company?

563

564 Mr. Shewmake - They entered into a contract with them. But legally
565 they're independent contractors. We can't control—Park 'N Go cannot control
566 the employee—legally we have no right to go to the employees of the
567 construction company, and direct and tell them what to do. That's the difference
568 between an employee and an agent, and being an independent contractor.
569 That's a minor point when we're talking about whether it's a violation of zoning.
570 From a legal perspective I'm simply raising that issue. That's not the major point
571 I'm making; it's just that you're always concerned on behalf of the owner when
572 you have someone that you cannot legally control and you're being cited for a
573 violation, that's a concern.

574

575 Mr. Wright - When you enter into a contract, you can tell them how
576 to access the property, can't you? Don't you have that in your agreement, your
577 contract?

578

579 Mr. Shewmake - That's what I'm saying. We have approached them
580 and told them that. The issue is whether it's a zoning violation on behalf of Park
581 'N Go or whether some other action would have to be taken. I don't want to
582 spend a lot of time on that because I think the other issues are of more
583 importance to us. I just want to alert to you that these are not employees who are
584 doing this.

585
586 Mr. Wright - How much longer do you suppose it will take to
587 complete what you're doing there?
588
589 Mr. Shewmake - At this point, Mr. Chairman, I think we're going to be
590 done probably within the week.
591
592 Mr. Wright - Within a week?
593
594 Mr. Shewmake - I would say within a week. That's my understanding.
595
596 Mr. Wright - I'm a little confused because our information indicates
597 that you're in violation of the plan of development 063-99.
598
599 Mr. Shewmake - If you look at the staff report, they admit that the plan
600 of development was revised in 2010 and the note was changed to the following.
601 So the staff is in agreement that they cited the wrong plan of development.
602
603 Mr. Wright - Well, we're hear from the County on that.
604
605 Mr. Baka - One question about that. To go back to your earlier
606 point, if your general concern is that the intent of this condition is addressing
607 permanent access onto Williamsburg Road and not necessarily addressing the
608 temporary access that you have, then why not seek to change the POD condition
609 rather than come seek an appeal from this Board?
610
611 Mr. Shewmake - The problem is we were issued a Notice of Violation.
612 So you have to address that. If we do a subsequent phase on this, quite frankly
613 when we come in with our site plan and all that we'll probably do that to clarify it.
614
615 Mr. Baka - Thanks.
616
617 Ms. Harris - Question, Mr. Shewmake. When this construction
618 process ends, are we taking the liberty to say we will see no more dump trucks
619 exiting from that?
620
621 Mr. Shewmake - The Notice of Violation dealt only with construction
622 vehicles. So when this ends, those construction vehicles are no longer there.
623 You'll have the vans and the customers going in one way on that site. It's clearly
624 marked. It's gated and so forth.
625
626 Ms. Harris - So you're saying that they're not going to be there
627 after this period ends?
628
629 Mr. Shewmake - For this phase, once it's done, it's done, yes ma'am.
630

631 Ms. Harris - When you say that they were independent
632 contractors, I didn't know if they would take the liberty to continue to exit from
633 your property.
634

635 Mr. Shewmake - No. There is normally a gate. And it's my
636 understanding that what's happened is all of this has been shut down to the
637 general operation of customers coming in. So folks are coming in and out of
638 Audubon Drive. So once they're completed, they're off site and their contract
639 ends. Those dump trucks and stuff will no longer be there.
640

641 Mr. Wright - All right. Any further questions for Mr. Shewmake?
642 Anyone else to speak in favor of this application? Mr. Shewmake, do you have
643 anyone else that wants to speak?
644

645 Mr. Shewmake - I have Mr. Mitchell who is the engineer that drafted
646 this language that's contained in the plan addition.
647

648 Mr. Wright - He was sworn. All right, sir. Please state your name
649 for the record.
650

651 Mr. Mitchell - Hi, I'm Brian Mitchell with Townes Site Engineering.
652 I'm the engineer of record on the approved plan of development. Brian Mitchell.
653 B-r-i-a-n. And then Mitchell—M-i-t-c-h-e-l-l. I was also the project engineer of the
654 original 1999 plan of development. I wrote the notes on both of those plans.
655

656 I guess when Mr. Shewmake called me and asked me to come speak on this, I
657 think the only point that I have to make is that we did write the note based on a
658 permanent condition for what the permanent condition would be. On the
659 approved plan of development, we actually do show a construction access point
660 at Williamsburg Road. And it was intended for construction access to use
661 Williamsburg Road. That's really the point that I have. Any questions?
662

663 Mr. Wright - Any questions?
664

665 Ms. Harris - Do you have any more plans for construction?
666

667 Mr. Mitchell - For that site?
668

669 Ms. Harris - Yes.
670

671 Mr. Mitchell - I'll tell you that currently in Phase 2 and Phase 3, the
672 area that's cleared is what is being constructed now. The only area available that
673 they have is the wooded area close to Williamsburg Road. And there isn't any
674 intent to do that anytime soon. It took them about eleven years to where they
675 were fully leased on Phase 1, which contained about 700 parking spaces. Phase
676 2 adds about maybe 400 spaces. That's a good probably three, maybe four

677 years of inventory I would say. I guess it really depends on the airport. The
678 wooded area, I think that only adds another maybe 100 parking spaces. But no,
679 to my knowledge, no time soon.

680

681 Mr. Wright - Mr. Blankinship, what does the POD authorize them
682 to do?

683

684 Mr. Mitchell - It only authorized Phase 2 and Phase 3. It doesn't
685 authorize a Phase 4.

686

687 Mr. Wright - So they have to come back to the Planning
688 Commission.

689

690 Mr. Blankinship - That's correct.

691

692 Mr. Wright - So they can't do anything more. Any other questions?
693 All right, sir, thank you. Anyone else to speak on behalf of the applicant?

694

695 Mr. Hart - Yes sir. Members of the Board, my name is Jason
696 Hart. That's H-a-r-t. I'm the assistant County Attorney for the County of Henrico.
697 I'm here to speak on behalf of the Director of Planning.

698

699 Mr. Wright - Wait a minute, hold on. I was asking does anybody
700 want to speak in favor.

701

702 Mr. Hart - I'm sorry, sir.

703

704 Mr. Wright - Does that conclude all the people? That's fine. All
705 right, sir. Evidently there was no one else to speak in favor.

706

707 Mr. Hart - I'm representing the Director of Planning in Park 'N
708 Go of Virginia's appeal of the Notice of Violation that was issued July 16, 2012.
709 The Notice of Violation at issue here alleges violation of the intended roadway
710 use language, which is found on pages C-3, C-6, and C-8 of POD-63-99, which
711 relates to Phase 2 and Phase 3 construction of the Airport America parking
712 facility on Audubon Drive. The language at issue, as mentioned before, requires
713 that the Williamsburg Road entrance to the Airport America parking facility be
714 used only by Airport America vans and customers, and only be used as an
715 entrance, not an exit. Review of the POD makes it clear the appellant violated
716 the POD by allowing construction trucks to exit the Airport America facility
717 through the Williamsburg Road entrance.

718

719 Mr. Shewmake mentioned earlier—and he said it was a small point—that there
720 were independent contractors who were working the construction. The County's
721 position is that they were still under the ultimate control of Park 'N Go, and Park

722 'N Go is therefore responsible for any violations committed while they were
723 under contract with the independent contractor.

724

725 In Phase 2 of the development, the appellant constructed a road connecting
726 Williamsburg Road to the parking facility. If you look here on the site plan page
727 C-3, this is the road right here where my cursor is moving that was under
728 construction during Phase 2. Right here is the Williamsburg Road entrance
729 which is at issue here.

730

731 The POD contained language regarding the intended use of this road right here,
732 as well as this entrance. Pursuant to the intended roadway use language, the
733 Williamsburg Road entrance was to be used only by Airport America vans and
734 customers as an entrance. The language went on to specify that traffic entering
735 from Williamsburg Road was to continue through and exit via the Audubon Drive
736 entrance. Thus after the completion of the road at the close of Phase 2, the
737 Williamsburg Road entrance could only be used as an entrance by Airport
738 America vans and customers.

739

740 Mr. Shewmake is correct that while it was under construction during Phase 2, the
741 Williamsburg Road entrance was permitted to be used as a construction
742 entrance. As you'll see, this use is indicated on the Phase 2 construction plans,
743 which says the Williamsburg Road entrance as construction entrance too. It's
744 noted CE2 on page C-6 of the Phase 2 construction plans. So if we look on page
745 C-6 here. It's somewhat hard to see; it might be easier if you look down on your
746 monitors, but it's CE2 as indicated right here. So it's actually indicated as a
747 construction entrance on Phase 2 of the plan. So Mr. Shewmake is correct in
748 that regard, that it was permitted to be used as a construction entrance during
749 Phase 2.

750

751 However, Phase 2 of the project was completed in late 2011. At this point, the
752 intended roadway use language, because the road was completed, prohibited
753 use of the Williamsburg Road entrance as anything other than an entry for
754 Airport America vans and customers. It could not be used as a construction
755 entrance or exit during Phase 3 or any other portion of the construction.

756

757 A review of the Phase 3 construction plans, which are found on pages C-8 and
758 C-9, further support this conclusion, as the Williamsburg Road entrance is no
759 longer marked as a construction entrance on the Phase 3 plans. The Phase 3
760 plans are the ones that are controlling as Phase 3 is now underway. If you look
761 here on the Phase 3 plans, you'll see that CE2 is no longer indicated right here
762 for the Williamsburg Road entrance. Therefore, on Phase 3 the Williamsburg
763 Road entrance is not intended to be used as a construction entrance or exit. And
764 if we look here on page C-9 of the plans, you can see right here—it's marked
765 CE3, which is the construction entrance three for Phase 3 of the construction.
766 And this lot right here is a lot constructed during Phase 1 on the construction.
767 And here is a lot that's under construction during Phase 3. So if we go back up to

768 the aerial, here is Phase 3. Here is the lot that was constructed during Phase 1.
769 The construction entrance for Phase 3 is right here. So the only entrance shown
770 on the plans for Phase 3 is right here. They are not permitted to enter or exit
771 construction vehicles right here during Phase 3.

772

773 Had the Williamsburg Road entrance been intended to be used as second
774 construction entrance during Phase 3, the entrance would have been denoted as
775 a construction entrance on the Phase 3 portion of the plan. While the director of
776 planning is sympathetic to the traffic concerns faced by the appellant during
777 Phase 3—as Mr. Shewmake said, they don't want to have to navigate the
778 construction vehicles through those cars—the appellant's suggested
779 interpretation would require the Board to disregard the intended roadway use
780 language on the plan. Additionally, and perhaps more importantly, the appellant's
781 interpretation requires the Board to disregard the Phase 3 construction plans,
782 which clearly indicate that the only construction entrance is right here between
783 the two parking lots. There is no construction entrance right here on the Phase 3
784 portion of the plans.

785

786 Accordingly, the Director of Planning respectfully requests that you deny this
787 appeal. And I would just take a second to speak to a couple of other points made
788 by Mr. Shewmake. As I said previously, he mentioned that there was an
789 independent contractor who was actually doing the construction on this. And it's
790 our position that Park N Go as the one doing the contracting for that independent
791 contractor is ultimately responsible for that contractor's compliance with the POD
792 and all other County regulations. Additionally, it's the County's position that
793 although we agree that the original Notice of Violation did incorrectly cite the
794 earlier 1999 plan, as is mentioned in the staff report, the amended plan also
795 contains this language which limits the use of the Williamsburg Road entrance
796 for Airport America vans and customers only, and is only to be used as an
797 entrance, not an exit. So under either version of the plan, the use of that
798 entrance by construction vehicles during Phase 3 was in violation of the POD. So
799 that technical error, in our opinion, is not fatal to the Notice of Violation.

800

801 And finally, Mr. Shewmake does mention that Phase 3 will be finished within the
802 week. I would point out that there is a Phase 4, which has not been scheduled
803 yet. And I believe that they will have to go through the planning process. But
804 there is a Phase 4. So this issue might not be completely resolved within the
805 week if Phase 4 moves forward on a timely basis.

806

807 Mr. Wright - Let me ask you a question, Mr. Hart.

808

809 Mr. Hart - Yes sir.

810

811 Mr. Wright - I think Mr. Shewmake testified that they have notified
812 the construction vehicles not to use that exit anymore and they are not using it.
813 That's what his testimony was.

814
815 Mr. Hart - Yes sir, I believe that's correct.
816
817 Mr. Wright - What does all this mean now? If we deny the appeal,
818 what's the effect of it?
819
820 Mr. Hart - If we deny the appeal, the Notice of Violation stands,
821 which essentially means that on the date that the violation was cited, which I
822 believe is July 16, 2012, they were in violation on that date. The fact that they
823 have since remedied it does not remedy that initial violation on that date.
824
825 Mr. Wright - I understand that, but would be the next step?
826
827 Mr. Hart - The next step is that the notice would be enforced as
828 it is in any other instance.
829
830 Mr. Wright - Since they have ceased violating, would there still be
831 action taken against them?
832
833 Mr. Hart - I don't know that further action would be taken if they
834 are no longer violating, but the fact that they have ceased their violation does not
835 remedy the initial violation.
836
837 Mr. Wright - I understand that. But I'm just saying what is the
838 practical effect of this? That's what I'm trying to say.
839
840 Mr. Hart - To be honest, sir, if they have ceased violating then
841 the County is not going to take any further action to go against them. We're not
842 going to need an injunction to stop them if they're ceased the violation.
843
844 Mr. Wright - We're tilting at windmills here now.
845
846 Mr. Blankinship - If I can address that, Mr. Chairman. Let's say there's
847 a violation tomorrow. If we have to go out and notify them again tomorrow, we
848 could go out there and serve a summons. We could say you've been under
849 notice, you know this is a violation. You told us that you knew it was a violation
850 and you corrected it, and we're going to court now. Whereas if this Notice of
851 Violation were overturned by the Board, we would have to begin all over again if
852 a new violation occurred.
853
854 Mr. Wright - I see. Okay. All right. Any questions of Mr. Hart by
855 members of the Board?
856
857 Ms. Harris - Mr. Hart, the POD was approved for these huge
858 construction trucks to weave their way through cars for construction purposes?
859

860 Mr. Hart - Yes ma'am. I'm not sure how much weaving there is,
861 but that is correct. The POD was approved for the only construction entrance for
862 Phase 3 to be right here. So they would take those large construction vehicles
863 through this parking lot. Whether that was a wise plan to make is not the issue
864 here; that was the plan that was made. And our position is that if they don't want
865 to have to, like you said, weave those trucks through this lot, then the proper
866 route is to amend the POD. The proper route is not to seek and appeal of it.

867
868 Ms. Harris - What's the fine for violation?

869
870 Mr. Hart - If I could defer that to Mr. Blankinship to answer that
871 question.

872
873 Mr. Blankinship - I actually don't have it right in front of me. Any fine
874 would be determined by a judge, so it's impossible for us to give you a specific
875 amount.

876
877 Mr. Wright - This says not less than \$10, no more than \$100.

878
879 Ms. Harris - That's what I thought. I just wondered how money
880 were we dealing with here.

881
882 Mr. Blankinship - And not more than \$250 if the offense was deemed
883 willful.

884
885 Mr. Hart - Like Mr. Blankinship explained previously to Mr.
886 Wright, as he said, the big issue here is we put them on notice. And if this Board
887 does overturn that notice, then we'll have to start all over if they continue to
888 violate.

889
890 Mr. Wright - All right. Thank you. Any other questions?

891
892 Mr. Baka - Just one question. You mentioned the construction
893 entrance for Phase 2 was shown adjacent to Williamsburg Road, and the
894 construction entrance for Phase 3 was not shown there; it was shown up at the
895 edge of the existing parking lot and the construction. Can you explain again or
896 elaborate why the technical error in the Notice of Violation is not necessarily fatal
897 if we don't reference a violation of the constructions plans?

898
899 Mr. Hart - I'm sorry, could you rephrase that?

900
901 Mr. Baka - I was trying to ask if you could elaborate a little
902 further. You mentioned that there was a technical error that would not be fatal if
903 you didn't have certain language in the Notice of Violation about a lack of
904 referencing that there was no construction entrance on Williamsburg Road.

905

906 Mr. Hart - I should have spoken more clearly. What I was
907 referencing was Mr. Shewmake's reference to the error with the intended
908 roadway use language of citing the language from the earlier POD and not the
909 current POD in effect. And I was saying that that error itself was not fatal.

910

911 Mr. Baka - Okay. By referencing 1999 and not referencing the
912 2010 plan, you're saying it's not fatal.

913

914 Mr. Hart - Correct.

915

916 Mr. Baka - Could you elaborate why that is so?

917

918 Mr. Hart - They are in violation of both the 1999 and the 2010
919 plan. As well as the fact that when they received the staff report over a month
920 ago, they had notice that this was what we were asserting was their violation,
921 they were in violation of the 2000 [sic] plan, which had the properly intended
922 roadway use language on it.

923

924 Mr. Baka - Okay, thanks.

925

926 Mr. Nunnally - When you checked that out, how many entrances did
927 you see on Williamsburg Road going back into this property?

928

929 Mr. Hart - I'm sorry?

930

931 Mr. Nunnally - How many entrances from Williamsburg Road goes
932 back into this property?

933

934 Mr. Hart - The only entrance I believe from Williamsburg Road
935 into this property is this one right here, which was previously denoted a
936 construction entrance, too, on the Phase 2 portion of the plans.

937

938 Mr. Nunnally - I know I went down there the other day. I went down
939 this road and right at the middle part of it, it said do not enter, use Audubon
940 Drive. I just wondered why they had that sign up there.

941

942 Mr. Hart - I think as Mr. Shewmake mentioned earlier, this
943 entrance has been shut down for customer and airport traffic, and is currently
944 shut down pending the duration of Phase 3. But I'm not familiar personally with
945 whether it's shut down or not.

946

947 Mr. Wright - Any further questions for Mr. Hart? Thank you very
948 much. Does the County have any other person to speak against this application?
949 That concludes the County's argument? Okay. Mr. Shewmake?

950

951 Mr. Shewmake - Thank you, Mr. Chairman. A few points. First, it is
952 very important to the extent that when this is ruled upon or in any way affirmed,
953 that any ruling make it clear that customers—it's a permanent condition that both
954 vans and customers can use it. If you don't make that clear, suddenly we've lost
955 the legal right for customers when it's opened to use it.

956
957 Mr. Wright - Well that's clear. That's already stated. That's not
958 even before us.

959
960 Mr. Shewmake - Well it is before you because the Notice of Violation
961 as is currently reads, if you were just to affirm, even though we're in agreement,
962 it would technically say—if you affirm it in whole—that customers can't use it. So
963 at best, it should be affirmed in part, reversed in part. I don't think there's a
964 disagreement on that issue. Everybody's in agreement and the County concedes
965 that the language that they cited—they're saying that's the operative language.
966 That's what the Notice of Violation says. It needs to be reversed because it is
967 conceded that language is not operative. So the allegation in the Notice of
968 Violation that we are bound by that 1999 language needs to be reversed
969 because are not. There is a subsequent POD that's in effect. So that's the
970 reason why the Notice of Violation should simply be reversed in toto because
971 they're saying we're bound by a document that we're not bound. Now I think this
972 is moot, whatever you rule hopefully will go away. But technically this is
973 important. I mean legally.

974
975 Mr. Wright - I understand what you're saying. But I don't think that
976 was the intent of that.

977
978 Mr. Blankinship - Right.

979
980 Mr. Wright - But that could be corrected.

981
982 Mr. Shewmake - That is a major point. And that is one reason why if
983 you just reverse it, because they are saying this is the operative language. So it
984 should be reversed.

985
986 The other thing that I would note is that they're changing the language. Even if
987 you were to look at the 2010 language, they did not cite the construction permits
988 as their basis. They made a technical mistake. I think everybody's in agreement
989 that it makes perfect sense to shut down that road and use it as a construction
990 entrance. It makes no sense that you would use that road for the first two
991 phases, but then be required to go through all the parked cars. And as I think you
992 indicated, when you went down and looked it's been shut.

993
994 So our position is we can't use it for other traffic so long as it's being used
995 permanently for our vans and customers. By closing it down to our vans and the
996 customers, we believe the temporary condition that allows us to use that road

997 generally then is resurrected as long as the vans and the customers aren't going
998 in and out of that road.

999

1000 And if you look at the language itself, what Mr. Hart was trying to suggest that the
1001 intended—and this is almost verbatim what he said. He's changing the location
1002 of the adverb *only*. I mean, he indicated that the intended roadway use is saying
1003 Williamsburg Road entrance will be—*only* be used by Airport America vans and
1004 customers as an entrance. No. The *only* is after. What that is clearly indicating if
1005 it says, "Williamsburg Road entrance will be used by Airport America vans and
1006 customer as an entrance *only*." This is not dealing at all with the construction
1007 traffic or anything other than what the Airport America vans and the customers
1008 are going to do. So even if you looked at the 2010 language that they cite,
1009 they're trying to say that this condition somehow has an impact on construction
1010 traffic, even under the 2010 plan. That's not what this language is dealing with;
1011 this language only deals with what the vans and the customers are going to do.

1012

1013 They further revised their argument standing up today and said well it's not even
1014 this language that is controlling the situation. It's actually if you look at a previous
1015 construction plan that talked about a construction entrance, that isn't on Phase 3,
1016 so there's other language that would have prescribed us being able to do it, not
1017 necessarily this language.

1018

1019 The final point I would make is essentially what I heard the County attorney say
1020 is it makes eminent sense, they have sympathy for our plight. It would have
1021 made perfect sense on Phase 3 to shut this down and allow the construction
1022 vehicles to go in and out like they did in the first two phases. But technically there
1023 was a drafting error, or whatever, on Phase 3, and therefore it's a violation. I
1024 think everybody can see on Phase 4, if that ever comes up years from now,
1025 obviously one of the conditions that's going to be on there is to fix that drafting
1026 error and say shut down the entrance off Williamsburg Road to regular customer
1027 traffic and have that be the construction entrance.

1028

1029 But my point is if they're going to say technically you're not following the
1030 construction plans, and we have to abide by the technicalities, then I think what's
1031 fair for the goose is fair for the gander. If they're going to charge us with a Notice
1032 of Violation as they submitted it, then those technicalities as they described it are
1033 equally important. And what are they? One, they have cited the wrong plans, so
1034 we cannot possibly be in violation of that. And in addition, they did not cite us for
1035 violating the construction plans as opposed to the POD itself.

1036

1037 So for those reasons I think this case should simply be reversed. It's a fine, but
1038 it's also a misdemeanor. So no company wants to have a misdemeanor on its
1039 record. Like I said, we've tried to be a good neighbor, and when we got notice
1040 it's my understanding that—my client indicated they gave instructions to the
1041 contractor. But we think that this should simply be reversed because it was

1042 issued in error. And obviously if Phase 4 ever comes forward, we are going to be
1043 very hypersensitive to do exactly what the construction plans would say.

1044

1045 Those would be my remarks. I'll be glad to answer any questions.

1046

1047 Mr. Bell - When operating under the intended roadway use
1048 plan, the first one—and you referenced several times about trucks going in and
1049 out for construction and there were not any problems. In your opinion and
1050 opinion only, if that was there at that time, and the trucks were going back and
1051 forth, and a citation POD was listed for violation of it, what's the difference
1052 between that and what's been said here?

1053

1054 Mr. Shewmake - I think even under the old language, clearly they
1055 would—I think they would concede at the time that this language is designed for
1056 the permanent use, that when customers are actually using this entrance this is
1057 the way they're supposed to come in. And they're not supposed to exit. So under
1058 the POD, even the County admits that construction traffic could be going in and
1059 out of that lane. So it would not be a violation under that old language because
1060 that old language only applied to Phase 1. There's no disagreement the
1061 construction traffic used that going in and out at the time. Again, that highlights
1062 my point of this language of intended roadway use was not designed to be
1063 addressing construction traffic and what the construction traffic would be. That's
1064 permanent. You're going to mark your roads, show your arrows one way, have
1065 your gates up for what the customers are going to do. So the problem is the
1066 language simply doesn't apply to the situation that they issued the Notice of
1067 Violation on.

1068

1069 Ms. Harris - Mr. Shewmake.

1070

1071 Mr. Shewmake - Yes ma'am.

1072

1073 Ms. Harris - Maybe the language does not apply, as you said, to
1074 this situation. But your POD did indicate for let's say Phase 2 where the
1075 construction would take place, exists, and entrances, and so forth. So I don't
1076 understand why you're saying—in other words, you're not going exactly by your
1077 POD, right?

1078

1079 Mr. Shewmake - Well, in terms of the construction plan, like I said, that
1080 wasn't part of the Notice of Violation. I admit I'm not as prepared to address that
1081 specific issue. But I think the intent when you look at it, is there is no zoning
1082 violation for using it. The issue would be if I kept it open to the public, then I think
1083 that might be a violation, because I can't have traffic coming in and construction
1084 vehicles going out. But if what we're doing—we've indicted that's been closed
1085 off. We believe that the temporary condition kind of resurrects itself. Now should
1086 the language be clearer on the POD? Absolutely. I can concede it should be
1087 clearer. If they come forward with a Phase 4, will we want to make sure that's

1088 clearer? Absolutely. But our issue is given the Notice of Violation, which doesn't
1089 even address that part of the POD, they can't use that issue to justify the current
1090 Notice of Violation, which doesn't even mention that construction entrance.

1091

1092 Mr. Wright - Any further questions?

1093

1094 Mr. Baka - Just one. If there was no construction entrance shown
1095 on Phase 3 of the construction plans, then why wasn't a big objection raised at
1096 that time prior to its approval?

1097

1098 Mr. Shewmake - I'm sorry. I didn't follow you, Mr. Baka.

1099

1100 Mr. Baka - On Phase 2 there was a construction entrance shown
1101 on Williamsburg Road. But on Phase 3 there was not a construction entrance
1102 shown at the intersection of Williamsburg Road. So since that was removed from
1103 the plan, why wasn't there an objection to that prior to construction plan approval
1104 at the time if you're not complying with that?

1105

1106 Mr. Shewmake - I think the road exists. Do I think it should have been
1107 on there? Yes, I agree. I think that should have been on there to clarify that you
1108 could use it for the construction vehicles. If they go forward with Phase 4, would I
1109 expect that to be there? Yes. Just because it isn't there doesn't mean that it's a
1110 zoning violation for the truck to use it when it's being shut to customer and van
1111 traffic.

1112

1113 Mr. Baka - But you would agree that it would be a construction
1114 plan violation.

1115

1116 Mr. Shewmake - Well, I would defer to Mr. Mitchell. I think that we
1117 would want to have the plans—I don't think it's a violation of the POD which we
1118 were charged. But I do believe that it should be better worded. I'll have Mr.
1119 Mitchell address it. I think what you do is—and the intent of the drafter was you
1120 won't have construction traffic coming in and out if it's being opened to the
1121 general public. If it's not open to the public, then the construction vehicles can
1122 use that.

1123

1124 Mr. Mitchell - I think your question is on Phase 3 why isn't there a
1125 construction entrance pointed towards Williamsburg Road. Would that be
1126 another way of rephrasing what you're asking?

1127

1128 Mr. Baka - The construction entrance was there on an earlier
1129 plan.

1130

1131 Mr. Mitchell - That's right.

1132

1133 Mr. Baka - It was removed on this plan.

1134
1135 Mr. Mitchell - Well—
1136
1137 Mr. Baka - And now we know it's not there and not able to use it.
1138 And we're saying oh, well, we also decide that we should be able to use it. But
1139 it's not on the construction plan.
1140
1141 Mr. Mitchell - I understand. I'll speak to that. The approved POD is
1142 actually for Phase 2 and Phase 3. You can see it on the title of it, Phase 2 and
1143 Phase 3, Phase 2 being the access drive from Williamsburg Road to connect to
1144 Phase 1, as which point there was a construction entrance shown both at the
1145 connection to Phase 1, as well as the connection to Williamsburg Road. So
1146 those were the two construction entrances that were shown with that access
1147 drive. The intent was we would move immediately—as part of the Phase 2
1148 construction process—into Phase 3. And really, the Phase 3 construction
1149 entrance that is shown, which I have the mouse over here, it was really intended
1150 to be nothing more than a relocation of this construction entrance that's pointing
1151 towards Williamsburg Road in Phase 2. The thought was that we would finish
1152 these projects and move concurrently through them; that wasn't the case. We
1153 built this access drive and paved it, and now we're moving into Phase 3. That
1154 was how that worked out as far as the construction plans go and those access
1155 points.
1156
1157 Mr. Baka - The time to complete Phase 3 is approximately one
1158 more week?
1159
1160 Mr. Shewmake - It's my understanding they've almost concluded the
1161 construction of Phase 3.
1162
1163 Mr. Wright - Okay. Any further questions? That concludes the
1164 case. Thank you very much for appearing.
1165
1166 **[After the conclusion of the public hearings, the Board discussed the case**
1167 **and made its decision. This portion of the transcript is included here for**
1168 **convenience of reference.]**
1169
1170 Mr. Wright - Do I hear a motion on this case?
1171
1172 Mr. Nunnally - I move that we deny the appeal.
1173
1174 Mr. Wright - Motion by Mr. Nunnally that we deny the appeal by
1175 Park N Go.
1176
1177 Mr. Blankinship - There was some concern expressed by the appellant
1178 that at least it should be clear in the motion that the 2010 plan is currently
1179 controlling, not the 1999.

1180
1181 Mr. Wright - I think he has a point there. Don't you?
1182
1183 Mr. Blankinship - Yes.
1184
1185 Mr. Wright - The notice referred to the old 1999 one and not the
1186 current one. It said that he couldn't have any more than just the vans. It didn't
1187 say customer's cars.
1188
1189 Mr. Blankinship - Right.
1190
1191 Mr. Wright - Well how can we attend to that?
1192
1193 Mr. Blankinship - I guess perhaps the motion should be to reverse in
1194 part and affirm in part, reversing only that clerical error and affirming the rest of
1195 the Director of Planning's decision.
1196
1197 Mr. Wright - Could you do that Mr. Nunnally?
1198
1199 Mr. Nunnally - Yes.
1200
1201 Mr. Wright - You want to reverse in part, that is to correct the
1202 clerical error with respect to the POD.
1203
1204 Mr. Baka - The date of the POD.
1205
1206 Mr. Wright - And you deny the other part of the application.
1207
1208 Mr. Nunnally - Right.
1209
1210 Mr. Wright - That is concerning the trucks. That's what the real
1211 issue is.
1212
1213 Mr. Blankinship - Right, yes.
1214
1215 Mr. Wright - Everybody understand that motion? Is there a
1216 second?
1217
1218 Ms. Harris - Yes, I second.
1219
1220 Mr. Wright - Any further discussion? Hearing none, all in favor say
1221 aye. All opposed say no. The ayes have it; the motion passes.
1222
1223 After an advertised public hearing and on a motion by Mr. Nunnally seconded by
1224 Ms. Harris, the Board **affirmed in part and reversed in part** application
1225 **APL2012-00003, PARK 'N GO OF VIRGINIA LLC's** appeal of a decision of the

1226 director of planning pursuant to Section 24-116(a) of the County Code regarding
1227 the property at 5701 Audubon Drive (Parcel 821-716-8025) zoned A-1,
1228 Agricultural District, B-3, Business District and M-1, Light Industrial District
1229 (Varina). The Board concluded that the specific language of the notice of
1230 violation was no longer operative, plan of development POD-063-99 having been
1231 superseded by administrative plan POD-063-99 ADM-II. However, because the
1232 use of the roadway as an exit for construction vehicles constitutes a violation of
1233 both the original POD and the revisions thereto, the notice of violation itself was
1234 affirmed.

1235
1236

1237	Affirmative:	Baka, Bell, Harris, Nunnally, Wright	5
1238	Negative:		0
1239	Absent:		0

1240
1241

1242 **[At this point, the transcript continues with the public hearing on the next**
1243 **case.]**

1244
1245

1246 **APL2012-00004** **LOLITA EPPS** appeals a decision of the director of
1247 planning pursuant to Section 24-116(a) of the County Code regarding the
1248 property at 1296 Concord Avenue (HUNGARY BROOK) (Parcel 783-757-5816)
1249 zoned B-3, Business District (Fairfield).

1250
1251

1251 Mr. Wright - All persons desiring to testify in this case please
1252 stand so that you can be sworn.

1253
1254

1254 Mr. Blankinship - Would you all raise your right hands, please? Do you
1255 swear the testimony you're about to give is the truth, the whole truth and nothing
1256 but the truth so help you God?

1257
1258

1258 Mr. Wright - Thank you. All right, Mr. Condlin, if you'll proceed.

1259
1260

1260 Mr. Condlin - Mr. Chairman, members of the Board, my name is
1261 Andrew Condlin from Williams Mullen. I have with me Preston Lloyd and Jennifer
1262 Mullen, also from my firm, representing Mr. and Mrs. Epps with their family, who
1263 own Family Life Services, providing adult day school services, and through their
1264 local food unit in question, prevocational training.

1265
1266

1266 First, I'd like to say it's finally nice to be here; it's been three months since we
1267 first appeared and six months, really, since the first violation. I'm going to
1268 referencing—and this is a little bit of a complicated case on certain issues. I'm
1269 going to be referencing my memo that I originally filed with the original zoning
1270 violation, which I believe every member should have. I have extra copies if
1271 needed. As well as my letter of 9/17, which was part of your package, as well as

1272 the County attorney's letter. Zoning Violation #2 is also part of the package. Mr.
1273 Blankinship, it dawned on me, I don't think the County policy was part of their
1274 package. Is that correct?

1275
1276 Mr. Blankinship - That's correct.

1277
1278 Mr. Condlin - I also have copies of the B-3 ordinance, I don't know
1279 if members of the Board need a copy of the B-3 ordinance if and when we come
1280 to that point. If we need to reference it I certainly can—I'm sure you have access
1281 to it otherwise.

1282
1283 I think most of all the facts that we need to discuss are set forth in those
1284 documents that I'm referencing. Mr. and Mrs. Epps want to run a mobile food
1285 unit outside their existing facility in the Hungary Brook Shopping Center. It's easy
1286 to get access to, and really, the mobile food unit acts as an accessory to Family
1287 Life Services as it's described in the memo as how they use it for a training
1288 facility. I'm not going to go over the details of that because I assume you read
1289 that in the memo. I'm going to cover the basic facts as I see them as appropriate.

1290
1291 First, Hungary Brook Shopping Center is zoned B-3 (Unconditional). In zoning
1292 terms, B-3 is the highest retail zoning you can achieve in Henrico County. You
1293 can do just about anything that you need to from a retail standpoint in business.
1294 Any B-1 and B-2 use—automobile, truck, tires, part sales, fortune teller, and rifle
1295 and pistol ranges are allowed in B-3, as are regional shopping centers like Short
1296 Pump Town Center, and adult businesses. All are allowed in B-3. But apparently
1297 mobile food units are not.

1298
1299 The Eppses started this process in 2010. In 2010, they went to the County, and
1300 asked for permission and what they needed to go through in order to open up a
1301 mobile food unit. They worked on it for about eighteen months before getting me
1302 involved earlier in the spring with zoning violation number one. They've been at it
1303 for more than two years in total. They've been trying to follow the rules. They've
1304 done their homework and taken the steps that were asked of them each and
1305 every time, as they understood it. There was not, as the County Attorney
1306 insinuates in his letter, a disregard for the steps necessary to comply with the
1307 law.

1308
1309 I'm going to tell you right off the bat this is an entirely confusing area. I've been
1310 practicing in land use law for twenty years. It took me weeks to figure out exactly
1311 what went on. And I'm going to say that I think there are only a few people in
1312 Henrico County that truly understood the rules as they applied at the time. I'm
1313 going to address first the thirty minutes. I'm going to be referencing the business license
1314 number one.

1315
1316 Every mobile food unit operator that has any experience in Henrico County—I
1317 talked to fifteen of them; I counted them. I talked to fifteen. Every single one of

1318 them said, "You can't operate in Henrico County if you stay more than thirty
1319 minutes." Every single one of them. I talked to Mr. Campbell from the Virginia
1320 Department of Health who told me the exact same thing. I talked to Greg
1321 Garrison. I talked to a number of people in the Planning Office. I'll reference
1322 business license number one, which is at Tab #12. Actually, it says on the
1323 business license you can't stay more than thirty minutes. Absolutely 100 percent
1324 wrong. There's no rule like that. Yet that's the rule that the County follows. That's
1325 the rule they tell everyone. I am going to tell you the rules as I understand them.

1326

1327 Here are the rules from the Health Department. You're either a restaurant or a
1328 mobile food unit. Those are your only two choices. When you say I want to open
1329 up a restaurant, they say well you can be restaurant. You have to be in a bricks
1330 and mortar restaurant. You have to be in a building. You have to have public
1331 water and sewer. This is not a zoning ordinance; this is a Health Department
1332 rule.

1333

1334 The mobile food unit, though, if you want to operate a mobile food unit it's
1335 absolutely 100 percent permitted by the Health Department. You just have to get
1336 a commissary. You have to have a commissary, which is a physical place in
1337 which you can store, have food, clean your mobile food unit, and you have to get
1338 a permit from the Virginia Department of Health. Once you do those things then
1339 you're fine to go ahead and open a mobile food unit, according to the Health
1340 Department.

1341

1342 Then we go to the Revenue Department. If you want to open up a business in
1343 Henrico County in any case, you're one of three things. You're either a peddler,
1344 an itinerant merchant, or a retail merchant/restaurant. If you're a peddler, that
1345 means if you stay in one spot thirty minutes or less you're deemed a peddler.
1346 That's all it means; nothing more than that. If you want to stay more than thirty
1347 minutes you're welcome. Please stay more than thirty minutes, but we're going to
1348 all you an itinerant merchant. And then finally, if you stay more than a year then
1349 you're either a retail merchant or a restaurant. That's it. These are tax rules;
1350 nothing more than that. All it is, is it's a definition to be able to know how much
1351 you tax. Henrico County collects taxes as a peddler at a tax rate of X, \$200 a
1352 year. For an itinerant merchant it's a different tax. It doesn't say you can't stay
1353 more than thirty minutes; it's just a different tax. And then finally if you're a retail
1354 merchant it's yet a third tax. The longer you stay the more possibility that you
1355 have to pay more. That's all it is. It's not a use restriction; it's just a matter of
1356 categorizing. Based on how long you stay determines how much tax you pay.
1357 You can sell the exact same thing, but you pay a different tax.

1358

1359 And then finally we go over to the Planning Department. What can you be if you
1360 sell food? I probably should have listed one other thing, and I apologize for that.
1361 You can be either a restaurant or you can be accessory to a special event. You
1362 have a temporary event. I like it when Mr. Blankinship nods his head yes; he
1363 knows the code a lot better. So you can do one of the two things. I should have

1364 listed that second thing on there. Those are your only choices. There is nothing
1365 in between. You're either part of a special event, which means you're only
1366 temporary and you have to get out of there as soon as the special even is over.
1367 Or you're a brick-and-mortar restaurant.

1368
1369 Those are the rules that we're following. There's nowhere in Henrico County
1370 code that says you can stay no more than thirty minutes. It bothers me that at
1371 least fifteen people I talked to that had that general rule, and at least five people
1372 within Henrico County understand that rule and were telling everyone, including
1373 that which is on the business license.

1374
1375 So the Eppses went to Mr. Campbell and the Health Department. They went
1376 there first and said we want to open up a mobile food unit. And he said great.
1377 What you need to do is need to have a commissary. And wherever the
1378 commissary is you need to have a business license. You need to go to the
1379 Virginia Department of Health and get a permit. Once you do that—and he told
1380 me the exact same thing. Mr. Campbell has been very gracious with his time. It's
1381 taken me a long time to understand; he's been very patient with me. He said
1382 once you get that it'll be honored in every jurisdiction. That permit. You don't
1383 have to go and get another permit in every other jurisdiction. I unfortunately took
1384 that to mean—and so did the Eppses—that they didn't need a business license.
1385 If you look in my book under Tabs 5 and 6, they went and they got their Virginia
1386 Department of Health permit. They got it. Under Tab 5. Tab 6? Their commissary
1387 is located in the city of Richmond. They went and got their business license in
1388 the city of Richmond to operate. What that typically means if you have a mobile
1389 food truck and you did like the Eppses did, that means you can go to the city of
1390 Richmond. But when you go to the county of Henrico, you do need a business
1391 license. When he said it's honored in Henrico, I took that it meant that we didn't
1392 need to get a business license. Certainly the Eppses did the same thing.

1393
1394 So the Eppses went through, got this, and spent \$90,000 to design the mobile
1395 food unit specifically not only to quality for all the necessary items for the Virginia
1396 Department of Health, but also for the use for their clients as food vocational
1397 training. It's outside if you want to see it at any time. We wanted to make sure it
1398 was available if anybody wanted to take a look at it.

1399
1400 When they notified Mr. Campbell that they had all the required items, he said
1401 that's great; welcome to Henrico County. Don't forget to get your business
1402 license. They said, "Well, I thought it was going to be honored." They were
1403 incorrect. I was incorrect as well in my understanding. Mr. Campbell in looking at
1404 further said he was correct. But Mr. Campbell told me, "Oh, by the way, even if
1405 you get your business license you're limited to thirty minutes." Well, that's
1406 actually not true. So we applied for a business license. And I really want to go
1407 through the business license, which is Item #12 on the tab in my handout.

1408

1409 The business license that they applied for, they checked the box. There are two
1410 boxes you can check. You check peddler or you can check itinerant merchant.
1411 They checked itinerant merchant. They wanted to stay for more than thirty
1412 minutes. Well somehow when it got approved, it was approved—by the way this
1413 business was approved. They walked out the door with this business license
1414 ready to do business. And under it said, “You’re a peddler.” They didn’t change
1415 that; the County changed that. The person that approved it said, “Oh, you can’t
1416 be an itinerant merchant; you have to be a peddler.” Actually, if you take a look
1417 at page two of this business license they wrote—again, the same handwriting of
1418 the person from the County that approved it wrote on there “peddler”. They
1419 wouldn’t let them be an itinerant merchant. But guess what? They took the
1420 money as a taxation to be an itinerant merchant. And they said you’re approved.
1421 Oh, and by the way, not only are you approved, but you can only be located in B-
1422 3 districts. And you can only stay thirty minutes. Two points to that.

1423
1424 It actually says they’re allowed to operate only in B-3. Which is kind of contrary to
1425 both zoning violations number one and number two, as I’ll describe. They also
1426 said you’re only limited to thirty minutes. Completely arbitrary and capricious
1427 condition. The Eppses then called me. They asked me. I looked through it. I took
1428 a number of calls. I tried to figure this out. There is no limitation. I said you’ve got
1429 your business license, you can move forward.

1430
1431 As we were trying to figure all this out, Mr. Blankinship was kind enough to get as
1432 many people from the County together. And that’s when Mr. Trice from the
1433 Revenue Department finally clarified what everybody was trying to figure out. He
1434 said, “You can be a mobile food unit all you want.” And we do. We qualified for
1435 this. And Mr. Campbell, we got an e-mail that says you got everything you need
1436 to be a mobile food unit. If you’re going to stay more than thirty minutes you’re an
1437 itinerant merchant; you’re good to go. And I said well that’s funny. We applied as
1438 an itinerant merchant. He said well then you’re an itinerant merchant. And I said
1439 well what do we owe you? And he goes we already paid the fee necessary to be
1440 an itinerant merchant. We already taxed you and you already paid it. So you’re
1441 good to go.

1442
1443 And so then we had to cross the barrier for the Planning Department, who took a
1444 look at this and said, “I don’t think you’re allowed in the County.” And I say that
1445 because if you took look at zoning violation number two, which is consistent with
1446 the information we’ve received from the County, which is that you’re not allowed
1447 in B-3. If you’re not allowed in B-3, you’re certainly not allowed in B-2 or B-1. B-3
1448 is the highest zoning. I would propose—and I think the County would say it—
1449 mobile food units are not permitted in Henrico County, unless you look at their
1450 policy—and I apologize that you have not received the policy beforehand. If I had
1451 known that I would have sent it to you earlier.

1452
1453 There are a couple of things in here, but I really am only going to turn to the last
1454 page. Obviously you can take the time to look at this more, and we’ll refer to it a

1455 couple of other different times. But on the last page there is a paragraph that I've
1456 marked, the second to last paragraph. And then right above there is really the
1457 description of how mobile food units are permitted in Henrico. It says, "A difficulty
1458 arises when the owner of a mobile food unit wants to operate in Henrico County
1459 on a regular basis. One solution is permanently attach the mobile food unit to a
1460 building and convert it to a restaurant. I'd like to think about that for a second.
1461 One solution to allowing a mobile food unit is to permanently attach it to a
1462 restaurant. Well then it's no longer a mobile food unit; then it's a building.

1463

1464 The second way to bring a mobile food unit into Henrico County is in connection
1465 with an approved event, and apply for a temporary food service permit and a
1466 peddler's license. Again, contrary to the Revenue Department. There's nothing in
1467 between. I'm not quite certain how the ice cream truck goes around and sells
1468 stuff. Maybe because they only stay less than thirty minutes. But they don't have
1469 a special event license, and they're not attached to a restaurant. I'm going to
1470 pointing out and arguing per the code that we are actually allowed per a number
1471 of provisions within the code.

1472

1473 But I found it interesting. If you look at this policy—and I talked to Mr. Emerson,
1474 the Director of Planning, when I was complaining about the first business license
1475 being issued and then receiving three weeks later the zoning violation. His
1476 answer to me was, "Well the business license was issued contrary to the written
1477 policy." I said oh, so it's a written policy; can I have a copy of that; the answer
1478 was no. You're not allowed to get a copy of that. I asked for a copy, and then
1479 finally I did ask for it again in writing. And I just received it prior to the last
1480 hearing. But this was actually issued two weeks after the business license. Our
1481 business license was issued April 2nd; this policy was issued April 16th. And then
1482 the violation was done a week after that. The very business license that said we
1483 could operate in B-3 so long as we don't stay any more than thirty minutes.
1484 Again, the thirty-minute rule, nowhere to be found in the code. So let's take a
1485 look at zoning violation number one, which is Tab #13.

1486

1487 I'm going to assume that this no longer applies since the County withdrew it. It
1488 says that you all are a restaurant, and as a restaurant you need to do the
1489 following. And I went through great pains in writing a ten-page memo with twenty
1490 exhibits to explain why this doesn't apply to use, and that we comply otherwise.
1491 We comply with the Health Department. They say you have to have public water
1492 and sewer. Interesting. The code says you don't have to have public water and
1493 sewer if you're approved as a mobile food unit. But you have to have one
1494 according to the Planning Department because that's the only way you qualify as
1495 a restaurant. Yet they'll approve it and collect taxes for it, but not allow you to
1496 use it.

1497

1498 I'm going to assume that the County said, you know, you're actually probably
1499 right. And it's a little frustrating—and I think you can sense my frustration when I
1500 appeared in July—that the Eppses came forward and they took this very

1501 seriously. And I actually took a little bit of offense at the County Attorney's
1502 reference to say that this zoning violation number one was a courtesy. I
1503 appreciate the prior conversation because I know exactly what it says at the very
1504 bottom of this. Not only does it talk about fines, it talks about misdemeanors. I
1505 take them very serious, and I don't consider them a courtesy. Matter of fact, my
1506 client takes them very seriously, did not consider it a courtesy, and hired me to
1507 write this memo in response to that. And all of sudden oops, sorry. We finally
1508 read your memo and we actually took a look at your zoning violation. And by the
1509 way, I guess you're probably right. We're going to withdraw that zoning violation.
1510 Two days before the hearing. Two days before the hearing, and issue a brand
1511 new one that we think is better.

1512
1513 I have to say that of all the things that I've seen, certainly this was relevant to the
1514 Epps when the County Attorney talks about having only relevant items. It
1515 certainly was relevant to the Epps that they were approved, and they got a
1516 business license that said they could operate in B-3, and had an arbitrary and
1517 capricious condition that says no more than thirty minutes. I hate to say it, but I
1518 don't think the County knew what they were doing at the time that they wrote the
1519 business license and at the time that they gave zoning violation number one.
1520 And only four months later—April to July. Three months; excuse me. Three
1521 months later did they finally realize oh well, I guess our zoning violation number
1522 one was incorrect. We'll go ahead and try that again. We'll throw something up
1523 against the wall and see if that one sticks.

1524
1525 In twenty years of practice—I mean, I live in Henrico County. I practice in a lot of
1526 jurisdictions. I hold up Henrico County as a standard bearer, and I know a lot of
1527 people do. And I do that sincerely. But you know sometimes...sometimes they
1528 get it wrong. And I'm here to tell you right today—and I'm going to go through in
1529 detail the code arguments to say why they got it wrong. The question is
1530 ultimately, is this permitted in B-3. I'm going to go ahead and argue that, in fact,
1531 yes, of course it is permitted in B-3. I have an outline for you of our argument just
1532 so you can follow along as we go through.

1533
1534 The first thing I'll reference is the zoning violation number two says mobile food
1535 units are not permitted in B-3, period. Under any circumstances, no conditions,
1536 not allowed in B-3. I don't care what you do, not allowed. Period. Is that so?
1537 Really? Well let's talk about accessory use. Our mobile food unit is permitted.
1538 Well, yes they are at special events. I'm going to argue—and of course I've
1539 already referenced the fact that this is accessory to the day school that they
1540 already provide. It's providing training. And training for a trade. Typically for
1541 restaurant businesses for this type of client, they're only allowed for washing
1542 dishes. We're trying to provide some greater service, and they're going to speak
1543 to that in a little bit. Which brings me to the second point, for school for industrial
1544 training or trade. That's a permitted use under B-3.

1545

1546 And then as referenced in the policy there's a question of temporary outdoor
1547 sales lots and stands for retail sales of a temporary nature. The policy goes
1548 through there. And I'm going to have to establish a little bit of a basis as to why
1549 that applies to us as well, if the other arguments don't work.

1550
1551 Well let's turn first to restaurant use. And I could stop there, but I think we have a
1552 number of arguments for restaurant use. Under B-3 it says restaurants of any
1553 kind. Any kind. Restaurants of any kind. Let's go ahead and take a look at the
1554 definition of restaurants; I agree with the County Attorney. Restaurant is any
1555 building where food edibles or beverages are prepared for consumption only
1556 within the building. Take a look at drive-in. Any building intended for the sale of
1557 food for any consumption outside the building. And then restaurant takeout. Any
1558 building intended for the sale of food for any consumption off the premises. I
1559 completely agree with the County Attorney.

1560
1561 Let's take a look at the word *building*. The one thing he doesn't mention is
1562 generally the word *building* includes the words *use* and *structure*. That's in the
1563 code under 24-3. Not quite sure how to read that other than to say when you say
1564 the word *building*, can you also substitute the word *use*. Any use intended,
1565 designed or use for the sale of food for any consumption outside of the building
1566 on the premises. Is that what we're talking about, potentially? I certainly think
1567 that's allowed, and it's in the code. But let's take a look at the word *building*. Any
1568 structure having a roof supported by columns or walls, used or intended to be
1569 used for the shelter, housing, or enclosing persons, animals or chattels, including
1570 tents and house trailers. Okay. These are defined as buildings. So as the County
1571 Attorney says, it's fair enough. But how is a tent a building but a mobile food unit
1572 is not? How is a house trailer a building, but this is not. The Board of Supervisors
1573 says a tent can be, and a house trailer can be, as examples of buildings. But
1574 let's be fair and keep looking at what the word *structure* is.

1575
1576 *Structure* is defined as anything constructed by an assembly of materials which
1577 requires a fixed location or an attachment to something having a fixed location
1578 on the ground. Fair enough. I am assuming that under the term for tent, that in
1579 fact a tent has to have a tie-down. Or has to have a post for a house trailer to
1580 attach to. I guess the question I'm asking is the zoning violation says you're not
1581 allowed to have a mobile food unit under any circumstances. The Eppses are
1582 perfectly willing to, so why can't they put a post and attach it so it's a trailer? Why
1583 can't they attach it permanently in the ground and allow for it at that use? Why
1584 can't they tie it down just like a tent? If a tent can be a building, certainly a mobile
1585 food unit can be a building. If a house trailer can be a building, certainly a mobile
1586 food unit can be a building.

1587
1588 I don't think that the zoning violation is written correctly. This is the second time
1589 you've heard this proposal, that the zoning violations, they are technical
1590 documents. We are supposed to reply to them and comply with them. Certainly
1591 zoning violation number one was thrown out the window because that one didn't

1592 seem to stick right. So let's try it again. Zoning violation number two, no mobile
1593 food units in B-3. As a matter of fact, I can have a mobile food unit. I can
1594 permanently attach it to a post in the ground. I can use tie-downs and tie it down.
1595 And I'm perfectly willing to do that. Just like a tent, just like a house trailer. Now I
1596 become a structure. As a structure I become a building. As a building selling
1597 food, I become a restaurant. It's as simple as that. There is no reason I can't be
1598 at this point. We were never given a chance to. We were never able to comply
1599 with that. We were given the zoning violation. If you want to go ahead and
1600 enforce the zoning violation, we'll then go out and try it again. We'll put a post in
1601 the ground and be cited again. We obviously don't want to be held in contempt.
1602 We don't want to be held as a misdemeanor. I think that's a different issue. I
1603 think this Board [unintelligible] to the fact that says if you do the following—tie it
1604 down, attach it to something permanent in the ground. And certainly we would be
1605 able to comply, and that's the interpretation you can make.

1606
1607 So my argument so far is that it's allowed in B-3 because it's accessory. A school
1608 for a trade, a temporary outdoor sales, which I'll come back to in a second, and
1609 restaurant with a post or tie-down just like a tent or a house trailer.

1610
1611 If you flip to the second page, though, I want to talk a little bit about Item 24-
1612 62.1(ee). It generally reads that other retail service and recreational uses which
1613 are the same general character as those listed above as permitted uses. I think
1614 you're probably going to be surprised that I disagree with the County Attorney
1615 once again.

1616
1617 In my opinion, there are three ways you can have a principally permitted use in
1618 B-3 in Henrico County. The first way is one of the enumerated uses listed above.
1619 Rifle range, it could be an adult business. Those are permitted. The second way
1620 is the first sentence of (ee), which says other retail, service, and recreational
1621 uses, which are the same general character as those listed above. The third way
1622 is the second sentence, which is such additional uses may be permitted by the
1623 director of planning pursuant to Section 24-109 of this chapter, provided that
1624 they shall be only retail and service establishments primarily selling new
1625 merchandise and/or rendering a personal service.

1626
1627 What we're looking at here is the County Attorney tried to merge these two
1628 sentences together. They're absolutely 100 percent distinct from each other. B-3
1629 permits those additional uses that are otherwise of the same general character.
1630 Other retail, service, and recreation of the same general character. When you
1631 look at these two sentences, first let's look at number one. It says retail service
1632 and recreational uses. The second sentence only references retail and service.
1633 The second sentence references such additional uses. It's added to the first
1634 sentence. You have other retail of the same general character, and then
1635 secondly such additional uses as approved by the director of planning. Under the
1636 first sentence I don't need the director of planning's permission. I'm absolutely
1637 100 percent in my right to have uses that are of the same general character as

1638 those listed above. I don't need to go to the director of planning to get
1639 permission. Under the second sentence I do. But that doesn't apply to us. We
1640 understand that doesn't apply to us. The second sentence has to do with retail
1641 and service. It doesn't list recreation. Since we don't sell retail new merchandise,
1642 we don't provide a personal service, it doesn't apply to us. But the first sentence
1643 does.

1644
1645 The Board of Supervisors could have, if it truly intended, merged the two
1646 sentences together if it really wanted this to happen by stating other retail,
1647 service, and recreational uses that are of the general character as those listed
1648 above, and are approved by the director of planning, and sell new merchandise
1649 and/or provide a personal service. It did not. The Board of Supervisors chose to
1650 split those two sentences up. We qualify under the second sentence. If we're not
1651 a restaurant, then our argument is that we certainly are of the same general
1652 character.

1653
1654 Under the policy that was provided to you and in reference to the County
1655 Attorney's letter, the County is taking a very strict interpretation looking at the
1656 term *other retail, service, and recreational uses*. They're saying you're a
1657 restaurant; you're not a retail and service use. You're not an outdoor sales lot for
1658 sale of retail purposes because you're a restaurant. Selling food is different than
1659 retail sales. That's interesting, because when you look at the definition of retail
1660 and service uses under B-3, it's not there. So how do you do a legislative
1661 interpretation? You look at other parts of the code.

1662
1663 Does the Board of Supervisors—do the drafters of the code anywhere else
1664 define retail and service? In fact, yes they do. Let's take look at O-2, which I
1665 provided on page three. O-2 provides as permitted uses retail and service
1666 facilities. Retail and service facilities may include, but not be limited to such uses
1667 as lunchroom or restaurant. The Board of Supervisors says under O-2 that
1668 restaurants and lunchrooms are permitted as retail and service uses.

1669
1670 Flip the page. Take a look at O-3. It says the exact same—well, not the exact
1671 same thing; it expands it a little bit more. Retail and service facilities may include,
1672 but not be limited to, restaurants, cocktail lounges, cafeterias, retail stores and
1673 stores for the selling of food and beverage. Same thing with O/S and O/S-2. O/S
1674 actually says retail and service uses, including but not limited to—now they've
1675 added dining rooms, restaurants, and cocktail lounges. If you take a look at
1676 O/S-2, it simply references retail. It says included but not limited to such uses as
1677 restaurant, cocktail lounges, cafeterias, retail stores for food and beverage.

1678
1679 All those have been defined by the Board of Supervisors to say that retail sales
1680 include the sale of food and beverages, and restaurants.

1681
1682 But another way you can a look at an interpretation is to say other than other
1683 parts of the code within the B-3 District has there been any interpretation. Sure.

1684 Take a look at Business 1, 2, 3, definition of shopping centers. And I have that
1685 on the very last page, page six of my handout. The definition of shopping centers
1686 under B-1. It's a neighborhood center consisting of a coordinated group of two or
1687 more indoor retail and service establishments. B-2 talked about community
1688 shopping centers. It's a coordinated group of two or more retail and service
1689 establishments. And finally B-3 is a coordinated group of retail and service
1690 establishments of forty acres or more.

1691

1692 I don't think I have to, but I'm certainly willing to provide to you evidence that
1693 Henrico County currently allows restaurants and food sales within shopping
1694 centers even though they're not listed as retail and service. The County Planning
1695 staff interprets retail and service to include restaurants when it comes to
1696 shopping centers. But they're not interpreting it when it comes to retail and
1697 service under code (ee).

1698

1699 And then we can just simply go to the plain meaning. If it looks, sounds, smells,
1700 functions, and tastes like a restaurant, but technically it's not going to be deemed
1701 a restaurant under the County Attorney's argument, isn't it of the same general
1702 character? And really what we're talking about here is for all intents and
1703 purposes it is a restaurant. It just happens to be on wheels. We can put it on a
1704 post; we can tie it down. We can be a structure, therefore a building, therefore a
1705 restaurant. Or we can actually stand alone and function in B-3 because it's of the
1706 same general character.

1707

1708 The code is apparently so clear and simple, according to the County Attorney's
1709 letter, that the Eppses have disregarded the clear steps from the courtesy zoning
1710 violation that was issued, zoning violation number one, which is Tab 13. Despite
1711 the facts that the words *retail* and *service* elsewhere list restaurant and food
1712 service as one of its uses. Despite the fact that the words *retail* and *service* are
1713 used in shopping centers to include, by the Planning office's very own
1714 interpretations, restaurants and sale of food. Despite the fact that the Health
1715 Department approves mobile food units, and the Revenue Department collects
1716 money and taxes people for the use of mobile food units. Despite the fact that
1717 the Eppses applied for an itinerant merchant, yet were forced to be a peddler,
1718 despite the fact that there is no thirty-minute limitation in the code. Yet every
1719 person I have talked to at the County, other than Mr. Trice, has referenced that.
1720 Despite the fact that it's so clear that it takes a policy no one else is allowed to
1721 see to clarify exactly what is permitted based on arbitrary and capricious
1722 reasoning. Despite that zoning violation number one calls this a restaurant.
1723 Zoning violation number one said you're a restaurant. And, by the way, business
1724 license number one said you're only allowed to operate in B-3, yet we're
1725 supposed to know that zoning violation number one is not a restaurant, but it's
1726 really just a courtesy to let us know what we need to be a restaurant.

1727

1728 This is simply a restaurant on wheels. It's of the same general character. It can
1729 be made a structure to be a building to be a restaurant. We can technically meet

1730 that definition. We can also meet the definition of accessory. We can also meet
1731 the definition of training for a trade. And I think we can also meet the definition of
1732 outdoor sales.

1733
1734 I propose to you that either it's a building, as I've described it can be made a
1735 building and therefore is permitted. Does not have to have public water and
1736 sewer. Can go ahead and be a peddler. And we can be a building. Or if we can't
1737 be a building, if we're not a building, aren't we outdoor sales? I've already
1738 established that retail sales include food sales and restaurants. So either we're in
1739 a building or we are outdoors. If we're a building, we're a restaurant. If we're not
1740 a building, why aren't we allowed under temporary outdoor sales so we can then
1741 go ahead, pull up, sell for the day, and then leave? That to me is a temporary
1742 outdoor sales lot.

1743
1744 I've covered a lot. I tried to be as quick as possible. But there's a lot to this case.
1745 There's a lot more than what you see; we just scratched the surface. The
1746 Eppses have come forward in good faith, and I do not like the insinuation that
1747 they have not followed the rules. They have tried to follow the rules all along the
1748 way, and the rules keep changing. Operate only in B-3. Oops, sorry, operate as
1749 a restaurant, you're a restaurant and therefore—oh, no, you're not a restaurant.
1750 We're going to withdraw that zoning violation. Oh no, you're not allowed to
1751 operate in B-3. These things are not fair to a citizen trying to comply with the law.
1752 The rules have been misapplied by the government, and they've used arbitrary
1753 and capricious limitations like the thirty-minute rule.

1754
1755 This is and can be an accessory use. This is and can be training for a food trade.
1756 This is and can be outdoor sales. It is and can be a structure, and therefore a
1757 building, and therefore a restaurant. Under (ee) the question is, is it of the same
1758 general character. I would propose to you that it's absolutely 100 percent the
1759 same general character. If it's not a restaurant, it looks it, tastes it, sounds it,
1760 functions just like a restaurant. That's how it operates. These folks just want to
1761 do good by their clients. They just want to run a small family-run business and
1762 train folks at their restaurant; it's what they do.

1763
1764 I would ask you to strike zoning violation number two to say that no mobile food
1765 units are permitted in B-3 to actually say mobile food units are permitted in B-3. If
1766 you're a structure by permanently attaching it to a post or tying it down just like a
1767 tent or a house trailer, or this is permitted as an outdoor sales, accessory, or as a
1768 training facility.

1769
1770 With that I'll be happy to answer any questions.

1771
1772 Mr. Wright - Do any members of the Board have any questions?

1773
1774 Ms. Harris - Oh yes. You mentioned that there is no code that
1775 deals with the thirty minutes. But we have cases whereby applicants have to deal

1776 with several groups of rules—the Police Department’s rules, the Fire
1777 Department’s rules, the code. The coordination of said departments or said
1778 coordination of rules I don’t see as a valid argument when—anyone who does
1779 business in Henrico has to deal with a group of rules.

1780

1781 Mr. Condlin - I agree completely. The issue here is there is no
1782 limitation to thirty minutes at one place anywhere. Even in the Revenue
1783 Department, where the only place it’s mentioned. When business license
1784 number one was issued it had a condition that said you can only stay no more
1785 than thirty minutes. If you’re at thirty-one minutes—I asked Mr. Trice, I said how
1786 is that enforced. He said by the police. You’ll be charged with a misdemeanor.
1787 And I said well what if we wanted to be an itinerant merchant. He said that’s fine;
1788 just go ahead and pay the tax. I said I already have. He said yes you have. The
1789 County changed me to peddler and said you can’t be more than thirty minutes.
1790 I’m like well no, I can be. Mr. Trice admitted to that. Mr. Hart was in the meeting
1791 with me when I met with Mr. Trice. The Health Department has approved this as
1792 a mobile food unit. The Revenue Department has approved this as an itinerate
1793 merchant saying you can stay more than thirty minutes. It’s the Planning Office
1794 that’s pulling in other rules and defining them differently—or the Permit Center,
1795 which I think is an arm of the Planning Department. So we are complying, and
1796 they have tried to comply. Admittedly we misunderstood. We thought that
1797 everything was going to be honored. Once you got the commissary business
1798 license and you got the VDH license, we thought that would be honored and that
1799 we didn’t need a business license. If you do business in Henrico, you need to
1800 have a business license. So we went and got one.

1801

1802 Ms. Harris - In your summation the itinerate merchant is the best
1803 way to characterize this particular mobile unit.

1804

1805 Mr. Condlin - Yes ma’am.

1806

1807 Ms. Harris - Okay. Second question. Our code 24-6 specifically
1808 states that the operation of a mobile food service unit is not a permitted use.
1809 How do you get around that?

1810

1811 Mr. Condlin - I’m sorry. I don’t think it says anywhere in the code
1812 that it’s not listed as a permitted use.

1813

1814 Ms. Harris - There are quotation marks here. I’m reading from this
1815 letter.

1816

1817 Mr. Condlin - Is this the zoning violation letter?

1818

1819 Ms. Harris - Yes. It’s from Williams Mullen. It’s a letter in our
1820 packet.

1821

1822 Mr. Blankinship - What's the date? The September 17th letter?
1823
1824 Ms. Harris - Yes.
1825
1826 Mr. Blankinship - And which paragraph are you in?
1827
1828 Ms. Harris - The end of paragraph one. Or we could turn to the
1829 code, 24-6.
1830
1831 Mr. Condlin - I was quoting the violation, zoning violation two. The
1832 very end of paragraph one. I'm quoting the violation which says operation of a
1833 mobile food service unit is not a permitted use in the B-3 District.
1834
1835 Mr. Wright - That's the violation, not the code.
1836
1837 Ms. Harris - That's not the code?
1838
1839 Mr. Condlin - No ma'am.
1840
1841 Mr. Blankinship - 24-6 says that unless a use is listed it's not permitted.
1842
1843 Mr. Condlin - Fair enough. Mr. Blankinship raises a good point.
1844
1845 Mr. Wright - I can read 24-6 if you want; I have it right here.
1846
1847 Ms. Harris - I have it. No, please don't. Please don't.
1848
1849 Mr. Condlin - Let me ask you this. It happens all the time in Henrico
1850 County. I'll take drive-thrus as an example. And there is not way I'm going to get
1851 in debate with Mr. O'Kelly and Mr. Blankinship about the code because they'll
1852 clean my clock all day long. But drive-thrus are not listed in B-2 for pharmacies.
1853 Yet they are certainly permitted. There are instances where the marketplace
1854 says certain uses. Here's an example, minor as it may be. Drive-thrus for
1855 pharmacies. Who would have thought of that ten years ago? Now you don't open
1856 a pharmacy without a drive-thru. Not specifically listed. And I've also argue it is
1857 specifically enumerated as restaurants. We can be a restaurant, as I've argued.
1858 And it's also permitted under (ee) as the same general character. Principally
1859 permitted.
1860
1861 Ms. Harris - Question number three. Why not put this in the
1862 shopping center as a restaurant? Why not? I know money has been spent—you
1863 said \$90,000. I know money has been spent. Keep that as a mobile unit, and
1864 then actually—I live four minutes from this location. And certainly I would
1865 frequent a Momma's Kitchen if it were in the restaurant. And I understand the
1866 benefits. And I'm sure we hear a lot about the training benefits, and I do believe
1867 in training. I understand the enormous benefits that come from training

1868 employees. But I wonder why not put it in the center. In addition to that you could
1869 still have a mobile unit going around like the ice cream truck. That's my question.
1870
1871 Mr. Condlin - Two parts to that answer. If you know a Dominic's
1872 outside Lowe's, Dominic's chose to not have a mobile food unit, and created a
1873 foundation, attached to public water and sewer, and amended the POD for the
1874 Lowe's. I think I covered it.
1875
1876 Mr. Blankinship - Yes.
1877
1878 Mr. Condlin - That's how those work. They don't want to do that.
1879 That's a \$100,000 cost to go ahead and connect to public water and sewer. And
1880 once it's on a foundation and part of a building—
1881
1882 Ms. Harris - That's not my question.
1883
1884 Mr. Condlin - Well, no, you asked why didn't they want to become
1885 part of the center.
1886
1887 Ms. Harris - They have vacancies probably in their mall. There are
1888 vacancies in that mall all the time.
1889
1890 Mr. Condlin - Okay. So now they want to be able to operate a
1891 mobile food unit, which is permitted by the Health Department and taxes are
1892 collected. They want to be able to go in the city of Richmond, for example, at the
1893 History Museum and at different locations. They go to RIR. They want to be able
1894 to operate a mobile food unit at different locations, pick up My Momma's Kitchen,
1895 and be able to tow it, and park it at special events, and want to be able to
1896 operate in a B-3 District, which has no conditions, which is a principally permitted
1897 use. They have the right to do that.
1898
1899 Ms. Harris - I think you're getting it, but I want to just pinpoint what
1900 I need. Okay. I have nothing against Momma's Kitchen being a mobile unit,
1901 going around wherever.
1902
1903 Mr. Condlin - But they're not allowed to do that.
1904
1905 Ms. Harris - But my question is—
1906
1907 Mr. Blankinship - At an approved event.
1908
1909 Mr. Condlin - And that's it.
1910
1911 Mr. Blankinship - Or in the city or in Hanover County.
1912
1913 Ms. Harris - Exactly.

1914
1915 Mr. Condlin - Okay. We're talking only Henrico. They can only be a
1916 mobile—
1917
1918 Mr. Blankinship - Well you can—
1919
1920 Ms. Harris - But why not have the business itself in the mall. It
1921 would be close to where they're being trained.
1922
1923 Mr. Condlin - Well, I guess you're right; I don't understand. Are you
1924 saying taking a leased spot and [unintelligible, several people speaking] the
1925 trailer?
1926
1927 Mr. Blankinship - You're not getting rid of the trailer, just getting the
1928 spot and operating—
1929
1930 Mr. Condlin - Having a kitchen. Well then it would no longer be a
1931 mobile food unit.
1932
1933 Mr. Blankinship - They could also have a mobile food unit.
1934
1935 Mr. Condlin - Oh, sure. Then that's additional space. But they could
1936 also have—one of the things that Mr. O'Kelly asked us to do in the shopping
1937 center is to say, okay, you're taking up parking spaces. We have to subtract that
1938 from the total. You're having to use additional spaces for this; let's calculate it per
1939 a restaurant. They have extra space out there. Why can't it operate as a mobile
1940 food unit if it's permitted? Why do they have to be like everybody else, and
1941 provide a big wide open area that has excess parking, that they're not bothering
1942 anyone, and it's permitted.
1943
1944 Ms. Harris - Okay. Maybe I shouldn't have asked you the
1945 question; maybe I should have asked the Eppses the question. I just wondered
1946 why didn't they just put it in the mall. In addition to having the mobile.
1947
1948 Mr. Condlin - That's two kitchens. That's extra expense. They've
1949 tried to design this for their clients to be able to work and train there. And now
1950 they have to have a mobile food unit and a kitchen/restaurant. That's just extra
1951 expense. It's like having two—
1952
1953 Mr. Baka - Why not have two kitchens, is the question. Why not
1954 have a leasable space inside the shopping center and have a mobile food unit. I
1955 believe that's what her question is. Let's try to drive at the essence of her
1956 question.
1957
1958 Mr. Condlin - Okay, let's go to the policy question. Why do we have
1959 to? What is there in the code that says you have to from a policy standpoint be

1960 protective of bricks-and mortar restaurants? The policy says—which smacks a
1961 little bit of equal protection clause—we prefer one use over the other. We need
1962 to be fair to bricks-and-mortar restaurants. Why do you have to be a restaurant
1963 that can't move?
1964

1965 Mr. Baka - Because the definition of *restaurant* may not allow it. I
1966 agree that's what we're here discussing today.
1967

1968 Mr. Condlin - The definition of *restaurant* includes tents. They could
1969 pop up a tent, cook in there all day long according to this, be a building, and then
1970 we're not even questioning what this is. How does a tent become a building,
1971 therefore a restaurant, but we can't? That's the real question. Why do they have
1972 to be a brick-and-mortar? Why do they have to open up when there is room for it
1973 in the B-3, it's allowed for it, and apparently some people in the County thought it
1974 was permitted because we got a business license to say you can operate in B-3.
1975 It's like asking—when you want to open up an adult business, why do want to
1976 open up an adult business. It's allowed. I don't know why someone would, but it's
1977 allowed. It may not be appropriate in certain instances, but in certain instances it
1978 may be. That's a policy decision the Board of Supervisors had made.
1979

1980 Ms. Harris - That was my last question. Thank you.
1981

1982 Mr. Bell - You mentioned training several times. Where do they
1983 receive the training?
1984

1985 Mr. Condlin - Mrs. Epps can describe it in a little bit better detail the
1986 various training programs that they provide for their clients.
1987

1988 Mr. Bell - No, where?
1989

1990 Mr. Condlin - Right there at the facility. As part of running the
1991 mobile food unit.
1992

1993 Mr. Bell - They park the unit and that's where they train.
1994

1995 Mr. Condlin - That's part of what they're trained to do.
1996

1997 Mr. Bell - Where do they park the unit when they're training?
1998

1999 Mr. Condlin - Correct, yes sir.
2000

2001 Mr. Bell - Where?
2002

2003 Mr. Condlin - We're in the parking lot at Hungary Brook Shopping
2004 Center, but also at other locations.
2005

2006 Mr. Bell - So you want to consider it a training center as well.
2007
2008 Mr. Condlin - Yes sir, yes, sir. They're teaching these clients how to
2009 cook, how to be hosts, how to order food, how to run the business itself.
2010
2011 Mr. Bell - It's my understanding that going back before you had
2012 the unit you did have discussions with our staff. And you understood a lot of what
2013 we're talking about today in terms of in order for you to have a mobile unit it have
2014 to be water, sewage, and—
2015
2016 Mr. Condlin - I appreciate you saying that. That's a completely
2017 different issue.
2018
2019 Mr. Blankinship - Isn't that exactly where you go when you talk about
2020 putting a post in the ground and attaching to that?
2021
2022 Mr. Condlin - If I put a post in the ground, why do I have to have
2023 public water and sewer?
2024
2025 Mr. Blankinship - Then you become a restaurant.
2026
2027 Mr. Condlin - No, no sir. I become a restaurant under the Planning
2028 Department, not under the Health Department, not under the Revenue
2029 Department. I'm a restaurant under Planning Department rules only because I've
2030 not got a structure. I can still be a mobile food unit pursuant to the Health
2031 Department because I can unhook it from that post, I can take the tie-downs off
2032 just like a tent, and take my merry way down the road. It's a mobile food unit at
2033 all times at that point; I do not have to have public water and sewer. Planning
2034 staff has defined *restaurant* to say needing public water and sewer. Not true. A
2035 restaurant under the Health Department does.
2036
2037 Mr. Baka - But the Virginia State Health Department doesn't
2038 write the County zoning ordinance.
2039
2040 Mr. Condlin - And the County zoning ordinance says you can be of
2041 similar uses. And nowhere does it say you have to have public water and sewer
2042 for a restaurant in the Planning Department. Nowhere.
2043
2044 Mr. Baka - I have a question, Mr. Chairman. I understand one of
2045 your contentions later in the discussion points, sir, was that you could be
2046 considered of other general character of similar uses. We go back to the
2047 definition of a restaurant. The one question I have is, you know, any building
2048 where food edibles and/or beverages are prepared and served for consumption
2049 in the building, just to walk through that for a second.
2050

2051 The County Attorney, I believe from the notes, is saying hey, this is not a
2052 building. It's prepared on the premises, yes; the next verb is *prepared*. Served.
2053 It's not served for consumption only within the building. So no, so it doesn't meet
2054 that standard. So I guess my question is why couldn't the Planning Department
2055 correctly—since it's not served for consumption within the building, it's not a
2056 building, why couldn't the Planning Department interpret it to say, with all due
2057 respect, that My Momma's Kitchen is not a restaurant under this particular code
2058 in this particular county?

2059
2060 Mr. Condlin - Well, there's also the definition of restaurant, drive-in
2061 restaurant, takeout, which allows for eating it either outside the building or off the
2062 premises. But I still need to get around—I'm going to admit I am still able to
2063 define myself as a building under the Zoning Ordinance.

2064
2065 Mr. Baka - That's not a structure.

2066
2067 Mr. Blankinship - But that's exactly where we were two years ago. You
2068 want to be a restaurant. Okay, you need to be connected to water and sewer—

2069
2070 Mr. Condlin - Water and sewer is not listed here, Mr. Blankinship.

2071
2072 Mr. Blankinship - Water and sewer is listed—

2073
2074 Mr. Condlin - That's required by the Health Department.

2075
2076 Mr. Blankinship - For what use?

2077
2078 Mr. Condlin - *Restaurant* is different under the Health Department.
2079 You don't have mobile food units; they have it under here.

2080
2081 Mr. Blankinship - We don't have *mobile food unit* listed in the Zoning
2082 Ordinance.

2083
2084 Mr. Condlin - That's exactly what I said. Because it's not listed then
2085 it's a restaurant.

2086
2087 Mr. Blankinship - And if it's a restaurant it requires water and sewer.

2088
2089 Mr. Condlin - Well sir, under the Health Department there are
2090 different codes and different criteria for being a restaurant than it is under the
2091 Planning Department. If we want to be a restaurant, I have to convince you that I
2092 can have a permanent post and attach to it. That's all it says I have to do. And
2093 now I'm a structure.

2094
2095 Mr. Bell - You make a point there that's interesting, however. In
2096 the code it does list tent. What it doesn't list is mobile unit. We're the Board of

2097 Zoning Appeals ruling on—much of your argument suggests, and maybe rightly
2098 so, that things should be changed. But what we're ruling on is what is in the
2099 code. Second conversation, just to get away from that just a little bit. If you know,
2100 if not I'll gladly wait for the Eppses to talk. I'm really interested in seeing exactly
2101 what they do because I think it's noble and honorable what they're doing. How
2102 many times has the trailer or the mobile unit been used as a mobile unit in
2103 assignments?

2104
2105 Mr. Condlin - I'd have to refer to them. They do operate it almost on
2106 a daily basis on the shopping center.

2107
2108 Mr. Bell - Is it used more for training or more for—

2109
2110 Mr. Condlin - I would say more for training, but it depends on
2111 special events. Currently under the code, as being interpreted by the County,
2112 they can only be at special events and they can only be at this location pending
2113 this appeal. It's not like they get to go to other B-3 uses. And to go to your first
2114 point, it says tents and house trailers, but it doesn't say mobile food units. The
2115 code doesn't say drive-thrus either. The market changes. Right now you can go
2116 to the Food Channel and there's a whole show dedicated to mobile food trucks.
2117 You go into the city of Richmond and they have mobile food truck places. West
2118 Broad Village had, just two months ago, a huge mobile food truck. It's a part of
2119 the industry that's changing. And it's an important part. But it is permitted. I'm not
2120 saying that I have to get a change. And it's unfortunate that there were mistakes
2121 made by the Eppses; there were mistakes by the County. The County seems to
2122 not want to recognize the fact that I got issued a business license, and have a
2123 business license that says I can operate in B-3. Apparently that's wrong because
2124 the zoning violation says we can't. I'm saying, actually, the zoning violation is
2125 wrong; there are ways in which a mobile food unit can operate. If you go ahead
2126 and deny the zoning violation, I probably will ask the question for the Eppses to
2127 go ahead and let's do a permanent tie-down, let's put a post in there, and let's
2128 attach it to something permanently embedded in the ground. That's all it says to
2129 be a structure. Once I do that, I become a building. Once I do that, I become a
2130 restaurant. I do not have to have public water and sewer. If I have public water
2131 and sewer, I'm a restaurant and I have different criteria I have to comply with the
2132 Health Department.

2133
2134 Mr. Wright - Any further questions for Mr. Condlin? Anybody else
2135 to speak? All right, next person, please.

2136
2137 Mr. Stout - My name is Robert Stout. Some of you may or may
2138 not know me. I am a planner. The name of my company is Round Corner Design
2139 Group. I consider myself a practical planner, so I sort of get lost sometimes in
2140 definitions. Andy has discussed with you many of the concerns that I was going
2141 to bring up. About six months ago I came to the County to ask about a mobile
2142 food unit as to what would be required. They said it's not allowed. And I asked

2143 for the definition, I asked for the law, and nobody could show it to me. They said
2144 this is the way it is. So I went away.

2145

2146 I have built a mobile food truck. Not a trailer like you just saw. I have a mobile
2147 food truck. Therefore, I can operate all around the place except for the county in
2148 which I live. I wanted to further emphasize—and again, Andy had covered what I
2149 was talking about, which was the fact that under the definition of restaurants it
2150 has drive-thru restaurants where you prepare the food, sell it, and it's taken off
2151 the premises. I don't know if any of you have really looked inside of a mobile
2152 food unit, but they are a mobile kitchen. They're required to first meet state
2153 regulations, which are above the County regulations for cleanliness and meeting
2154 the code. You have to have a three-bowl sink; you have to have a commissary.
2155 You can't even have it in your house anymore; it has to be a commercial kitchen
2156 in order to prepare the food that you're going to sell. You have to meet the
2157 Health Department requirements with regard to sewer and water, which in this
2158 case can be a holding tank, which is also permitted for bricks-and-mortar. It
2159 doesn't have to be public sewer and water in order to meet the code for a
2160 restaurant. It can be private well and septic. There are many restaurants within
2161 the County that meet that. All it says is that you have to have an approved
2162 system for sewer and water. The system that you put on the truck or the trailer
2163 does meet the state requirements, which is reviewed by the Health Department,
2164 not by Planning and Zoning. Therefore, if we get approval from the Health
2165 Department that means that we've met the requirements for such waste
2166 materials. The state also says that I can come to Henrico County to get my state
2167 approval, or I could have gone to Hanover County. And I'd still be allowed to
2168 operate in other jurisdictions because it's a state requirement. The state just
2169 uses local health departments in order to enforce the state law. And in this case I
2170 used Henrico County.

2171

2172 I also visited the Building Department to make sure how they defined the
2173 structure and how they defined a mobile unit. They went with the definition that
2174 Andy talked to you about. I went to the Fire Department, and I talked with the fire
2175 marshal about what would be required in order to meet Henrico County's
2176 requirements for the Fire Department, which my truck does comply based on the
2177 requirements they did.

2178

2179 I did all of this in the anticipation that when I came to get my business license
2180 that I would have everything. And if they challenged me on something, I like
2181 being better prepared. I'd rather have the ball in their court than mine. So I went
2182 there and Mr. Blankinship, I was there that day, I was going through to get my
2183 business license. And I filled out all the paperwork. And fortunately, fortunately
2184 there was miscommunication between Mr. Blankinship and I. He was talking
2185 about events, and I was talking about an itinerant license. I got all the way down
2186 to writing the check to the lady downstairs in the business license department.
2187 She looked at what the permit had said from Mr. Blankinship, and she said

2188 there's a misunderstanding. I went back upstairs and was told that I cannot have
2189 a license.

2190

2191 I come back to the code the same way that Mr. Condlin did. I just go by the
2192 definitions. If you look at the definitions—and the County Zoning Department
2193 says it's not defined in there. There are many, many uses. I've been a land
2194 planner for over thirty-five years. Again, Mr. Baka knows me quite well. There are
2195 a lot of times when we propose things in a use that is not spelled out in the
2196 zoning code. And it's interpreted that that particular use is allowed under certain
2197 districts based on what it's doing.

2198

2199 The lady—I'm sorry; I don't know your name, ma'am. But you asked about why
2200 would he not want to be bricks and mortar. The opportunities for us as mobile
2201 unit are we can go where the event is or where the traffic is. The reason that a lot
2202 of restaurants go out of business is because the traffic patterns change, and
2203 therefore the people aren't coming in that direction anymore. So as a mobile unit,
2204 you can go where the businesses are. I don't know if any of you have had the
2205 opportunity, but at the History Museum all summer long, every Tuesday and
2206 Friday, they had the mobile food unit events there. They were so well attended it
2207 reminded me of the old days when you used to go out with your family and had a
2208 picnic. It was a festive type thing. The History Museum put out music. Each
2209 vendor had to meet certain criteria. For example, we had to have trashcans, we
2210 had to have a table with six chairs, we had to be in certain locations. Everybody
2211 profited from it in the aspect of providing a service. If you go down around the
2212 History Museum, there are no restaurants.

2213

2214 If you go to most things—and I'll use Innsbrook as an example—they have
2215 maybe one restaurant. They have restaurants out on Broad Street, but what
2216 about the industrial parks that do not have restaurants, and these people have to
2217 get in cars, travel to some place to eat, and then travel back to work. Whereas a
2218 mobile unit can go there and service the needs of the employees. And especially
2219 in the economy and the cost of gasoline, provide a service to the citizens of
2220 Henrico County and/or other jurisdictions that they're in.

2221

2222 I would hope that at a minimum that you revisit this and look at it closely, and
2223 look at the definitions and not just say because it didn't say it we don't have to do
2224 it. You've done it in the past. They've had many different uses that are not
2225 spelled out in the zoning code. And I've come to the County several times and
2226 met with them where we had to get an interpretation of where that use would be
2227 or not be permitted in a particular zone. Thank you.

2228

2229 Ms. Harris -

Sir? How do you spell your last name?

2230

2231 Mr. Stout -
2232 than—

S-t-o-u-t. I just happen to be tall and thin rather

2233

2234 Ms. Harris - Stout. Okay. My question was why in addition to the
2235 mobile unit. I know full well the merits of a mobile unit. But I believe the training
2236 might be in a facility in the shopping center?

2237

2238 Mr. Stout - I'm not talking about them specifically.

2239

2240 Ms. Harris - No, but I was talking about them specifically. Then
2241 are they going to come out and then train in the trailer. I was wondering why not
2242 have a centralized type of training system and then—you know, actually have
2243 something in the mall. There's an Italian restaurant in the mall. But as I said,
2244 these are my neighbors. I would love for it to be in the mall, in addition to
2245 carrying out the mobile unit. So you don't have to sell me on how great it is to
2246 have these restaurants on wheels; I think it's a great idea.

2247

2248 Mr. Stout - A number of the mobile units do. I would tell you that
2249 they are from—from the city of Richmond do have bricks-and-mortar and mobile
2250 units. They'll come to the events. I wasn't going to mention it, but since you
2251 asked about training. I do an immense amount of work with the homeless people
2252 in the city of Richmond. I've been working with them in the same way. It's not
2253 formal or anything, but in showing them how they can do this thing and be able
2254 to get a job. So I've been doing it, but it's informal. I'm not a training company;
2255 don't pretend to be.

2256

2257 Ms. Harris - Thank you.

2258

2259 Mr. Wright - Any further questions of Mr. Stout?

2260

2261 Mr. Baka - One brief question. If a use is not specifically
2262 enumerated in the zoning code, then isn't it possible that a locality could say that
2263 that use is not allowed in a certain zoning district?

2264

2265 Mr. Stout - Thus far it's always been my experience—and I can
2266 only go by my experience—that if I've come to the County with a particular kind
2267 of use—and I'll use skateboard. At one point they were never listed in the zoning
2268 code. But when they first came out and everything, although they weren't listed,
2269 the County said you could do it in a specific kind of way. Andy mentioned drive-
2270 thru with pharmacies. Find that in the code for me where it says pharmacies with
2271 a drive-thru. There are different uses. So I would say to you no, I don't
2272 necessarily agree with that. We've always had, "Well allow that use if you meet
2273 certain criteria."

2274

2275 Mr. Baka - Thank you.

2276

2277 Mr. Wright - Any further questions? Thank you very much. Anyone
2278 else who desires to speak please come forward. We ask due to the length of this

2279 that you not repeat what has already been said. But any additional thing we'd
2280 love to hear.

2281

2282 Ms. Epps - I'm Lolita Epps, and this is my husband. I have
2283 provided pictures for you all, but I think you have pictures of the fully functioning
2284 mobile unit that we're speaking of.

2285

2286 I would like to just provide you some information so that it provides a more
2287 holistic perspective of what we're working with. By profession I'm a mental health
2288 therapist. My specialization is working with adults who have congenital birth
2289 defects. My husband is a world-traveled retired merchant seaman. He's traveled
2290 to more than ten different countries preparing foods in those countries.

2291

2292 Now, the service that we provide, we happen to also partner in a family business
2293 that has been in existence in Henrico since 2001. We own and operate seven
2294 group homes, an adult day program, which also has a fully functioning salon
2295 inside of the day program. And we have clients who aspire to do more, do
2296 different things. This is an out-of-the-box approach, Ms. Harris, to providing a
2297 service to the community, and also providing training opportunities for our clients
2298 who otherwise wouldn't have those experiences. One of the clients that we have
2299 here with us today, she said she wanted to be a hair stylist. The reason we have
2300 that hair salon in our day program is because we know her actually obtaining the
2301 proper licenses to operate a hair salon far exceeds the scope of her abilities. But
2302 certainly we can provide her an experience where she can come and sweep up
2303 hair, and she can do some other things where she still gets that salon
2304 experience. Thus, the trailer.

2305

2306 We provide a community integration program. So in as much as we are exposing
2307 our clients to the community, we're exposing the community to our clients. So the
2308 community gets to see how people with disabilities operate. That's one of the
2309 reasons why the restaurant inside the Hungary Brook Shopping Center wouldn't
2310 be as much benefit as some of our clients who said that they want to do things
2311 that are fun. We all like to have—and wish that all aspects of our job were fun.
2312 Many of us, we have the jobs and we've excelled and sought out higher degrees
2313 because, you know, we're driven by money. Our clients aren't driven by that
2314 same thing. Our clients want exposure, they want to get out there and have fun,
2315 and they want to not to be associated with the common things: food, filth, and
2316 flower.

2317

2318 Now our clients typically are introduced to food from the perspective of having to
2319 clean pots and pans. At the trailer, part of our training, there are no pots and
2320 pans that our clients clean. That is a job for the training specialist. Our clients
2321 don't do that. And the folks that are here, they're going to tell you the different
2322 aspects of the jobs that they have performed. But it is to provide them what they
2323 consider to be a good life given what their limitations and abilities are, as well as
2324 providing a viable service to the community. All of the foods that we prepare are

2325 fresh prepared foods. Everything. You will not get processed food when you
2326 come to our trailer. We just don't have it.

2327

2328 One of the other aspects that the trailer concentrates on is we have a modeling
2329 agency, as well as an adult athletic league for people with disabilities. So monies
2330 that are generated from the trailer, it goes to offset the expenses for those
2331 organizations.

2332

2333 You don't make money operating a restaurant unless you're selling alcohol or
2334 you're providing some nightclub experience. That's why it's not cost-effective for
2335 us to even consider having a building, because we've had that. It doesn't work
2336 for what we're doing. We don't sell alcohol and we don't operate a nightclub.

2337

2338 I wanted to provide you some of that information because, you know, it's not as if
2339 we walked into this thoughtless. You don't remain in business the length of time
2340 that we have successfully been in business with no citations or violations from
2341 the Department of Mental Health, which is virtually unheard of in this industry,
2342 unless you invest the time. We are owners, but we're working owners. And we
2343 know what it takes to get business started. So we didn't just say oh, we want a
2344 trailer, and let's just go start building. We made all of the necessary contacts. We
2345 did all of the necessary preparations. My husband has invested his entire
2346 retirement into the operation of this trailer. Now I don't know what any of your
2347 bank accounts look like, but we do not have—Andy mentioned \$90,000? As
2348 eloquently as Andy speaks, we far exceed \$90,000 of debt as I stand before you
2349 today. So this isn't anything that we have entered into lightly; this is our livelihood
2350 that we're talking about. This is my husband's livelihood.

2351

2352 The policy that Andy presented you all today references April 2012. We began
2353 this venture August 23, 2010, when we were given information about what things
2354 it is that we would need to operate this trailer. And when you look at this, this
2355 isn't just your hot dog stands. In order to be in compliance with the Fire
2356 Department, we were told you need to have fire extinguishers. But if you want to
2357 be in compliance anywhere, why don't you go get a fire suppression system.
2358 That baby has the bells and whistles that most restaurants may not have. And
2359 it's outside for you to see. It's a fabulous piece of work that is designed to
2360 provide, again, a viable service and a safe service to the community.

2361

2362 Andy revisited how we were bounced around from the different departments. We
2363 just didn't know whose problem we were going to be at any given time when it
2364 came to us getting properly licensed because we were told so many different
2365 things. There definitely has been a very gray area in what you all interpret as
2366 black and white. It's been very gray for us. And not only for us, but it's been gray
2367 for the people that have been providing us the information. Because again, we
2368 consider ourselves to be prudent people. We're not fools; we don't have money
2369 to throw away. I really want the Board to understand that and what our position is
2370 regarding that. To the untrained eye, it's clear to see that there has been a great

2371 amount of inconsistency. And I think that there are people that need to stand up
2372 with us and acknowledge that they have contributed to the inconsistency
2373 because maybe had we been told that it was something that wasn't going to
2374 work, we could have invested our money some other way.

2375

2376 I think we're at a place now of how do we make it work. We have invested this
2377 money that we cannot get back. We need to know how we can make it work.

2378

2379 The training program, I know someone mentioned where does training take
2380 place. We operate the adult day program within the shopping center where the
2381 trailer is located. We have a license and a lease by the landlord to operate the
2382 trailer in the parking lot. Training for them, sometimes there's training that takes
2383 place within the building itself, but then there's also training that takes place
2384 within the trailer itself. And I know there was also a question about what types of
2385 things do they do. Just last Sunday we participated in the Making Strides, the
2386 breast cancer walk. So that gave them the opportunity to get out there and to
2387 meet people, to take orders, to socialize and interact with people. There was
2388 trash pickup. We all picked up trash. There were people that had different jobs.
2389 One person's job was to hand out sodas. We participated in NASCAR events.
2390 These are things that these folks otherwise wouldn't have the opportunity to do.
2391 Just about any special events that come to town we try to get involved. Next
2392 year, we believe we're going to be involved in the fair; we didn't make it this year.
2393 But how super would that be for our clients to be able to attend the fair not only
2394 one day, but the entire, what, eleven days the fair is here.

2395

2396 I'm done.

2397

2398 Mr. Wright - Thank you, Ms. Epps. Any questions for Ms. Epps?

2399

2400 Ms. Harris - Yes. You answered the question about the training
2401 going on in the shopping center. Momma's Kitchen, does it move around during
2402 the course of a day? I mean is that your plan?

2403

2404 Ms. Epps - Well, you know, to not have to move from location to
2405 location throughout the day? No. Unless there's a special event we would like to
2406 be stationary there. Other than having to—

2407

2408 Ms. Harris - That's all I need. Okay. The second question. Is it
2409 possible for you to connect the trailer to public water and sewer or to some type
2410 of system?

2411

2412 Ms. Epps - We have an elaborate water tank system that we paid
2413 an excessive amount of money for to not have to do that. We do have a
2414 commissary where we fill up those tanks and where we empty those tanks. But
2415 in order for us to be connected to water and sewer with the exorbitant amount of
2416 money that we've already invested into this project not to have been able to

2417 really make any money because we really haven't been able to fully function, Ms.
2418 Harris, it would cost us \$100,000. We met with Albert and—yes. And that was
2419 Alvin Christian. And that was the estimate that we were given. We don't have
2420 that money.

2421

2422 Ms. Harris - Okay. The reason I ask is because when you have a
2423 restaurant or a mobile food unit, we want to know that sanitary conditions are
2424 being maintained. I'm sure that's the objective of being connected to public water
2425 and sewer.

2426

2427 Ms. Epps - That's why we have the commissary, and the
2428 commissary is inspected regularly. We have to maintain compliance with our
2429 commissary.

2430

2431 Ms. Harris - Explain—

2432

2433 Ms. Epps - The city of Richmond—the commissary is a place
2434 where we fill up the water tanks and where we empty the water.

2435

2436 Ms. Harris - Okay.

2437

2438 Ms. Epps - And that's where we also hook up the trailer as well.

2439

2440 Ms. Harris - Mr. Blankinship, if they did not connect to public water
2441 and sewer, would the commissary suffice?

2442

2443 Mr. Blankinship - The commissary is what they need—it's a
2444 requirement of a mobile food—a Health Department mobile food service permit
2445 so that they can go to the state fair, they can go to the walk that she mentioned,
2446 and those other events.

2447

2448 Ms. Harris - But as far as the permanency of it, according to the
2449 County standards they would need to fixed some type of way to permanency?

2450

2451 Mr. Blankinship - The County zoning standard looks at it one of two
2452 ways. Either you're a restaurant with all that entails or you're a temporary unit
2453 that goes to events like the fair or like the walk that Ms. Epps mentioned.

2454

2455 Ms. Harris - Okay. If you had a choice, which would you be?

2456

2457 Ms. Epps - I'm sorry?

2458

2459 Ms. Harris - If you had to choose between being considered by
2460 the County of Henrico a restaurant or a mobile food unit, which would you
2461 choose?

2462

2463 Ms. Epps - Whichever would authorize us to operate in the
2464 parking lot as we are now.
2465
2466 Ms. Harris - Okay. Your attorney said the preference would be the
2467 itinerant—
2468
2469 Ms. Epps - The itinerant merchant.
2470
2471 Mr. Blankinship - That's a different set of classifications. That is the
2472 Finance Department.
2473
2474 Mr. Epps: [Speaking off microphone.] That's one of the
2475 problems. Everything is changing. We're trying to [inaudible]. It's time for change;
2476 it's as simple as that. [Inaudible.] The cost of owning a restaurant and working it
2477 with the overhead really is over \$4,000 a month. That's the reason why a lot of
2478 restaurants go under, you know. [Begins speaking at the microphone.] This is the
2479 best way to work this situation out for everyone.
2480
2481 Ms. Epps - That is what it is that we do.
2482
2483 Ms. Harris - Right. I know you're paying rent to lease the space in
2484 the shopping center. But that's not my decision; that's your decision.
2485
2486 Mr. Epps: [Speaking off microphone; inaudible.] We're just
2487 trying to be in compliance with everyone.
2488
2489 Ms. Harris - I understand. We can see.
2490
2491 Mr. Epps: [Speaking off microphone; inaudible] a lot of
2492 restaurants and mobile units that are trying to provide for their families. It makes
2493 it hard when you have all these different codes that change.
2494
2495 Ms. Harris - We don't have the authority to change the
2496 ordinances. You understand that.
2497
2498 Ms. Epps - Yes, but we're not asking for that. We're asking that
2499 you assess our situation based on the information that was given to us and those
2500 plans that we set in place based on information that was provided us. That's why
2501 we're standing here before you today.
2502
2503 Mr. Bell - Did you meet with our staff prior to getting your
2504 mobile unit?
2505
2506 Ms. Epps - Did we meet with—I'm sorry?
2507
2508 Mr. Bell - Planning staff.

2509
2510 Ms. Epps - With Planning, yes. We started with the Health
2511 Department, and we got the information that we needed there from speaking
2512 with Mr. Campbell at the Health Department. We were advised that we needed
2513 to contact Zoning. We spoke with Greg Garrison. We spoke with a Mr. Moffitt.
2514 We actually came down and spoke with Mr. Moffitt.
2515
2516 Mr. Bell - [Unintelligible] [2:17:00]* with our staff the first few
2517 times.
2518
2519 Ms. Epps - I'm sorry?
2520
2521 Mr. Bell - What was the information you received when you met
2522 with our staff
2523
2524 Ms. Epps - They had no problem with it.
2525
2526 Mr. Blankinship - Did Mr. Garrison discuss with you what it would take
2527 to connect to water and sewer?
2528
2529 Ms. Epps - Not at that time. Mr. Garrison at that time was more
2530 concerned with us having the proper licenses based on landlord approval. And
2531 that was the basis of our conversations, ensuring that we had landlord approval
2532 to operate within the shopping center.
2533
2534 Mr. Bell - When did you all find out about water and sewage?
2535
2536 Ms. Epps - We found out about water and sewage after we had
2537 been—this has been very complex. Yes. We found out about that somehow after
2538 we had been denied the second license. And I think Mr. Blankinship—
2539
2540 Ms. Harris - Talk in the microphone because we can't hear you.
2541
2542 Ms. Epps - Okay.
2543
2544 Mr. Epps - Mr. Blankinship stopped by the mobile unit and gave
2545 me a card to call him to find out, you know, what we had to do next as far as the
2546 license. This was after we had already been given the okay.
2547
2548 Mr. Blankinship - When did you meet with Alvin Christian about the
2549 cost of water and sewer?
2550
2551 Mr. Epps - We met with him—
2552
2553 Mr. Blankinship - That was before you—
2554

2555 Mr. Epps - No. We met with him afterwards.
2556
2557 Ms. Harris - After what?
2558
2559 Mr. Epps - After we had—
2560
2561 Ms. Epps - When did we meet—you're talking about with—I'm
2562 sorry. I wish I had—we met with Alvin after we were then told by Greg after the
2563 third conversation or so that, you know, well if this presents as a problem, let's
2564 look at this as an option. But this was long after the trailer had been built. The
2565 trailer was built in 2010. It was actually licensed January 18, 2011. The meetings
2566 that we're talking about now are meetings that occurred in 2012. This has been a
2567 long process.
2568
2569 Mr. Wright - All right, we have to move along. We'll be here all
2570 day.
2571
2572 Ms. Epps - With beginning the process I would be remiss to not
2573 say that we met with a number of people to make sure that we were on the right
2574 path.
2575
2576 Mr. Wright - We understand, Ms. Epps. Thank you very much. Are
2577 there any other questions? We understand we say. We'll take that into
2578 consideration. Thank you very much. Anyone else desire to speak? And please
2579 keep it very short. We don't want any repetition. Please come forward. Keep it to
2580 a couple of minutes, please.
2581
2582 Mr. Don - Good morning, Mr. Chairman. My name is Patrick
2583 Don; I live in Hanover, Virginia. My sister-in-law became a resident at Family Life
2584 back in 2003. I have been in and out of their facility at least two days a week
2585 picking her up. And generally speaking a lot more than that. I also do a little bit of
2586 work for them. And I take photographs at their special events. What I just wanted
2587 to make very clear to you all is that this trailer and all the events surrounding it,
2588 especially the ones where they go out and go to these other off-site events mean
2589 a huge—I can't say how huge it is to the residents that participate in that
2590 program. The rest of the residents, like my sister-in-law who are unable to, to
2591 them, going out there to eat is also huge. I would also say the food is very good.
2592 Thank you.
2593
2594 Mr. Wright - Thank you. Anyone else desire to speak? All right, sir.
2595 Please come up. If anyone else wants to speak, please come up and be
2596 available. It's taking us some time going back and forth.
2597
2598 Mr. Bibbs - My name is Marvin D. Bibbs. I'm here as a former
2599 counselor—
2600

2601 Mr. Wright - Can you speak right into that microphone, please.
2602
2603 Mr. Gidley: [Speaking off microphone.] Spell your name, please.
2604
2605 Mr. Bibbs - Marvin D. Bibbs—B-i-b-b-s.
2606
2607 Mr. Gidley: [Speaking off microphone.] Thank you.
2608
2609 Mr. Bibbs - I also work with Mr. and Mrs. Epps on the food trailer.
2610 I've been at different events over the last couple of years with these clients. And
2611 it's made a difference in their self-worth, a positive difference. I see the smiles on
2612 their faces, I see them mingling with the crowd. It's like it's been a lighthouse
2613 connecting the community to the clients and the clients to the community. And as
2614 far as being a mobile trailer, being outside, it takes me back to the old days like
2615 you could just go to a window, get me a burger or a bologna sandwich, and
2616 come back and share with my friends. One of the things about the trailer itself, a
2617 television, they have one. They tailgate. They actually have an opportunity to
2618 mingle as normal society would, as opposed to being inside of a building, hoping
2619 that somebody comes in the building. These people, they reach out to people.
2620 They suggest why do you try this, why don't you try that? You know, the fish is
2621 good today. The shrimp is good today.
2622
2623 But just going from what I see with these clients and with the owners of this
2624 trailer, it is a necessity, I believe. And it's a good thing for the community for
2625 these people to be able to be in touch with the community and the community to
2626 be in touch with them. Thank you.
2627
2628 Mr. Wright - Thank you. Next, please? Pull that microphone down,
2629 please, so you can be heard.
2630
2631 Ms. Lawhorn - My name is Samantha Lawhorn. My last name is L-a-
2632 w-h-o-r-n. No e. I help wrap silverware, pass out sodas, chips, and other
2633 accessories. I like meeting the people and greeting the people. Their food is
2634 terrific. And it's good. I think it's the best you ever tasted.
2635
2636 Ms. Carlisle - Hi. My name is Crystal Carlisle. I set up the table. I
2637 put the ice in soda. And I think the food is good, delicious, and everything like
2638 that.
2639
2640 Mr. Wright - Thank you. All right. You want to take a five-minute
2641 recess?
2642
2643 Ms. Harris - Yes.
2644
2645 Mr. Wright - We've gone a long time. You want to take a five-
2646 minute recess?

2647
2648 Ms. Harris - I'm okay. Whatever you all decide is okay with me.
2649
2650 Mr. Baka - Yes.
2651
2652 Mr. Bell - Yes sir.
2653
2654 Mr. Wright - The Board will take a five-minute recess before we
2655 hear from the County.
2656
2657 FIVE-MINUTE RECESS
2658
2659 Mr. Wright - Is that everything from the applicant? May we hear
2660 from the County?
2661
2662 Mr. Hart - Yes sir. Members of the Board, again my name is
2663 Jason Hart—that's H-a-r-t. I'm assistant County attorney for the County of
2664 Henrico representing the Director of Planning in this appeal.
2665
2666 I wanted to first start off by saying I feel personally, and I'm sure the Director of
2667 Planning and Department of Planning feels that it's great what the Epps are
2668 doing for the community. And it's a laudable work that they are a part of. I think
2669 that they should keep it up whenever they can throughout the community.
2670
2671 In both of his correspondence to the Board, as well as his presentation today,
2672 Mr. Condlin speaks about the extensive efforts the Epps have made to comply
2673 with the County requirements for the operation of their business. The Planning
2674 Department is not unsympathetic to these efforts and does not necessarily
2675 dispute the lengths they have taken to do what they thought was in compliance.
2676 Acquiring the necessary permits, licenses, and approvals from multiple County
2677 departments can be a confusing process and a headache for any business
2678 owner. Unfortunately, in any bureaucracy or any company with many
2679 departments you're going to have to deal with various departments and receive
2680 approvals from multiple departments; that's simply the nature of the business.
2681
2682 At the beginning of Mr. Condlin's, presentation he seemed to put a lot of weight
2683 on the determinations made by the Revenue Department, Finance Department,
2684 and the Health Department as to whether My Momma's Kitchen was a restaurant
2685 or a mobile food unit. Unfortunately, the determinations of other departments
2686 have no bearing on the zoning determination that the Board is being asked to
2687 make today. The sole issue for the Board today on this appeal is whether the
2688 Department of Planning was correct in determining that a mobile food service
2689 unit is not a permitted use in the B-3 District. I'd like to walk you through
2690 somewhat briefly the legal analysis of why the Notice of Violation was properly
2691 issued.
2692

2693 This analysis starts with Section 24-6 of the Henrico County Code, which
2694 basically says that any use not permitted by the Zoning Ordinance is prohibited.
2695 Any use not permitted is prohibited. Because My Momma's Kitchen typically
2696 operates and was operating in a B-3 District, we have to go to the list of uses
2697 permitted in B-3 districts, which is found in Section 24-62.1 of the Zoning
2698 Ordinance. Although Section 24.62.1 lists many different types of uses and
2699 includes any permitted use in the R-6, B-1, and B-3 districts, none of the uses
2700 include the operation of mobile food service units. Indeed, mobile food service
2701 units are not listed as a permitted use in any zoning district in the County. I
2702 submit that if the Board of Supervisors had intended for mobile food service units
2703 to operate in the B-3 or any other district, they would have included this use
2704 explicitly in the Zoning Ordinance. Despite this, Mr. Condlin makes several
2705 arguments as to why the Board should disregard the Board of Supervisors
2706 exercise of its legislative prerogative and allow My Momma's Kitchen to operate
2707 as a mobile food service unit in the County.
2708

2709 Among his other arguments, Mr. Condlin argues that the term *restaurant of any*
2710 *kind* listed in Section 24-62.1 as a permitted use in the B-3 District should be
2711 interpreted to include a mobile food service unit like My Momma's Kitchen.
2712 However, as Mr. Condlin briefly went through, and I'll go through a little more
2713 closely, a reading of the definitions of *restaurant* in Section 24-3 necessarily
2714 precludes this interpretation. As Mr. Condlin mentioned, Section 24-3 defines
2715 three different types of restaurants. First, the term *restaurant* is defined as any
2716 building where food, edibles and/or beverages are prepared and served for
2717 consumption only within the building. The term *restaurant, drive-in*, is defined as
2718 any building intended, designed or used for the sale of food, edibles and/or
2719 beverages for any consumption outside of the building on the premises. And
2720 finally, the term *restaurant, take-out*, is defined as any building intended,
2721 designed or used for the sale of food, edibles and/or beverages for any
2722 consumption off the premises. Although the three definitions encompass
2723 different types of food service establishments, one defining feature of all three
2724 definitions, which Mr. Condlin mentioned, is that each definition requires a
2725 building. Mr. Condlin mentioned something about the term *building* being
2726 synonymous with use in the definition of *restaurant*. And I'm not really sure
2727 where that came from because to me it clearly says that a restaurant requires a
2728 building.
2729

2730 The term *building* is defined by Section 24-3 as any structure having a roof
2731 supported by columns or walls, used or intended to be used for the shelter,
2732 housing or enclosure of persons, animals, or chattels, including tents, cabins,
2733 house trailers and carports. Thus, to be considered a building, as Mr. Condlin
2734 said, the establishment must be a structure.
2735

2736 Section 24-3 of the Zoning Ordinance defines *structure* as anything constructed
2737 by an assembly of materials, the use of which requires a fixed location on the
2738 ground or an attachment to something having a fixed location on the ground. I

2739 think this is where our interpretation differs slightly from Mr. Condlin's. The
2740 definition of *structure* is anything constructed by an assembly of materials that
2741 *requires* a fixed location on the ground. In this definition is the *requirement* that it
2742 must *need* a fixed location on the ground, such as a tent; it has to have a fixed
2743 location on the ground. A cabin cannot operate as a cabin without a fixed
2744 location on the ground. A mobile food service unit does not have a fixed location
2745 on the ground. It is not connected to anything with a fixed location on the ground.
2746 And as Mr. Condlin has said, it doesn't need a fixed location to operate as a
2747 mobile food service unit; therefore, because it does not have a fixed location on
2748 the ground and the use itself does not *require* a fixed location on the ground, it is
2749 not attached to anything with a fixed location on the ground, it is not considered a
2750 structure. Because it is not a structure, the Zoning Ordinance does not consider
2751 it to be a building. And because it is not a building, it does qualify as any of the
2752 three types of restaurants define by Section 24-3.

2753
2754 Mr. Condlin has said that they are willing to modify their use slightly. He says
2755 connect it to a pole in the ground to try to make it have a fixed location on the
2756 ground. First, as I said before, that still wouldn't *require* a fixed location on the
2757 ground, so I'm not sure that would qualify to change it suddenly to a restaurant.
2758 And secondly, converting their use to a restaurant was what the County has
2759 been trying to get them to do from the very beginning. I wasn't present at the
2760 initial meetings back in 2009, 2010 when they initially met with the Planning
2761 Department, but from those very first meetings, they were told that in order to
2762 permissibly operate in the County in a B-3 District or any other zoning district in
2763 this capacity, they had to operate as a restaurant. And they were given the steps
2764 that they needed to take in order to operate as a restaurant, such as connection
2765 with County water and sewer, amendment of the POD for Hungary Brook
2766 Shopping Center in order to show another restaurant on the premises and
2767 obtaining a business license. They were told from the get-go that these are the
2768 steps they had to make to convert into a restaurant. And they've had more than
2769 enough opportunity to make these changes. Mr. Condlin said that he was
2770 offended by my reference to the courtesy Notice of Violation. But that is again
2771 another instance where the Department of Planning told them specifically what
2772 they needed to do to be able to operate in the B-3 zoning district. Rather than
2773 complying with the Notice of Violation, the Eppses sought the services of Mr.
2774 Condlin and sought to challenge the Notice of Violation, to try to find some
2775 alternate way that they could operate in the B-3 District. They have made no
2776 efforts to comply with what the Planning Department has told them they need to
2777 do from the very beginning.

2778
2779 Next, the Eppses requested the Board determine that My Momma's Kitchen is of
2780 the same general character as other permitted uses in the B-3 District. Although
2781 such similar uses are permitted under Section 24-62.1(ee), that section limits
2782 these uses to retail and service establishments primarily selling new
2783 merchandise and/or rendering a personal service. Because My Momma's
2784 Kitchen is neither a retail establishment primarily selling new merchandise nor a

2785 service establishment rendering a personal service, Section 24-62.1(ee) does
2786 not apply. Mr. Condlin repeatedly referenced the fact that restaurants are
2787 included differently than a retail establishment. However, nowhere in the code is
2788 a mobile food unit specifically mentioned as a retail establishment.

2789

2790 The Eppses additionally argue, and Mr. Condlin argues, that My Momma's
2791 Kitchen qualifies as a temporary outdoor sales lot or stand, and challenges the
2792 Director of Planning's determination that this term does not include a mobile food
2793 service unit. Under Section 24-62.1(cc), temporary outdoor sales lots and stands
2794 for retail sales of a temporary nature are a permitted use in the B-3 District when
2795 located 200 feet from any R District. The Director of Planning in April issued a
2796 determination that the term *temporary outdoor sales lots and stands for retail*
2797 *sales of a temporary nature* did not include mobile food service units. And this
2798 was based on the director's finding that the term *retail sales of a temporary*
2799 *nature* did not include mobile food service units. This determination was made,
2800 as is mentioned in the determination itself, to promote orderly aesthetic
2801 development and for the health and general welfare of the public, which are
2802 legitimate zoning considerations under Virginia Code Section 15.2-2283.

2803

2804 The Director of Planning does not construe the Zoning Ordinance in a vacuum
2805 only applying it to this one particular use in one particular instance. Instead, the
2806 Director considers the effect of each proposed use on the other existing uses in
2807 the County or future uses in the County and in that zoning area, as well as the
2808 effect of that use on the comprehensive plan. Moreover, this determination and
2809 the treatment by the County of the Eppses in requiring them, if they wanted to
2810 operate, to operate as a restaurant, is consistent with the way that the County
2811 has treated similar uses in the past. Mr. Condlin referenced Dominic's of New
2812 York, which is outside of Lowe's and sells hotdogs, and sausages, and other
2813 similar things. Dominic's initially wanted to operate as a mobile food service unit
2814 and not have a fixed location. They came to us and said here's what we want to
2815 do, can we do it. And the Planning Office said unfortunately not because mobile
2816 food service units are not a permitted use in the County. In order to operate in
2817 the County in the capacity in which you want, you have to operate as a
2818 restaurant. The Department of Planning laid out the different steps they would be
2819 required to take to operate as a restaurant. And as you can see when you go by
2820 Dominic's, they are attached to County water and sewer. They have a fixed
2821 location on the premises. They spent significant amounts of money to convert to
2822 a restaurant in order to be able to operate underneath the zoning. The Eppses
2823 have offered no compelling reason as to why Momma's Kitchen should be
2824 treated any differently than the County has treated other proposed uses in the
2825 past, such as Dominic's.

2826

2827 Moreover, even if My Momma's Kitchen were considered a temporary outdoor
2828 sales lot and stand for retail sales, it would still not be a permitted use at its
2829 current location because it is not located within 200 feet of an R District, which is
2830 required under Section 24-62.1(cc). The nearest R District to where My

2831 Momma's Kitchen typically operates is over 500 feet away. So even if the Board
2832 were to conclude that they were a temporary outdoor sales lot, they could not
2833 operate at the location where they were currently operating under Section 25-
2834 62.1(cc).
2835

2836 Finally, despite the Eppses allegations to the contrary and Mr. Condlin's
2837 examples of the kind of runaround that he's suggesting the Eppses were given,
2838 the Planning Department has consistently considered the Eppses to be a mobile
2839 food service unit, which is not a permitted use in the County unless it is
2840 accessory to a permitted event. This is not an accessory to another use; this is
2841 an accessory to a permitted event. As the Eppses mentioned, they want to
2842 operate at the races or the County fairs or different permitted events. And they
2843 can still operate their mobile food unit at those events as an accessory to those
2844 events; they just need to get a permit. And we're not saying they can't do that.
2845 So they are still going to be able to operate in many of the capacities they
2846 mentioned.
2847

2848 When they first met with the Eppses, as I mentioned previously, the Department
2849 of Planning outlined the steps the Eppses must take in order to permissibly
2850 operate as a restaurant in the County, which included amending the Hungary
2851 Brook Shopping Center POD, connecting to County water and sewer, obtaining a
2852 business license, and obtaining a building permit. The Eppses—contrary to Mr.
2853 Condlin's contentions—disregarded these steps. They knew from the beginning
2854 that these were the steps they needed to take, and they disregarded these
2855 steps, seeking to operate in an alternate manner in the County. The first Notice
2856 of Violation, issued April 23, 2012, was issued to the Eppses to remind them of
2857 the steps necessary to permissibly operate at Hungary Brook Shopping Center.
2858 This is not an indication that the Planning Department considered the Eppses to
2859 be a restaurant at this point. It was merely the Planning Department informing
2860 the Eppses, again, if they wish to operate in the County these were the steps
2861 that the Planning Department believed they would have to take in order to
2862 permissibly operate as a restaurant in the County. Once we realized the Eppses
2863 were again not going to comply with the request of the Planning Department and
2864 operate as a restaurant within the County, we were forced to withdraw that
2865 Notice of Violation, amend it, and issue the proper Notice of Violation, which as
2866 Mr. Condlin has said, is for operation of a mobile food service in a B-3 District,
2867 which is not a permitted use in the County.
2868

2869 There was a question voiced I believe by Ms. Harris as to why don't they just put
2870 this in that strip mall, why don't they operate as a restaurant in a strip mall.
2871 Unfortunately, the answer, when you lay it down to its most basic elements,
2872 comes down to they don't want to spend the money. And it is a lot of money. We
2873 agree that it may cost a lot of money to comply. However, not wanting to spend
2874 the money is not a sufficient reason for this Board to disregard the Zoning
2875 Ordinance.
2876

2877 Mr. Condlin tries to have it both ways. He wants to be considered a restaurant for
2878 zoning purposes and fall under the realm of restaurant or retail like a restaurant
2879 for zoning purposes, but as a mobile food service unit for Health Department
2880 purposes so they don't have to spend the extra money to connect with County
2881 water and sewer, as Mr. Condlin has mentioned would be required if they were to
2882 operate as a restaurant for Health Department purposes. However, the Planning
2883 Department has always considered the Eppses to be a mobile food service unit
2884 and not a restaurant because they do not meet the definition of a restaurant. If
2885 the Eppses wish to continue operating as a mobile food service unit, they are
2886 welcome to do so. They simply cannot do so in this capacity in the County.
2887 However, if they want to operate permissibly in the County as a restaurant, they
2888 then need to comply with the remainder of the County and state health
2889 regulations; they can't have it both ways.

2890

2891 To conclude, the Department of Planning respectfully requests the Board uphold
2892 the department's determination that My Momma's Kitchen is not a permitted use
2893 in the B-3 District. If the Board of Supervisors had intended to allow mobile food
2894 service units to operate in the B-3 District or anywhere else in the County, it
2895 could have, and would have, provided for them in the ordinance. As Mr. Bell
2896 stated, this is a legislative determination that is made by the Board of
2897 Supervisors that the Eppses are just trying to get around, trying to seek an end
2898 run around the Board of Supervisors determination that mobile food units are not
2899 a permitted use in the County, as evidenced by the fact that they were not
2900 explicitly listed in the Zoning Ordinance as a mobile food service unit.
2901 Alternatively, if the Board of Supervisors had intended the term *restaurant*, any
2902 of the three definitions of *restaurant* that both Mr. Condlin and I have gone
2903 through today, to encompass mobile food service units, they would not have
2904 chosen to require a fixed location or attachment to a fixed location to the
2905 definition of *restaurant*. As we went through, the definitions of *restaurant*,
2906 *building*, and *structure*, when you look through those definitions, it necessarily
2907 requires attachment to a fixed location. That is put *in* the definitions. Unless you
2908 are willing to completely disregard those definitions, My Momma's Kitchen as a
2909 mobile food unit, does not qualify as a restaurant in the County.

2910

2911 Mr. Condlin has mentioned some of the pharmacies with drive-ins as evidence of
2912 the changing of the times, and that things weren't considered previously, and
2913 that changes need to be made. And changes may need to be made in the
2914 ordinance. However, that is a determination to be made by the Board of
2915 Supervisors in their legislative capacity. The Department of Planning can't
2916 change the law or amend the ordinance as it's been enacted by the Board of
2917 Supervisors, which is essentially what the Eppses have asked us repeatedly to
2918 do, to amend or disregard the ordinance as it was passed by the Board of
2919 Supervisors. Instead, the Department of Planning only seeks to enforce the
2920 ordinance as written by the Board of Supervisors in a fair and consistent manner.
2921 This is evidenced by the fact that this is how we've treated people who have

2922 come to us time and time again seeking to operate mobile food service units in
2923 the County.

2924
2925 As the gentleman previously said earlier today, he came to the County and said I
2926 want to operate a mobile food service unit, and we said you can't; you have to
2927 have a restaurant. Dominic's of New York, ten, fifteen, twenty years ago, came to
2928 us and said we want to operate a mobile food service unit. The Department of
2929 Planning said you can't; you have to operate as a restaurant or as an accessory
2930 to a permitted event, and we're going to help you. Here's what you need to do to
2931 operate as a restaurant in the Department of Planning's eyes.

2932
2933 In a similar manner, this Board, the Board of Zoning Appeals, has always strived
2934 to be faithful to the ordinance as enacted by the Board of Supervisors, applying it
2935 in a fair and consistent manner to all applicants and all appellants. Given the
2936 legislative prerogatives of the Board of Supervisors enacting the Zoning
2937 Ordinance, the Director of Planning respectfully requests that the Board deny
2938 this appeal. I welcome any questions you might have.

2939
2940 Mr. Wright - I understand there is nothing in the ordinance that
2941 requires water and sewer of for a restaurant. Is that correct?

2942
2943 Mr. Hart - There's nothing in the Zoning Ordinance requiring
2944 water and sewer for a restaurant. That is correct, sir.

2945
2946 Mr. Wright - Then how could the Planning Office require it if
2947 there's nothing in the ordinance?

2948
2949 Mr. Hart - The Planning Office isn't requiring water and sewer to
2950 be considered a restaurant. However, in order to be considered—

2951
2952 Mr. Wright - That's what you just said, to be a restaurant you have
2953 to have water and sewer.

2954
2955 Mr. Hart - Under the Health Code to be considered—

2956
2957 Mr. Wright - But that's another thing. That's the Health
2958 Department.

2959
2960 Mr. Hart - I agree that's another thing. The Planning Department
2961 was trying to help out the Eppses by laying down what they would need—

2962
2963 Mr. Wright - You're saying we don't talk about the Health
2964 Department; this is the Planning Office.

2965
2966 Mr. Hart - That's correct, sir.

2967

2968 Mr. Wright - That befuddles me.
2969
2970 Mr. Hart - The Planning Department, it's never been our
2971 contention that it's a zoning regulation that they have water and sewer to operate
2972 as a restaurant.
2973
2974 Mr. Wright - Any other questions?
2975
2976 Ms. Harris - Yes. Mr. Hart, you said that according to your
2977 interpretation the mobile unit—you had a stipulation that it does not require a
2978 fixed location in the ground. I don't see the difference between this and
2979 Dominic's, I really don't. There you have a mobile unit that does not require a
2980 fixed anything in the ground to be considered a mobile unit. Of course they're
2981 operating as a restaurant. I'm just looking at some of your statements. You were
2982 talking about the requirement stipulation. Any mobile unit in Henrico County
2983 that's attached does not require attachment to a fixed location to be considered
2984 what it is. I don't understand. I didn't follow your reasoning there.
2985
2986 Mr. Hart - I understand what you're saying. The County's
2987 position is that a mobile food unit does not require a fixed location; it's a mobile
2988 food unit. However, to be a restaurant, a restaurant necessarily, under the
2989 definition provided in the ordinance by the Board of Supervisors, to be a
2990 restaurant, it has to require a fixed location. It has to have a fixed location.
2991 Therefore, in order to operate in that capacity permissibly under the Zoning
2992 Ordinance, it has to be a restaurant and have that fixed location.
2993
2994 Ms. Harris - Right. Another thing. You said that the Eppses had
2995 not made an effort. To me they made many efforts. And here we have another
2996 rule saying, you know, that—I mean it's in the code but—you have to be so many
2997 feet from a residential district or whatever that distance was. I mean it's like a
2998 runaround it seems that you're giving these people who are investing their life
2999 savings in this business. Do you have any record of their having applied for a
3000 building permit?
3001
3002 Mr. Hart - I do not personally have that record. I believe they
3003 did—no, they got a business license. I do not believe they've applied for a
3004 building permit. I'm not sure. Mr. Blankinship, do you have any?
3005
3006 Mr. O'Kelly - Yes, they applied for a building permit in April of
3007 2011.
3008
3009 Ms. Harris - So when you made the statement they had not made
3010 any effort, I think they had made many efforts.
3011
3012 Mr. O'Kelly - That's how the issue first came to the Planning
3013 Department. They filed for a building permit. We reviewed it, told them that they

3014 were a restaurant. They had to be a restaurant. They had to have a fixed
3015 location on the ground. They had to have a revised POD, and they have to be
3016 connected to water and sewer under the Health Department regulations.
3017

3018 Mr. Hart - I believe I stated that we told them from the get-go,
3019 the Planning Department, what they would specifically have to do in the Planning
3020 Department's eyes to qualify as a restaurant. I will amend my earlier statement. I
3021 mean they have made some efforts to comply, but they have not complied with
3022 what the Planning Department has said from the very beginning that they would
3023 need to do to operate as a restaurant in the County.
3024

3025 Ms. Harris - The last thing that you said, though, had to do with
3026 being so many feet from a residential community, whatever designation. Did you
3027 give them that information?
3028

3029 Mr. Hart - No ma'am. We were not—we do not believe they
3030 qualified as a temporary sales lot or stand under Section 24-62.1(cc). Mr.
3031 Condlin mentioned that in his argument today that he thought that they could
3032 qualify as one of those. My sole point in that was if we are considering them a
3033 temporary outdoor sales lot and stand for retail sales of a temporary nature,
3034 under Section 25-62.1(cc) it has to be located within 200 feet of an R District.
3035 That's not one of the conditions they were initially provided by Planning because
3036 they weren't trying to operate in that capacity. And we don't believe they can
3037 operate in that capacity. I was just informing the Board that if the Board did find
3038 that they qualified as a temporary outdoor sales lot and stand for retail sales,
3039 they would still not be able to operate in the capacity in which they are at their
3040 current location because they are not within 200 feet of an R District.
3041

3042 Ms. Harris - Okay.
3043

3044 Mr. Wright - Any further questions?
3045

3046 Mr. Baka - I have one. I regret hearing that this process has
3047 taken so long and been so confusing because I know the applicant was
3048 frustrated earlier and made a reference to literally saying there should be a
3049 change in the ordinance. But first, am I understanding this correctly that the
3050 Virginia Department of Health construed that My Momma's Kitchen was a
3051 restaurant, and then the Revenue Department, the County, construed that it's an
3052 itinerant merchant. But is the sole question before us today what does the
3053 County Zoning Ordinance states that this use is? Hearing what you said earlier,
3054 you're saying that this is a mobile food unit and that a mobile food unit is not
3055 considered a restaurant; it's defined by the County Zoning Code, and it's also not
3056 of the same general character of other uses as defined by the Zoning Ordinance.
3057 Is that correct.
3058

3059 Mr. Hart - You have hit the nail on the head as to the only issue
3060 before this Board today.
3061
3062 Mr. Baka - Okay. I'm going back to the definition of a restaurant.
3063 I guess I asked this question earlier, any building where food edibles and/or
3064 beverages are prepared and served for consumption only within the building. If
3065 the food is prepared, and if it's not considered a building under the Zoning Code,
3066 and if it's not served for consumption only within the building, what you're saying
3067 is it doesn't meet the definition of a restaurant, correct?
3068
3069 Mr. Hart - My argument was based on the fact that it's not a
3070 structure, which is not a building, so it's not a restaurant.
3071
3072 Mr. Baka - Right.
3073
3074 Mr. Hart - There are three different types of restaurants defined
3075 in the code. All three of them are permissible in the B-3 District. There's
3076 *restaurant*, there's *restaurant drive-in*, and I think *restaurant, takeout*. I think any
3077 of them can operate in the B-3 District. So it's not so much that food is served on
3078 premises or off premises or within the restaurant or outside of the restaurant, but
3079 solely because—it is not a restaurant because it is not a building because it is
3080 not a structure that requires a fixed location.
3081
3082 Mr. Baka - Thank you.
3083
3084 Mr. Wright - All right. Anything further from the County?
3085
3086 Mr. Hart - No sir. Thank you for your time.
3087
3088 Mr. Wright - That concludes the case.
3089
3090 Ms. Harris - No, rebuttal.
3091
3092 Mr. Wright - Oh, excuse me. After we hear from the rebuttal.
3093
3094 Mr. Blankinship - While Mr. Condlin comes down, let me just say for the
3095 record that I think there is a little confusion over the application of the 200-foot
3096 distance requirement, but I don't think it's really relevant.
3097
3098 Mr. Condlin - I'm just going to take a moment knowing that we've
3099 taken a lot of your moments in time. I think you're getting my frustration. I think
3100 you have a taste of the Epps's frustration saying they've done an end run. And I
3101 know there have been some questions around there.
3102
3103 I will continue to point to as evidence the business license that was applied for
3104 that said you're allowed to operate in B-3. I know Mr. and Mrs. Epps had moved

3105 the trailer to other B-3 locations before they were told by the County that no you
3106 can't do that either. We have a business license that says you're allowed to
3107 operate. They didn't do an end run; I think you get that point. They have been
3108 very frustrated.

3109

3110 And you've hit the nail on the head with no other departments. I'm a little
3111 frustrated by this continuing reference—Mr. O'Kelly made it; Mr Hart has made
3112 it—saying water and sewer, you have to have water and sewer. The code says
3113 under Code Section 23-5 that if the Health Department approves plans for water
3114 and sewage disposal, then public water and sewer are not necessary. We've
3115 gotten those plans approved. We do not need to be anything related to public
3116 water and sewer. That's not even a question for you to consider. The only
3117 question—I think Mr. Hart and I agree on that—is is this use permitted in B-3
3118 district? Certainly under zoning violation number two and number one, they both
3119 reference that you have to have public water and sewer. And yet we're being
3120 blamed for—I mean, if you look at both those zoning violations and a cover letter
3121 that Mr. Blankinship provided, they say you have to have public water and sewer.
3122 Actually, though, you don't. And this is the information. This is the frustration we
3123 are continuing to get as late as September—wrong information. Or excuse me,
3124 as last as July, information that's not relevant to the question at hand. Are we
3125 allowed. And I'm just going to lay right on the line for you. I'm not going to ask
3126 you to change the code; I'm not going to ask you to disregard the code. It's a
3127 question of interpretation and interpretation only.

3128

3129 The Board of Supervisors saw fit under ee to put a catchall. Mr. Hart can try to
3130 merge those two sentences together all he wants, but you can't. If it's of the
3131 same general character. That's why they put it in there. You can't come up with a
3132 definition and list every single use that's going to be permitted for the rest of our
3133 lives. Henrico doesn't change the code that often. They have a catchall under
3134 ee. They certainly allow for drive-thrus. Not listed in the code. They certainly
3135 allow for restaurants in shopping centers. Not technically listed in the code; only
3136 retail and service are. But it's an interpretation that's made. Because the
3137 Planning director will not make that interpretation, I am asking this Board to
3138 make that interpretation to say the use that they're providing for is of the same
3139 general character. We're not reinventing the code. We're not going contrary. In
3140 fact, we're going exactly consistent with what the Board of Supervisors said. If
3141 you're of the same general character you're principally permitted. Forget about
3142 water and sewer. We're talking about the same general character.

3143

3144 I'm not being hypocritical when I say hey, I think we would qualify as a restaurant
3145 if we put a post in here. Now you can rule as you want to, and I can't ask you to
3146 make an opinion one way or the other. But if you rule that the zoning violation is
3147 upheld, I'm going to advise my client to put a post in, permanent in the ground,
3148 attach it, and now we're a structure. I firmly, firmly believe that then they become
3149 a structure, therefore a building, and then becomes a restaurant.

3150

3151 I am confused about the outdoor food sales. I thought we had to be more than
3152 200 feet. I think Mr. Hart, with all due respect, is actually backwards on that. I
3153 don't think the Board of Supervisors interpreted B-3 to say you have to be within
3154 200 feet. It says 200 feet from. So it's 200 feet or more. I think we do qualify.
3155 Again, if we're outdoor sales—if we're not a building, then aren't we outdoor
3156 sales? You can argue then about temporary, and we can provide compliance
3157 with the temporary.

3158
3159 The final point I'll make is accessory and training. Specific. Not to any other use,
3160 but specific to their use they're certainly accessory to their existing use. They're
3161 accessory to other events, and they want to take their mobile food trailer and go
3162 to other events, but they're accessory to Family Life Services. And they're also
3163 providing training. Not required to have public water and sewer pursuant to the
3164 code, pursuant to the Health Department. They could convert to a restaurant;
3165 they don't want to. They could go to West Broad Village; they don't want to. They
3166 want to be located here.

3167
3168 With that I'll be happy to answer any other questions that you may have.
3169

3170 Mr. Wright - Any further questions? Thank you very much, Mr.
3171 Condlin. I thank everyone for appearing on this matter.

3172
3173 **[After the conclusion of the public hearings, the Board discussed the case**
3174 **and made its decision. This portion of the transcript is included here for**
3175 **convenience of reference.]**

3176
3177 Ms. Harris - I move that we reverse that decision. Seems there
3178 has been a lot of runaround, and these applicants have been trying to make this
3179 work with their investments. I see no misdemeanor intent even though that's not
3180 really our concern. I feel that somehow there needs to be clarification and
3181 conciseness of situations whereby we might have mobile food unit cases coming
3182 before us.

3183
3184 Mr. Wright - Your motion is we affirm the appeal.

3185
3186 Ms. Harris - No.

3187
3188 Mr. Wright - Or grant the appeal?

3189
3190 Mr. Blankinship - Grant the appeal.

3191
3192 Mr. Wright - Grant the appeal.

3193
3194 Ms. Harris - Appeal the decision. I want to deny the appeal.

3195

3196 Mr. Wright - Wait a minute. Now if you deny the appeal then the
3197 director of planning's decision stands. Is that your—
3198
3199 Ms. Harris - No, that's not what I want then.
3200
3201 Mr. Wright - I didn't think that's what you said.
3202
3203 Ms. Harris - Right.
3204
3205 Mr. Wright - You want to grant the appeal, which means that you
3206 stand with the appellant, right?
3207
3208 Mr. Blankinship - Yes. And reverse the decision.
3209
3210 Mr. Wright - And reverse the decision of the Planning director.
3211
3212 Ms. Harris - Yes.
3213
3214 Mr. Wright - Is there a second to that?
3215
3216 Mr. Nunnally - Second.
3217
3218 Mr. Wright - Second. Mr. Nunnally seconds. Is there any further
3219 discussion?
3220
3221 Mr. Baka - I have some discussion on that case. After hearing
3222 both testimony from the applicant and from the County attorney—and I regret
3223 hearing this has taken so long—I particularly sense the frustration of the
3224 applicant when Mr. Epps made a reference at one point that there should be a
3225 change or could be a change one day or the ordinance should be changed. But I
3226 would go back to the basic specific question that's before us in the case. I
3227 believe the issue before us is whether the mobile food unit is a permitted use in
3228 the B-3 District. Based on what the County attorney explained and from the
3229 testimony, I realize there are a number of extenuating circumstances, and there
3230 are other ways you could possibly construe this such as the general character of
3231 the district and other uses. But if the mobile food unit trailer is not a structure and
3232 it's not a building, it's not a restaurant.
3233
3234 At this point, as I see fit, I see that there's—I see that it's possible that we could
3235 make a determination as a Board or as individuals to say yes, it's possible that
3236 maybe the appeal could be affirmed because so much has happened. But at the
3237 same time, I clearly see that there is sufficient latitude that the Planning director
3238 could have reached this decision and it could be very reasonable to say that it's
3239 not a structure, it's not a building, it's not a restaurant under this code. Other
3240 counties may have different codes; other localities may have different codes in
3241 how to become a restaurant. But it appears to me that it's clearly within sufficient

3242 latitude of the Planning director to make a decision to say that this is not a
3243 restaurant under County code. So I would not vote in favor of that motion.

3244
3245 Mr. Wright - All right. Any other discussion?

3246
3247 Mr. Bell - I just want to pick up on what you said. The director of
3248 Planning was looking at the code based on what the code said. And what the
3249 code said to this, in terms of my thinking, was that a mobile unit is not permitted.
3250 Now, the argument of whether it should be and all of that is a great argument,
3251 but he's ruling on if it meets the requirements, and that it did not meet the
3252 restaurant requirements. Secondly, to follow to that, the only precedent that has
3253 been used in the past is to allow a mobile unit to operate in the County with a
3254 permit for a special event, which this mobile unit still has the ability to do and
3255 would be allowed to do. So like you said, I'd have to uphold the director of
3256 Planning.

3257
3258 Ms. Harris - I'd like to further add that as far as the requirement to
3259 connect to County water and sewer, I think Mr. Blankinship said it didn't have to
3260 be County. And Attorney Condlin said it didn't have to be connected to the
3261 County water and sewer. So to me the applicants have gone through quite a few
3262 steps including trying to obtain a building permit. We're not saying that they
3263 should forego trying to follow those step-by-step requirements. We're not trying
3264 to forego those requirements. But when we look at Dominic's at Lowe's starring
3265 us in the face, we do know that there are examples throughout the County
3266 wherever there is a Lowe's that this type of unit does go on. Of course they're
3267 attached to the ground, and this is what we would require of them. We're not
3268 saying change the requirements. We're saying don't find them in violation when
3269 they've gone through numerous steps trying to certify this establishment as a
3270 legitimate establishment. I think they have suffered long enough.

3271
3272 Mr. Wright - Did we get a second?

3273
3274 Ms. Harris - Mr. Nunnally seconded.

3275
3276 Mr. Wright - All right. Is there any further discussion?

3277
3278 Mr. Baka - I understand your comments. I guess I would just say
3279 I was looking at two different questions. Should the Board of Supervisors—and
3280 that's not a question before us today—should they consider a code change?
3281 Maybe. And I realize there has been a lot through this. But did the Planning
3282 director have sufficient latitude to reach the conclusion that he did? Yes, I
3283 believe that he did. That's why I would not support that current motion.

3284
3285 Mr. Wright - All right. Any further discussion? All in favor of Ms.
3286 Harris's motion that we grant the appeal, which would reverse the director of

3287 Planning's decision, say aye. All opposed say no. Two nos. That means the
3288 appeal is granted.

3289
3290 After an advertised public hearing and on a motion by Ms. Harris, seconded by
3291 Mr. Nunnally, the Board **granted** appeal **APL2012-00004, LOLITA EPPS's**
3292 appeal of a decision of the director of planning pursuant to Section 24-116(a) of
3293 the County Code regarding the property at 1296 Concord Avenue (HUNGARY
3294 BROOK) (Parcel 783-757-5816) zoned B-3, Business District (Fairfield). The
3295 Board reversed the notice of violation that was the subject of the above-
3296 referenced appeal. The Board determined that My Mama's Kitchen is allowed to
3297 operate at Hungary Brook Shopping Center.

3298
3299
3300 Affirmative: Harris, Nunnally, Wright 3
3301 Negative: Baka, Bell 2
3302 Absent: 0

3303
3304

3305 **[At this point, the transcript continues with the public hearing on the next**
3306 **case.]**

3307
3308

3309 **CUP2012-00032 COLLEGIATE SCHOOL** requests a temporary
3310 conditional use permit pursuant to Section 24-116(c)(1) of the County Code to
3311 allow temporary classroom trailers at 251 N Mooreland Road (Parcels 747-735-
3312 6082, 748-736-1139 and 748-737-1411) zoned R-1, One-Family Residence
3313 District and R-2, One-Family Residence District (Tuckahoe).

3314
3315

3314 Mr. Wright - Anyone desiring to testify in this case please stand
3315 and be sworn.

3316
3317

3317 Mr. Blankinship - Raise your right hand, please. Do you swear the
3318 testimony you're about to give is the truth and nothing but the truth so help you
3319 God?

3320
3321

3321 Mr. Carson - I do.

3322
3323

3323 Mr. Wright - All right, sir. Please state your name for the record
3324 and present your case.

3325
3326

3326 Mr. Carson - Thank you. My name is Scott Carson. I'm the director
3327 for Facilities and Construction for Collegiate School. I'm here to represent
3328 Collegiate in this case.

3329
3330

3330 I'm not going to give you the entire history of Collegiate School, but as many of
3331 you know we are an independent K through 12 school located on Mooreland
3332 Road in the West End of Henrico with an enrollment of just under 1600 students.

3333 We are separated into three divisions—lower, middle, and upper school. We're
3334 currently underway with a number of construction projects on campus that will
3335 support our education mission for the years to come.

3336
3337 One of our current ongoing projects is the construction of an academic
3338 commons, which is an upper school student commons, which includes a library
3339 function. Our current library is the Reed-Gumenick Library. It is a 7,000-square-
3340 foot brick shoebox, if you will. That is currently used by our middle and upper
3341 school divisions, roughly 1100 students. At the completion of the academic
3342 commons project our upper school student body, roughly half of that number, will
3343 then use the academic commons for the library, and our middle school will then
3344 continue to use the Reed-Gumenick building. Again, about half as many
3345 students.

3346
3347 What we would very much like to do while all this construction is underway is to
3348 do an interior renovation of the existing Reed-Gumenick Library space, such that
3349 when the academic commons opens for student use the renovated Reed-
3350 Gumenick Library will also be open for middle school use. In order to do that, we
3351 need to remove the contents and the function of the middle school library out of
3352 the building into temporary modular units located on campus to store books,
3353 periodicals, meeting space, offices—those types of functions that currently exist
3354 within the Reed-Gumenick Library—temporarily during the period of renovation
3355 until such time that we can move the middle school contents back to the Reed-
3356 Gumenick space, and then ultimately move the upper school contents up to the
3357 academic commons on a time frame that's acceptable to both projects.

3358
3359 The interior renovations we currently have are still in the planning phase. They're
3360 modest. Painting, new lighting, some ductwork, punch in a few windows into the
3361 library. As I mentioned it's a shoebox; it's kind of dark in there. And light in the
3362 space. Make it functional for today's use as opposed to the uses it was built for,
3363 which was in 1961.

3364
3365 That in a nutshell is the case. We've asked the Board for consideration to install
3366 up to four modular trailers, I think the dimensions of which are shown in the
3367 case. These trailers would be handicapped accessible and set back from our
3368 existing entrance drive and our existing construction zone, which is shown to the
3369 left-hand side of the graphic that's up on the screen right now. Also, it would be a
3370 very short distance from the existing library to the trailers, on paved pathways, so
3371 it would not impact the student ebb and flow during the normal class day.

3372
3373 This is a photo of the intended project site for the trailers. It's adjacent to our
3374 existing drop-off area. The site is level and directly accessible off of these paved
3375 pathways and the drop-off area. It is actually separated from the construction
3376 zone—which is shown in the rear of this photograph—with a six-foot-high chain
3377 link fence and wind screen. I know that was mentioned in the case from the
3378 Planning Commission that they wanted separation between the construction

3379 zone and these trailers. That separation is already in place. And that's just a
3380 function of our construction safety plan.

3381

3382 Mr. Wright - Have you read the conditions?

3383

3384 Mr. Carson - Yes I have, thank you.

3385

3386 Mr. Wright - Are you in accord with #2?

3387

3388 Mr. Carson - Yes, with the exception of the chain link fence. The
3389 fence already exists between the construction site and the trailer location. It's at
3390 the far end of the photo already.

3391

3392 Mr. Wright - You say with the exception?

3393

3394 Mr. Carson - Exactly. I have no issue at all with the setbacks. I
3395 think those are very well considered. But the five-foot-high chain link fence to be
3396 located essentially between the trailers and the construction, that fence already
3397 exists.

3398

3399 Mr. Baka - This is just ensuring that it will stay in place is all it's
3400 doing.

3401

3402 Mr. Carson - Oh, yes. The fence will be in full—I mean it'll be there
3403 until the job is done.

3404

3405 Mr. Baka - Okay.

3406

3407 Mr. Wright - Do you have any problem with that, Mr. Blankinship,
3408 his position?

3409

3410 Mr. Blankinship - No sir, that's fine.

3411

3412 Mr. Wright - Does that mean we need to change #2?

3413

3414 Mr. Blankinship - I don't think so. If he's going to keep it there where it
3415 is.

3416

3417 Mr. Carson - I would like to point out, too, that—and we don't do
3418 this all the time so apologies—the application should read "up to four trailers."
3419 We're currently looking at square-footage requirements and things of that nature.
3420 On a straight square-footage basis the four trailers would be necessary. We're
3421 hoping to economize and save some cost if we can go with a few trailers.

3422

3423 Mr. Blankinship - The greater would include the lesser. If we've
3424 approved four, you could put three of the four there.

3425
3426 Mr. Carson - Okay.
3427
3428 Mr. Blankinship - Are you comfortable with the September 1st deadline?
3429
3430 Mr. Carson - Yes. We fully intend to have the Reed-Gumenick
3431 Library renovation complete in advance of that date. Our goal is to have the
3432 academic commons open and fully functional prior to the first day of classes,
3433 which is always the Tuesday prior to Labor Day.
3434
3435 Mr. Wright - Any questions from members of the Board?
3436
3437 Ms. Harris - Are you going to have to remove any of your
3438 landscaping? I see you have lovely shrubbery and trees and flowers.
3439
3440 Mr. Carson - I certainly hope not. But I will say that in order to get
3441 our students from this patio or this hardscape up to the trailers we may have to
3442 pluck a few grasses or some of our knockout roses. But come by campus; we do
3443 a great job with landscaping.
3444
3445 Ms. Harris - Mr. Carson, you didn't tell us about the construction of
3446 the trailers, but I know that it should have a minimum impact on the
3447 neighborhood. So they will be of what construction?
3448
3449 Mr. Carson - Right. We're working with a company called
3450 ModSpace. We're looking at T1-11 siding that's painted in sort of a bisque color,
3451 which is kind of our campus off-white, so to speak. The skirting would be
3452 installed around the base. There would be an accessible ramp and steps up to
3453 these. And we'd probably put in some foundation pots or plants because that's
3454 just what we do.
3455
3456 Ms. Harris - Will it have restrooms, because it's going to be used
3457 as a library, right?
3458
3459 Mr. Carson - Correct. What we would hope for is that the
3460 restrooms within the science buildings directly adjacent to these trailers could be
3461 used for that purpose. We have no means to provide sanitary or domestic water
3462 at this location.
3463
3464 Ms. Harris - Okay.
3465
3466 Mr. Wright - Mr. Baka, did you have a question?
3467
3468 Mr. Baka - My only question is, were all the adjoining property
3469 owners notified of the case, and did staff receive any letters of concern or
3470 objection?

3471
3472 Mr. Blankinship - They were notified, and I'm not aware of any calls.
3473
3474 Mr. Baka - Thanks.
3475
3476 Mr. Wright - Anything further? Is anyone here in opposition to this
3477 request? Hearing none that concludes the case. Thank you very much for
3478 appearing.
3479
3480 **[After the conclusion of the public hearings, the Board discussed the case**
3481 **and made its decision. This portion of the transcript is included here for**
3482 **convenience of reference.]**
3483
3484 Mr. Baka - I move we recommend approval. It will not be a
3485 substantial detriment to the neighborhood or surrounding properties. And I move
3486 we approve that case with the four conditions as proposed in the staff report.
3487
3488 Ms. Harris - I second the motion, striking the sentence that dealt
3489 with the chain link fence. He had mentioned that fence is already up.
3490
3491 Mr. Baka - I thought since the chain link fence is there that the
3492 condition needed to stay in only because it clarifies what's there in the field
3493 already.
3494
3495 Ms. Harris - What's that terminology for that sentence two?
3496
3497 Mr. Baka - "A chain link fence of a minimum of five feet in height
3498 shall be located along this thirty-foot setback line as long as the trailers are in
3499 use."
3500
3501 Ms. Harris - Right. And it's already there.
3502
3503 Mr. Baka - I thought since it's already there it is okay or
3504 permissible to leave this condition in. Is that consistent? Is that okay?
3505
3506 Ms. Harris - The applicant singled that out.
3507
3508 Mr. Wright - I was trying to understand what he meant. And then I
3509 asked if it was okay, and you said—
3510
3511 Mr. Blankinship - I understood him to say at the end—he did raise that
3512 as an issue. But I understood him to say at the end that the fence is there and
3513 they're going to leave it there.
3514
3515 Ms. Harris - Yes
3516

3517 Mr. Wright - That's what I understood. Did you have a different
3518 understanding, Mr. Baka?

3519
3520 Mr. Baka - No. I understand the points. I would leave the motion
3521 as-is except to move that we approve this case with those four conditions as
3522 printed, realizing he does not have an objection to #2.

3523
3524 Mr. Wright - Yes.

3525
3526 Mr. Baka - Because it's already built.

3527
3528 Mr. Wright - So the motion is that we approve it with the
3529 conditions—

3530
3531 Mr. Baka - With these four conditions as stated.

3532
3533 Mr. Wright - Okay. Is there a second now?

3534
3535 Ms. Harris - I second.

3536
3537 Mr. Wright - Any further discussion on this case? Hearing none, all
3538 in favor say aye. All opposed say no. The ayes have it; the motion passes.

3539
3540 After an advertised public hearing and on a motion by Mr. Baka, seconded by
3541 Ms. Harris, the Board **approved** application **CUP2012-00032, COLLEGIATE**
3542 **SCHOOL's** request for a temporary conditional use permit pursuant to Section
3543 24-116(c)(1) of the County Code to allow temporary classroom trailers at 251 N
3544 Mooreland Road (Parcels 747-735-6082, 748-736-1139 and 748-737-1411)
3545 zoned R-1, One-Family Residence District and R-2, One-Family Residence
3546 District (Tuckahoe). The Board approved the temporary conditional use permit
3547 subject to the following conditions:

3548
3549 1. This conditional use permit is to permit the four proposed trailers as shown
3550 and described on the attached site plan submitted with this application, with the
3551 exception of the additional requirements noted below. Any additional
3552 improvements shall comply with the applicable regulations of the County Code.
3553 Any substantial changes or additions to the design or location of the
3554 improvements will require a new use permit.

3555
3556 2. The trailers shall be set back a minimum of 30 feet from the new Upper
3557 School Library construction site. A chain link fence a minimum of 5 feet in height
3558 shall be located along this 30 foot setback line as long as the trailers are in use.
3559 In addition, the trailers shall be set back a minimum of 25 feet from the existing
3560 access drive to the east.

3561

3562 3. The applicant shall apply for and obtain all necessary building permits prior to
3563 the installation of the trailers. All trailers shall comply with the Americans with
3564 Disabilities Act (ADA). The trailers shall not be occupied until certificates of
3565 occupancy have been issued.

3566
3567 4. The trailers shall be removed from the property on or before September 1,
3568 2013, at which time this permit shall expire.

3569
3570
3571 Affirmative: Baka, Bell, Harris, Nunnally, Wright 5
3572 Negative: 0
3573 Absent: 0

3574

3575

3576 **[At this point, the transcript continues with the public hearing on the next**
3577 **case.]**

3578

3579 **CUP2012-00033 CHURCH RUN COMMUNITY RECREATION**
3580 **ASSOCIATION** requests a conditional use permit pursuant to Section 24-12(b)
3581 of the County Code to add lights to the existing tennis courts at 3700 Church
3582 Run Parkway (CHURCH RUN) (Parcel 743-756-6088) zoned C-1C,
3583 Conservation District (Conditional) and R-3C, One-Family Residence District
3584 (Conditional) (Three Chopt).

3585

3586 Mr. Wright - Anyone desiring to speak in this case, please stand
3587 and raise your right hand to be sworn.

3588

3589 Mr. Blankinship - Do you swear the testimony you're about to give is
3590 the truth and nothing but the truth so help you God?

3591

3592 Mr. Kaplan - I do.

3593

3594 Mr. Wright - All right, sir, please state your name and present your
3595 case.

3596

3597 Mr. Kaplan - Sure. My name is Josh Kaplan. It's spelled K-a-p-l-a-
3598 n. I am a board member for the Church Run Community Recreation.

3599

3600 Just a quick background. Our facility is a little over twenty years old. Our tennis
3601 courts are quite deteriorated and need repair—or replacement, actually. We
3602 have to completely remove them down to gravel and replace. As a board we
3603 decided a good improvement at that time would be to add lighting to the courts
3604 as a benefit to our members.

3605

3606 Everything has been submitted. I've read the—
3607

3608 Mr. Wright - Have you read the conditions?
3609
3610 Mr. Kaplan - Yes sir. I have two concerns on the conditions or
3611 request two changes, I guess, on two of the conditions.
3612
3613 Mr. Wright - If you have any concerns we'd like you to speak to
3614 them.
3615
3616 Mr. Kaplan - All right. The first one is #4. I spoke with our tennis
3617 court contractor, and he had told me that a two-hour timer is standard. The
3618 reason for that is once those lights go off there's a least a fifteen-minute time
3619 period before they can be reactivated. They have a cooling period or something
3620 like that.
3621
3622 Mr. Wright - Do you have any problem with that, Mr. Blankinship?
3623 So instead of sixty minutes—
3624
3625 Mr. Kaplan - It would be 120 minutes, yes sir.
3626
3627 Mr. Wright - A hundred and twenty minutes. Okay. All right.
3628
3629 Mr. Kaplan - The other item is on #10. Most of that is already
3630 stated on our 1986 use permit with the exception of the last sentence that says
3631 swimming pool activity shall be limited to the summer months. I'd like to ask that
3632 that sentence be stricken. We use the facility already between spring and fall,
3633 not just summer months. That would also preclude us in the future if we
3634 considered perhaps like a bubble or heating the pool to be able to extend the
3635 period.
3636
3637 Mr. Wright - Well now if you put a bubble on it that would require
3638 them to come back.
3639
3640 Mr. Blankinship - I think we'd want to see that.
3641
3642 Mr. Wright - I don't think you could put a bubble on it—
3643
3644 Mr. Kaplan - Well sure, not without application. But that sentence
3645 would preclude us from ever even being able to apply to do that.
3646
3647 Mr. Blankinship - Well no, that would just be revised at that time.
3648
3649 Mr. Kaplan - Okay. Well then it would just pertain to we already
3650 use it beyond the summer months. That sentence didn't exist in the previous.
3651
3652 Mr. Baka - From when until when?
3653

3654 Mr. Kaplan - I don't know the exact dates, but it's May and we
3655 close sometime in September.
3656

3657 Mr. Wright - You probably start your swimming team in March,
3658 don't you, or April?
3659

3660 Mr. Kaplan - Well, maybe March; I think you're right. It's not
3661 summer months—it's spring, summer, and fall.
3662

3663 Mr. Baka - I was thinking it was Memorial Day.
3664

3665 Mr. Kaplan - It may be. The kids are really cold when swim team
3666 starts; I know that.
3667

3668 Mr. Wright - They start early. My daughter did that. I know they
3669 start early. What about that one, Mr. Blankinship?
3670

3671 Mr. Blankinship - I want to ask Mr. Madrigal to reply to that; I believe he
3672 drafted that.
3673

3674 Mr. Madrigal - Yes. Mr. Chairman, Mr. Blankinship. I believe that
3675 question I ended up rewriting from the original conditions. I think that recreational
3676 use of the pool was limited to when there was water in the pool. So I ended up
3677 rewriting that condition to limit it to summer months not knowing that there were
3678 other activities during the fall.
3679

3680 Mr. Blankinship - We're not terribly opposed to broadening that.
3681

3682 Mr. Madrigal - I don't think so, no.
3683

3684 Mr. Wright - So strike that last sentence, "Swimming pool activities
3685 shall be limited to summer months." Okay.
3686

3687 Mr. Kaplan - And that's all I have.
3688

3689 Mr. Wright - Anything else? Have you talked to any of the
3690 neighbors about this? Are the neighbors familiar with what you want to do?
3691

3692 Mr. Kaplan - Yes sir. We've talked to several of our neighbors. And
3693 then as a board, you know, voted on doing the lighting. And we have lots of
3694 neighbors that are looking forward to being able to play past five o'clock when
3695 winter comes. So we're just trying to improve our facility a little bit.
3696

3697 Mr. Wright - Have you had any objections voiced by anybody?
3698

3699 Mr. Kaplan - No. The facility is very well lit already between all the
3700 pool lighting that remains on for security and then for the outside parking lot
3701 lighting. These lights are actually more directional; they're going to be lighting
3702 just that area. And the facility is kind of wrapped between woods, parking lot, and
3703 road, and then pool. The pool is actually elevated above the courts so it's pretty
3704 well protected.

3705
3706 Mr. Baka - One question, Mr. Chairman. Since the pool is
3707 adjacent to Church Road, I have a question generally about light spillage. Some
3708 ordinances or conditions I've seen in other localities have had comments to say
3709 efforts will be made to minimize light spillage on adjoining properties, or even
3710 more specifically in cases of shopping centers sometimes conditions might read,
3711 you know, no more than x-amount of foot candles which is very detailed. Is there
3712 any provision in the twelve conditions for minimizing light spillage in general
3713 terms?

3714
3715 Mr. Blankinship - In general terms it's covered by #3, "A detailed
3716 lighting plan shall be submitted. They're already submitted—

3717
3718 Mr. Baka - Okay.

3719
3720 Mr. Blankinship - Which is before you there.

3721
3722 Mr. Baka - So at that point does that mean that staff reviews how
3723 much light candle spillage is? All right, thanks.

3724
3725 Mr. Wright - Any further questions? Is there anyone here in
3726 opposition to this request? Hearing none, that concludes the case. Thank you
3727 very much.

3728
3729 Mr. Kaplan - Thank you, gentlemen. Have a good day.

3730
3731 **[After the conclusion of the public hearings, the Board discussed the case**
3732 **and made its decision. This portion of the transcript is included here for**
3733 **convenience of reference.]**

3734
3735 Mr. Wright - I move we approve this.

3736
3737 Mr. Blankinship - That has two conditions to—

3738
3739 Ms. Harris - Yes. Condition 4—

3740
3741 Mr. Wright - Let me get my paper before me here. Condition #4
3742 change to exceed 120-minute intervals. Is that correct?

3743
3744 Ms. Harris - Right.

3745

3746 Mr. Wright - And Condition #10 we're striking "swimming pool
3747 activities shall be limited to the summer months." That's my motion that we
3748 approve this because I don't think it will adversely affect the health, safety, and
3749 welfare of the persons in the community or in the neighborhood. And I don't think
3750 it will unreasonably impair adequate supply of light on the adjacent properties. I
3751 don't think it has anything to do with the congestion in the streets. And I think it
3752 will be in substantial accordance with the general purposes and objectives of this
3753 chapter. That's the motion. Is there a second?

3754

3755 Mr. Bell - I second it.

3756

3757 Mr. Wright - Any discussion? Hearing none, all in favor say aye.
3758 All opposed say no. The ayes have it; the motion passes.

3759

3760 After an advertised public hearing and on a motion by Mr. Wright, seconded by
3761 Mr. Bell, the Board **approved** application **CUP2012-00033, CHURCH RUN**
3762 **COMMUNITY RECREATION ASSOCIATION's** request for a conditional use
3763 permit pursuant to Section 24-12(b) of the County Code to add lights to the
3764 existing tennis courts at 3700 Church Run Parkway (CHURCH RUN) (Parcel
3765 743-756-6088) zoned C-1C, Conservation District (Conditional) and R-3C, One-
3766 Family Residence District (Conditional) (Three Chopt). The Board approved the
3767 conditional use permit subject to the following conditions:

3768

3769 1. This conditional use permit applies only to the installation of twelve 1000 Watt
3770 light fixtures atop nine 20 foot light poles surrounding the tennis courts at the
3771 Church Run Community Recreation Facility. All other applicable regulations of
3772 the County Code shall remain in force.

3773

3774 2. Only the improvements shown on the plot plan and lighting plan filed with this
3775 application may be constructed pursuant to this approval. Any additional
3776 improvements shall comply with the applicable regulations of the County Code.
3777 The property shall be developed and maintained as shown on the original site
3778 plan submitted with case UP-040-86. Any significant changes or additions to the
3779 general layout shall not be made without the prior approval of the Board of
3780 Zoning Appeals.

3781

3782 3. A detailed lighting plan shall be submitted to the Planning Department with
3783 the building permit for review and approval. The overall light pole height (with
3784 fixture) shall not exceed 22 feet. All exterior lighting shall be shielded to direct
3785 light away from adjacent properties and streets.

3786

3787 4. The proposed tennis court lights shall be placed on a manual timer not to
3788 exceed 120-minute intervals and shall cut-off at 10:00 PM. The tennis courts
3789 shall not be used prior to 8:00 AM.

3790

3791 5. All approved landscaping shall be maintained in a healthy condition at all
3792 times. Dead plant materials shall be removed within a reasonable time and
3793 replaced during the normal planting season.

3794

3795 6. The parking lot shall be subject to the requirements of § 24-98 of Chapter 24
3796 of the County Code.

3797

3798 7. Standard traffic signs shall be maintained on all parking areas and driveways.

3799

3800 8. The swimming pool and recreation facilities shall be operated on a non-profit
3801 basis and be open for members and their guests only.

3802

3803 9. The property shall be maintained in a clean and orderly manner. Recreational
3804 activities shall be supervised and operated so that noise does not exceed 65 db
3805 at the property lines and activities do not negatively impact the surrounding
3806 neighborhood.

3807

3808 10. Outdoor recreational activities shall be limited to the hours of 8:00 AM to
3809 10:00 PM and indoor activities shall be limited to the hours of 8:00 AM to 12:00
3810 midnight.

3811

3812 11. Four dual swimming meets shall be permitted at the pool each swimming
3813 season; starting guns and sound amplification equipment may be used only
3814 during these events.

3815

3816 12. The swimming pool shall be enclosed by a fence as required by the Uniform
3817 Statewide Building Code.

3818

3819

3820 Affirmative: Baka, Bell, Harris, Nunnally, Wright 5

3821 Negative: 0

3822 Absent: 0

3823

3824

3825 **[At this point, the transcript continues with the public hearing on the next**
3826 **case.]**

3827

3828 **CUP2012-00034 THE SHOPS AT WILLOW LAWN** requests a
3829 temporary conditional use permit pursuant to Section 24-116(c)(1) of the County
3830 Code to allow a temporary event at 1601 Willow Lawn Drive (NORTH WILLOW
3831 LAWN) (Parcels 773-736-2198 and 773-736-6272) zoned B-2, Business District
3832 (Brookland).

3833

3834 Mr. Wright - Let's just wait just a moment. Mr. Nunnally had to
3835 leave.

3836

3837 All right. No applicant here?
3838
3839 Mr. Blankinship - Well that's not good.
3840
3841 Mr. Wright - Do I hear a motion to continue it to the next meeting?
3842
3843 Ms. Harris - I move that we continue this case until the next
3844 meeting.
3845
3846 Mr. Baka - Second
3847
3848 Mr. Wright - Motion Ms. Harris, second by Mr. Baka. All in favor
3849 say aye. All opposed say no. The ayes have it; the motion passes.
3850
3851 After an advertised public hearing and on a motion by Ms. Harris, seconded by
3852 Mr. Baka, **CUP2012-00034, THE SHOPS AT WILLOW LAWN's** request for a
3853 temporary conditional use permit pursuant to Section 24-116(c)(1) of the County
3854 Code to allow a temporary event at 1601 Willow Lawn Drive (NORTH WILLOW
3855 LAWN) (Parcels 773-736-2198 and 773-736-6272) zoned B-2, Business District
3856 (Brookland) has been deferred until the November 15, 2012 meeting.
3857
3858
3859 Affirmative: Baka, Bell, Harris, Nunnally, Wright 5
3860 Negative: 0
3861 Absent: 0
3862
3863
3864 Mr. Wright - As a courtesy. People sometimes people get hung
3865 up, they have problems. Okay.
3866
3867 Mr. O'Kelly - Mr. Blankinship, wasn't the event supposed to be held
3868 on the seventeenth?
3869
3870 Mr. Blankinship - Yes. This event will be over before the next meeting.
3871
3872 Mr. Wright - They may want to amend it. All right. Let's go back to
3873 the beginning
3874
3875 Mr. Blankinship - I'm sorry. I'm assuming that vote was 5 to 0?
3876
3877 Mr. Wright - Yes, it was.
3878
3879 Mr. Wright - Minutes.
3880
3881 Mr. Baka - I move we approve the minutes as printed.
3882

3883 Mr. Wright - Mr. Baka approves the minutes. The motion is made.
3884 Do we have a second?
3885
3886 Mr. Nunnally - Second.
3887
3888 Mr. Wright - Any discussion?
3889
3890 Ms. Harris - I did read the minutes because I needed them for this
3891 meeting. There were a few typos, but I think that the thought was there so.
3892
3893 Mr. Wright - All in favor say aye. All opposed say no. The ayes
3894 have it; the motion passes.
3895
3896 On a motion by Mr. Baka, second by Mr. Nunnally, the Board **approved as**
3897 **submitted** the **Minutes of the September 27, 2012**, Henrico County Board of
3898 Zoning Appeals meeting.
3899
3900
3901 Affirmative: Baka, Bell, Harris, Nunnally, Wright 5
3902 Negative: 0
3903 Absent: 0
3904
3905
3906 Mr. Wright - Anything else to come before us? We're so happy to
3907 have Ms. Harris back.
3908
3909 Ms. Harris - Thank you. Did you get my thank you card?
3910
3911 Mr. Blankinship - Yes. We passed it around before the meeting.
3912
3913 Ms. Harris - Oh, great, great. I received calls and a big basket of
3914 fruit that I thoroughly enjoyed and I enjoyed sharing with my grandchildren. And I
3915 thank you, and I'm back.
3916
3917 Mr. Wright - I thought the fruit made more sense than flowers.
3918
3919 Ms. Harris - I appreciate it so much. And the plaque, gentlemen,
3920 and the plaque; it's beautiful. So the meeting is adjourned? You didn't say the
3921 meeting was adjourned.
3922
3923 Mr. Wright - Adjourned. That was a long one.
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R. A. Wright
Chairman



Benjamin Blankinship, AICP
Secretary