VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

IN RE: JULY 13, 2016 DECISION OF THE BOARD OF ZONING APPEALS OF ARLINGTON COUNTY (V-11158-16-APP-1)	:	Case No. CL16002056-00

APPELLANT'S OPENING BRIEF

Appellant, 3336 Wilson Boulevard, LLC ("Owner" or "Appellant"), now files this Opening Brief in this appeal, pursuant to Virginia Code Section 15.2-2314, from the July 13, 2016 decision of the Board of Zoning Appeals of Arlington County (the "BZA") in case number V-11158-16-APP-1.

INTRODUCTION

This case involves an appeal from the BZA's decision to uphold a determination of the Arlington County Zoning Administrator related to parking for the proposed redevelopment of a 1960s-era motel with a new pharmacy along Wilson Boulevard. The Zoning Administrator denied the Appellants' request to locate parking for the pharmacy on an adjacent lot. The BZA then upheld that determination on appeal. This decision effectively killed Appellants' proposed redevelopment plan. The Zoning Administrator and the BZA erred as a matter of law and the zoning determination should be reversed.

Appellant owns two properties in Arlington, Virginia, respectively located at 3330 Wilson Boulevard (the "Wilson Lot") and an unaddressed lot at North Kenmore Street (the "Kenmore Lot"), near the Clarendon neighborhood. The Highlander Motel has been in operation on the Wilson lot since the early 1960s. In 1963, the Arlington County Board approved a use permit to allow transitional parking, including parking for customers of the Highlander Motel, on the adjacent Kenmore Lot (the "Use Permit).

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In 2016, the Appellant proposed to redevelop the Wilson Lot with a new pharmacy, which is a by-right use permitted in the zoning district applicable to the Wilson Lot. The Appellant sought a zoning determination from the Zoning Administrator confirming that the proposed pharmacy on the Wilson Lot may continue to use the Kenmore Lot for its parking needs, pursuant to the still-valid 1963 Use Permit. The Zoning Administrator, however, rejected that request and held that neither the 1963 Use Permit nor the current Zoning Ordinance would allow the new pharmacy to locate required parking spaces on the Kenmore Lot. Given that this decision effectively killed the Appellants' proposed redevelopment, the Appellant then appealed that decision to the BZA, which upheld the Zoning Administrator's decision.

The Zoning Administrator and BZA are incorrect, as a matter of law, for at least two reasons. First, the approved 1963 Use Permit permitting parking on the Kenmore Lot contains no restrictions or limitations related to the use of the Kenmore Lot for parking for the Wilson Lot. Moreover, the Use Permit on the Kenmore Lot is not conditioned on the motel use remaining on the Wilson Lot. Second, even absent the 1963 Use Permit, the Arlington County Zoning Ordinance ("ACZO") allows off-site parking on the Kenmore Lot for commercial uses such as the proposed pharmacy in this case. Therefore, the BZA's decision should be reversed and the Zoning Administrator's decision should be overturned.

FACTUAL BACKGROUND

Appellant owns the Wilson Lot and the Kenmore Lot. (R. at 5, 22.)[1] The Wilson Lot is zoned as C-2 Service Commercial-Community Business District. (*Id.*) The Kenmore Lot is zoned as R-6 One-family Dwelling District. (*Id.*)

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[1] Citations to "R. ____" refer to the bate-stamped Record that the Board of Zoning Appeals filed with the Court in this case.

The 1963 Use Permit and Related Arlington County Zoning Ordinance Provisions

The Wilson Lot is currently improved with the Highlander Motel, which was established in approximately 1963. At that time, the Appellant's predecessor in title of the Wilson Lot and Kenmore Lot applied for the Use Permit for the Kenmore Lot, pursuant to Section 6, Subsection A(2)(c) of the Zoning Ordinance, for the purpose of operating "additional parking in connection with motel now being constructed on adjacent property" and "a public parking area as a transitional use." (R. at 33.) The Zoning Ordinance in effect at that time stated in Section 6, Subsection A(2)(c) that the "following uses shall be permitted on a transitional site in the 'R-6' Districts: . . . c. Public parking area if a use permit is secured as provided for in section 28 and said area is located and developed as required in section 23." (R. at 66.) The Zoning Ordinance at that time further defined "Parking area, public" as "[a]n open off-street area, other than a private parking area, used for the parking of motor vehicles, and available for general public use including customer use." (R. at 64.)

On November 2, 1963, the Arlington County Board approved the Use Permit to permit "transitional parking" on the Kenmore Lot subject to only two conditions: (1) that screening be approved by the County Manager; and (2) that access to the lot must be oriented toward Wilson Boulevard and the existing commercial ground. (R. at 55.) Shortly thereafter, the Highlander Motel was built and customers of the Highlander Motel began using the Kenmore Lot for parking. (R. at 142.) Pursuant to the Use Permit, the Kenmore Lot has been used for transitional parking for the Highlander Motel continuously since the approval of the Use Permit in 1963. (*Id.*)

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Proposed Redevelopment of the Wilson Lot and the Zoning Determination Letter

The Appellant now desires to redevelop the Wilson Lot with a by-right pharmacy that is permitted under the Arlington County Zoning Ordinance ("ACZO") provisions applicable to the Wilson Lot. (R. at 7.) On January 14, 2016, the applicant for the proposed pharmacy requested a zoning determination from the Arlington County Zoning Administrator to confirm that the Kenmore Lot could continue to serve as off-street transitional parking for the commercial use on the Wilson Lot, including the proposed new pharmacy. (R. at 17-20.)

In response, on February 11, 2016, Deputy Zoning Administrator Andrew Noxon issued a zoning determination (the "Determination") regarding the Wilson Lot and Kenmore Lot. (R. at 14-16.) In that Determination, Mr. Noxon stated that the Kenmore Lot would not be permitted to be used as a transitional parking area for a new pharmacy on the Wilson Lot. (*Id.*) Mr. Noxon stated further in the Determination that all required parking for the new pharmacy must be provided on-site on the Wilson Lot. (*Id.*)

The BZA Appeal of the Zoning Determination Letter

Following receipt of the Determination, Appellant filed an appeal with the BZA on March 11, 2016. (R. at 5-12.) The appeal requested that the BZA reverse the Determination and confirm that the Kenmore Lot may continue to be used for transitional parking to support the proposed commercial use on the Wilson Lot. (*Id.*) The BZA appeal was assigned case number V-11158-16-APP-1. (R. at 141.)

The BZA held a hearing on July 13, 2016, at which the BZA voted to confirm the findings in the Determination letter and denied the Appellant's request that the Kenmore Lot be permitted to continue to be used as a public parking area to satisfy the required parking requirements for any redevelopment on the Wilson Lot. (R. at 102-103.)

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As the owner of the Wilson Lot and Kenmore Lot, the Appellant is especially aggrieved by the July 13, 2016 decision of the BZA in V-11158-16-APP-1 as it will impede the Owner's ability to redevelop the Wilson Lot and use the Kenmore Lot to support the parking needs of future commercial uses on the Wilson Lot.

STANDARD OF REVIEW

In this appeal, this Court shall hear any arguments on questions of law *de novo*, pursuant to Virginia Code Section 15.2-2314.

ARGUMENT

The BZA erred as a matter of law when it confirmed the Zoning Administrator's Determination that the Kenmore Lot could not continue to be used for parking for the redevelopment of the Wilson Lot. The BZA was incorrect for two reasons. First, the approved 1963 Use Permit permitting parking on the Kenmore Lot contains no restrictions or limitations related to the use of the Kenmore Lot for parking for the Wilson Lot. Moreover, the Use Permit on the Kenmore Lot is not conditioned on the motel use remaining on the Wilson Lot. Second, even absent the 1963 Use Permit, the Arlington County Zoning Ordinance ("ACZO") allows off-site parking for commercial uses such as the proposed pharmacy in this case.

I. THE 1963 USE PERMIT ALLOWS PARKING ON THE KENMORE LOT WITH NO LIMITATIONS OR RESTRICTIONS OTHER THAN THOSE CONDITIONS THAT THE BOARD SPECIFICALLY REQUIRED.

The BZA erred as a matter of law and its decision to uphold the Zoning Administrator's Determination should be reversed because the 1963 Use Permit permits parking on the Kenmore Lot with no limitations or restrictions related to the commercial use on the Wilson Lot. The only conditions associated with the Use Permit are two specific conditions related to screening and

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orientation. Therefore, redevelopment of the Wilson Lot with a by-right pharmacy should have no impact on the Use Permit and the transitional parking use permitted on the Kenmore Lot.

A. The Zoning Administrator and BZA Erred in Holding that the Use Permit Does Not Allow "Required" Parking for the Wilson Lot.

In the Determination letter at issue in this appeal, the Deputy Zoning Administrator incorrectly relied on Section 12.8.5 of the current ACZO, which states that "[t]ransitional parking areas shall not be used to satisfy the provisions of parking required by this zoning ordinance." (R. at 15.) Citing this provision, the Deputy Zoning Administrator wrote: "Therefore, it is my determination that the transitional parking area located at 823 North Kenmore Street shall not be used to satisfy the parking requirements for the proposed pharmacy located at 3330 Wilson Boulevard." (R. at 15.) The Zoning Administrator's reliance on Section 12.8.5 of the current ACZO is incorrect as a matter of law and should be reversed.

When the Board approved the Use Permit in 1963, the provisions of Section 12.8.5 of the ACZO had not yet been enacted. (R. at 143.) In fact, the Board did not adopt these provisions restricting the use of transitional parking areas until 1983, twenty years later. (R. at 244-45.) This is an undisputed fact. In the staff report for the BZA Appeal, County staff even wrote that the Zoning Administrator "agrees that neither the 1962 Zoning Ordinance nor the subject use permit included a limitation on the use of transitional parking areas for required parking." (R. at 143.) Staff went on to concede that, "[t]o that end, the transitional parking area may continue to be used for public parking, so long as it is not discontinued for more than one year, per the provisions of Section 15.4.5." (R. at 143.) Yet, oddly, the Zoning Administrator's determination states the opposite, and staff wrote that the "Zoning Administrator appropriately applied the provisions of this section [12.8.5], which expressly prohibits the use of transitional parking areas to satisfy the provision of required parking, and denied the request." (R. at 144.)

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The Zoning Administrator's position is facially flawed and internally inconsistent and should be reversed. The Zoning Administrator agrees that the Use Permit permits public parking[2] on the Kenmore Lot, with no limitation on the use of the Kenmore Lot for required parking for the Wilson Lot. Indeed, the Highlander Motel has been using the Kenmore Lot for required parking for decades. The Zoning Administrator concedes that the transitional parking area on the Kenmore Lot may continue to be used without limitation "so long as it is not discontinued for more than one year." (R. at 143.) Here, the Appellant proposed to continue to use the Kenmore Lot for required parking for the new pharmacy on the Wilson Lot. That use on the Kenmore Lot would not have been discontinued, rather, it would have continued just as it has since the 1960s. Yet, the Zoning Administrator ultimately took the position that current Section 12.8.5 requires that the Zoning Administrator deny appellants' request to use the Kenmore Lot for required parking for a future pharmacy on the Wilson Lot. This conclusion is illogical and contradicts the Zoning Administrator's own admissions as to the continued validity and operation of the Use Permit.

The Zoning Administrator's application of current Section 12.8.5 in this matter also violates Appellants' vested rights. Appellant has a vested right under Va. Code. Ann. § 15.2-2307 to use the Kenmore Lot as a transitional parking area notwithstanding the 1983 amendment implementing Section 12.8.5. This is because Va. Code. Ann. § 15.2-2307 prohibits local zoning boards from impairing a landowner's vested rights where the landowner "obtains or is the beneficiary of a significant affirmative governmental act which remains in effect." Va. Code. Ann. § 15.2-2307(A). One such "significant governmental act" is the granting of a use permit by

[2] The Zoning Ordinance at the time the Board approved the Use Permit defined "Parking area, public" as "[a]n open off-street area, other than a private parking area, used for the parking of motor vehicles, and available for general public use including customer use." (R. at 64.)

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the County Board. Va. Code. Ann. § 15.2-2307(B)(iii). Here, Appellant, via Appellant's predecessor in title, is the beneficiary of a vested right to use the Kenmore Lot as a transitional parking area based on the Arlington County Board's approval of the Use Permit in 1963. Therefore, the Zoning Administrator incorrectly applied Section 12.8.5 of the current ACZO, and the Determination should be reversed.

B. The Zoning Administrator and BZA Erred in Finding that Transitional Parking on the Kenmore Lot is Contingent on the Continued Operation of the Motel Use on the Wilson Lot.

As discussed above, in the Determination letter, the Deputy Zoning Administrator stated the following: "The transitional parking area permitted by the Use Permit U-1579-63-1 may continue to be used for additional parking as long as this use is not discontinued for more than one (1) year . . . ." (*Id.*) Read literally, this statement would seem to indicate that the parking use on the Kenmore Lot must not be abandoned for more than one year in order to maintain the Use Permit. Appellant would agree with that statement. In the Determination letter, the Deputy Zoning Administrator made no mention of the motel use as a condition for the continuing validity of the Use Permit, but still denied the Appellants' request. (R. at 14-16.) In the County's staff report prepared for the BZA Appeal, however, staff stated that the Zoning Administrator's position was that the Use Permit was contingent on the continuing operation of the *motel use* on the Wilson Lot:

> Assuming for the sake of argument that the transitional parking use at 823 N. Kenmore Street was approved for required motel parking in 1963, any right to use this [Kenmore Lot] for required parking is only to protect a landowner's right to continue to use the lot for parking for the motel only. *There is [sic] exists no protection for the appellant to continue to use the transitional lot for required parking necessary for all future uses on the motel parcel.*

(R. at 144.)

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The Zoning Administrator's position, as stated by staff and confirmed by the BZA, is incorrect as a matter of law and should be reversed. There is no condition associated with the Use Permit that requires the motel use to be maintained on the Wilson Lot. Rather, the only conditions that the Board required when it approved the Use Permit in 1963 were related to screening and orientation. (R. at 55.) The Board could have required a condition restricting the use of parking on the Kenmore Lot to the motel on the Wilson Lot, but did not do so. Further supporting this point, the published public notices related to the application in 1963 made no mention of the motel, but rather stated only that the applicant had made a request "for a Use Permit as required by Section 6, Subsection A-2c to permit a public parking area as a transitional use, on premises known as 823 North Kenmore Street." (R. at 167.) There was no stated restriction or contingency in those notices related to the motel use on the Wilson Lot.

The County may attempt to argue that the motel is referenced in the application materials from 1963 and therefore it is incorporated into the Board's approval. This argument should be rejected. References to the motel in the 1963 application materials are immaterial. This is because the only conditions that may be associated with a Board approval are those that the Board specifically requires. The case *Omps v. Board of Zoning Appeals of Winchester*, 8 Va. Cir. 433, 436 (Winchester Cir. Ct. Apr. 26, 1987) is directly on point and supports the Appellants' position. In *Omps*, the Winchester BZA granted a special exception with no written conditions. Later, the BZA attempted to enforce verbal representations made by the appellant while seeking to obtain the special exception. The court in *Omps* ruled against the BZA and held: "We cannot subscribe to the proposition that a formal written order which contains some express terms and conditions can also be said to carry with it silent and unexpressed terms and conditions." *Id.* at 436. The *Omps* court made clear that discussions and internal considerations of the BZA were

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inapplicable because "no condition respecting future uses of the premises found its way into the findings as filed or the order as issued." *Id.* Such is the case here. There is nothing in the County Board's official approval of the Use Permit in 1963 to support the Zoning Administrator's view that the Use Permit is conditioned on the motel use being maintained on the Wilson Lot.

In the staff report supporting the Zoning Administrator's Determination before the BZA, staff attempted to support the Determination by citing the case *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E. 2d 153 (2008). *Goyonaga*, however, is not on point because that case does not involve a use permit, but instead dealt with a variance that the Falls Church Board of Zoning Appeals approved for a nonconforming structure. During the course of renovations of their home, and after obtaining approval of a variance, the Appellants in *Goyonaga* effectively demolished their existing house, thereby causing the structure to lose its nonconforming status under the applicable zoning ordinance. The Court agreed with the BZA that this effectively nullified the variance that had been previously approved. This case, on the other hand, involves an approved and still-valid use permit. There is no allegation, nor could there be, that the use permit is not valid at this time. County staff, by referencing *Goyonaga*, seem to have incorrectly equated the Use Permit in this case with the nonconforming status of the structure in *Goyonaga*. The two are not equivalent. As discussed above, a use permit is a significant governmental act that explicitly authorizes a use of property. Nonconforming status, on the other hand, is a land use and zoning concept that shields property owners from being held in violation of subsequently-amended zoning provisions applicable to their property. *Goyonaga*, therefore, is not on point, and the BZA's decision upholding the Zoning Administrator's Determination should be reversed.

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II. EVEN ABSENT THE USE PERMIT, THE ZONING ORDINANCE ALLOWS THE ZONING ADMINISTRATOR TO APPROVE OFF-SITE PARKING ON THE KENMORE LOT.

Even if there were no valid use permit for the Kenmore Lot, or if the Use Permit that exists was somehow inapplicable, the Zoning Administrator erred for a second reason: the current provisions of the ACZO permit the Zoning Administrator to approve off-site parking on the Kenmore Lot for a future pharmacy use on the Wilson Lot. The Zoning Administrator incorrectly took the position that the ACZO prohibited the County from authorizing such off-site parking in this case.

The Appellant initially sought a zoning administrator determination that off-street parking for a new pharmacy on the Wilson Lot may be provided on the Kenmore Lot, pursuant to Section 14.3.3.B.1 of the ACZO. (R. at 18-19.) This provision states that the zoning administrator may authorize off-site parking under certain conditions. (R. at 26-27.) These conditions require common ownership of the two parcels, a pedestrian entrance to the parking area, and that the parking area must be conveniently usable without unreasonably causing certain hazards or interference with the surrounding business and any residential neighborhood. (*Id.*) Notably, Section 14.3.3 states that such authorization for off-site parking may be provided for required parking spaces or voluntarily provided spaces. (R. at 26.)

In the Determination letter, rather than addressing the standards in Section 14.3.3.B.1, the Deputy Zoning Administrator stated that Section 14.3.3.B conflicts with Article 12, Section 12.8.5, which states that transitional parking areas shall not be used to satisfy the provisions for required parking under the ACZO. (R. at 15.) The Deputy Zoning Administrator then stated that Section 12.8.5 pre-empts Section 14.3.3.B.1. because under Section 1.4.1 of the ACZO:

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> Where any part of this zoning ordinance imposes a greater or lesser restriction upon the use of the buildings or premises, or upon the height of the buildings, or requires larger or smaller yards, courts or other open spaces than are imposed or required by other existing agreements or provisions of law or ordinance, the provisions which are more restrictive shall control.

(R. at 15.)

The Zoning Administrator's position is inapplicable and illogical and should be reversed. If the Zoning Administrator is correct, an entire section of the ACZO would be rendered a superfluous nullity. That cannot possibly be the law or the intent of the County Board. Under Virginia law on statutory construction, "courts apply the plain meaning of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result." *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006) (citation omitted). A statute is ambiguous "if the text can be understood in more than one way or refers to two or more things simultaneously or when the language is difficult to comprehend, is of doubtful import, or lacks clearness or definiteness." *Id.* at 227 n. 8. An absurd result occurs in "situations in which the law would be internally inconsistent or otherwise incapable of operation." *Id.* at 227 n. 9. Here, the provisions of the ACZO are not ambiguous. Therefore, acceptance of the Zoning Administrator's interpretation would lead to an absurd result, which should be rejected.

When read carefully, it is apparent that Section 14.3.3.B does not conflict with Section 12.8.5. This is because Section 14.3.3.B deals with parking *requirements* while Section 12.8.5 deals with a parking *use*. Indeed, a "transitional parking area," as referenced in Section 12.8.5, appears as a "use type" on the transitional use table in the ACZO. (R. at 24.) Section 12.8.5 states that "[t]ransitional parking areas shall not be used to satisfy the provisions of parking required by this zoning ordinance." (R. at 200.) The Appellant, however, was not requesting that the zoning administrator approve a "transitional parking area." The reason for this was two-fold:

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(1) a "transitional parking area" may only be approved through the County Board's approval of a use permit (R. at 24.); and (2) the Appellant already has a use permit allowing transitional parking on the Kenmore Lot. Rather, the Appellant simply sought an approval by the Zoning Administrator, pursuant to Section 14.3.3.B, that certain parking for the proposed pharmacy may be permitted to be located off-site.

The Zoning Administrator incorrectly conflated the provisions of Section 12.8.5 (transitional parking use) with Section 14.3.3.B (off-site parking requirements). Here, as noted above, Section 14.3.3.B. and Section 12.8.5 can and should be harmonized. Section 14.3.3.B. provides the requirements for parking, including off-site parking; Section 12.8.5 provides the requirements for the initial authorization of a transitional parking area *use*. Accordingly, the only inquiry that the Zoning Administrator should have undertaken was whether the proposed parking on the Kenmore Lot met the requirements of Section 14.3.3.B. Section 12.8.5 is not applicable to the Appellants' proposal. Therefore, the BZA's decision to uphold the Zoning Administrator's Determination should be reversed as a matter of law.

CONCLUSION

For all of the above reasons and those to be argued at the trial in this matter, the BZA's decision upholding the Zoning Administrator's determination should be reversed.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Opening Brief was e-mailed and mailed, postage prepaid, on July 17, 2017, to the following:

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IN RE: JULY 13, 2016 DECISION OF	:	
THE BOARD OF ZONING APPEALS OF	:	Case No. CL16002056-00
ARLINGTON COUNTY (V-11158-16-APP-1)	:	

APPELLANT'S REPLY BRIEF

Appellant, 3336 Wilson Boulevard, LLC ("Owner" or "Appellant"), now files this Reply Brief in this appeal, pursuant to Virginia Code Section 15.2-2314, from the July 13, 2016 decision of the Board of Zoning Appeals of Arlington County (the "BZA") in case number V-11158-16-APP-1.

INTRODUCTION

In this Reply Brief, the Appellant addresses three issues raised in the County's Opposition Brief. First, the County misstates the standard of review in this appeal. Given that this appeal involves questions of law related to a zoning administrator determination, the BZA's decision is reviewed by this Court *de novo*. There is no special burden on the Appellant to establish its legal arguments, nor is the BZA or Zoning Administrator Determination presumed correct. Second, the County now concedes that the Use Permit at issue is *not* in fact tied to the continued operation of the motel use. That is an important change of position that comes only *after* the BZA rendered its decision. Finally, the County again misconstrues the concept of a nonconforming use with the Use Permit that is at issue in this case. The legal effect and mechanism of a nonconforming use is very different from a Use Permit. For these reasons, and those stated in Appellants' Opening Brief, the Court should reverse the decision of the BZA upholding the Zoning Determination in this case.

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ARGUMENT

I. THE COUNTY MISSTATES THE STANDARD OF REVIEW IN THIS APPEAL.

In its Opposition Brief, the County states that the "appellant who challenges the BZA's decision has the burden of proof" and the "appellant cannot meet this burden and this Court should deny this appeal." (County's Br. at 1-2.) That is not correct. The Zoning Administrator's Determination and the BZA's decision constituted an administrative interpretation of the Use Permit and the Arlington County Zoning Ordinance ("ACZO"). Accordingly, this Court's review is governed by Virginia Code Section 15.2-2314. While questions of fact are entitled to a presumption of correctness under Section 15.2-2314, questions of law are subject to a *de novo* review.[1]

This case presents a pure question of law: Whether the Use Permit, as approved by the County Board in 1963, allows Appellant to continue to use the Kenmore Lot as a transitional parking area for the redevelopment of the Wilson Lot. *See Alexandria City Council v. Mirant Potomac River*, 273 Va. 448, 455 (2007) ("Interpretation of a local zoning ordinance, like interpretation of a statute, is a pure question of law, subject to de novo review."). Unlike an appeal related to the granting or denial of a *special exception*, there is no presumption of correctness accorded on appeal to the BZA's decisions on questions of law in this case, nor does the Appellant carry any greater burden than the Appellee in arguing questions of law. *See, e.g.*, Va. Code § 15.2-2314; *Hale v. Bd. of Zoning Appeals*, 277 Va. 250, 268 (2009).

[1] To support its erroneous position on the standard of review, the County cites *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 380-81 (2007). As the Supreme Court noted, however, that case was decided under a different standard of review that changed with the amendments to Code Section 15.2-2314 on July 1, 2006. *See, e.g.*, 273 Va. 375 n. 3.

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The Court's central focus when interpreting the zoning ordinance is to ascertain and give effect to the intention of the legislative body that enacted the ordinance. *Boasso America Corp. v. Zoning Administrator of Chesapeake*, 293 Va. 203, 207 (2017). In doing so, "appellate courts are bound by the plain meaning of statutory language." *Alliance to Save the Mattaponi v. Commonwealth Department of Environmental Quality*, 270 Va. 423, 439 (2005). In other words, "[c]ourts are not permitted to add language to a statute nor are they 'permitted to accomplish the same result by judicial interpretation.'" *Burlile v. Commonwealth*, 261 Va. 501, 511 (2001). More specific to the context of this case, "the interpretation of a zoning ordinance is controlled by the principle that words in common use must be given their plain and natural meaning in the absence of any showing that such words were used in any other than their usual and ordinary sense." *McClung v. Cty. Of Henrico*, 200 Va. 870, 875 (1959). Indeed, the Virginia Supreme Court has "consistently held that courts do not defer to an agency's construction of a statute because the interpretation of statutory language always falls within a court's judicial expertise." *Nielsen Co. (US), LLC v. County Bd. of Arlington County*, 289 Va. 79, 88 (2015). Thus, the Court's role in this appeal is to determine, as a matter of law and with no shifting or weighing of burdens of proof, the correct interpretation of the ACZO and Use Permit at issue.

II. THE COUNTY NOW CONCEDES THAT THE USE PERMIT IS NOT TIED TO THE MOTEL USE ON THE WILSON LOT.

In a surprising change of position, the County now concedes in its Opposition Brief that the Use Permit, in fact, is *not* tied to the motel use on the property located at 3330 Wilson Boulevard (the "Wilson Lot"). Yet, in the County's report to the BZA for its hearing in this matter, the County reported that the "(Acting) Zoning Administrator's Position" was, in part, that "any right to use this lot for required parking is only to protect a landowner's right to continue to use the lot for parking for the motel only." (R. at 144 (emphasis in original).) The County, in its

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brief, argues that this statement was merely a hypothetical that would be applicable only if the Use Permit allowed required parking for the Highlander Motel. (County's Br. at 9.) Regardless, this was a position that the Zoning Administrator represented as part of her Zoning Determination that the BZA confirmed on appeal.

Moreover, the Zoning Administrator has already conceded that the Use Permit allows the Kenmore Lot to be used for required parking: "[t]he Zoning Administrator agrees that neither the 1962 Zoning Ordinance nor the subject use permit included a limitation on the use of transitional parking areas for required parking. To that end, the transitional parking area may continue to be used for public parking, so long as it is not discontinued for more than one year, per the provisions of Section 15.4.5." (R. at 143.) Thus, the Zoning Administrator agreed that the Use Permit allows required parking for the Highlander Motel. The County cannot now take a position opposite to what was represented as the Zoning Administrator's position before the BZA. The shifting positions of the Zoning Administrator and County only further highlight the erroneous decision of the BZA, which this Court should reverse on appeal.

III. THE COUNTY ERRONEOUSLY EQUATES A LEGISLATIVELY APPROVED USE PERMIT WITH A NONCONFORMING USE.

Having abandoned its argument that the Use Permit was tied to the continued operation of the motel, the County now relies solely on its argument that the BZA and Zoning Administrator Determination are correct because the Use Permit in this case is akin to a nonconforming use. As a matter of law, the County is incorrect, and the Court should therefore reverse the BZA's decision.

A "nonconforming use" is "a lawful use existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." *Knowlton v. Browning-Ferris Industries of Va., Inc.*, 220 Va. 571, 572 n.1 (1987); *see also* Ex. 1, 2017

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ACZO Article 18.2 (General Terms Defined) ("Nonconforming use. A use that lawfully occupied a building or land at the time this zoning ordinance became effective and which does not conform with the use regulations of the district in which it is located."). Where a lot owner has a validly issued use permit, however, and the lot owner's use conforms to the conditions of that permit, the use remains a lawful conforming use. *See Patton v. City of Galax*, 269 Va. 219, 227 (2005).[2] This is because the issuance of a use permit is a specific legislative act. *Bd. of Supervisors of Fairfax Cty. v. Southland Corp.*, 224 Va. 514, 522 (1982) ("[T]he decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category . . . involves the same balancing of the consequences of private conduct against the interests of public welfare, health, and safety as any other legislative decision.").[3] In other words, a legislative body specifically approves a use permit for a specific property, whereas a nonconforming use arises by implication through the subsequent amendment to a zoning ordinance. *See Board of Supervisors v. Booher*, 232 Va. 478, 482 (1987) (holding that a special exception, unlike a nonconforming use, cannot arise by implication).

Moreover, a use permit, according to Virginia Code Section 15.2-2307, provides a vested right in a permissible use of property that is protected "against any future attempt to make the use impermissible by amendment of the zoning ordinance." *Goyonaga v. Bd. of Zoning Appeals for Falls Church*, 275 Va. 232, 244 (2008). Put differently, "where . . . a special use has been granted . . . the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation." *Fairfax Cty. v. Med. Structures*,

[2] The County cites *Patton* for the proposition that the Use Permit in this case now is considered a lawful nonconforming use. (County's Br. at 9.) In fact, in *Patton*, the Court noted correctly that it was analyzing the use in question as a nonconforming use only because no use permit had been granted.

[3] In *Southland Corp*, the court uses the term "special exception," but the court points out that "[t]he terms 'special exception' and 'special use permit' are interchangeable." 224 Va. at 521.

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213 Va. 355, 358 (1972). The Use Permit in this case provides Appellant with the vested right to use the Kenmore Lot as a transitional parking area, as that use was defined in the ACZO at the time the Use Permit was granted. The 1983 amendment to the transitional parking provisions in the ACZO does not deprive Appellant of that vested right. The 1983 amendment amended the ACZO—it did not amend or alter the Use Permit in this case. Thus, the Zoning Administrator erred in her Determination, and the BZA's decision should be reversed.

CONCLUSION

For all of the above reasons and those stated in Appellant's Opening Brief, the BZA's decision upholding the Zoning Administrator's Determination should be reversed.

Respectfully Submitted,

3336 WILSON BOULEVARD, LLC
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Reply Brief was e-mailed and mailed, postage prepaid, on July 31, 2017, to the following:

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Nonconforming building. A building or structure or portion thereof lawfully existing at the time this zoning ordinance became effective, that was designed, erected or structurally altered such that it does not conform to the regulations of the district in which it is located.

Nonconforming sign. A sign that met all ordinance requirements at the time of installation or placement but which, due to ordinance changes, does not comply with current requirements.

Nonconforming use. A use that lawfully occupied a building or land at the time this zoning ordinance became effective and which does not conform with the use regulations of the district in which it is located.

Nursing home. A facility licensed by the state as a health care facility for chronic or convalescent patients or the aged or infirm in which three or more persons are received, kept or provided with food, shelter and care, but not including hospitals, medical clinics or similar institutions devoted primarily to the diagnosis and treatment of the sick or injured.

Nursery school. Any place, however designated, operated for the purpose of providing training, guidance, education, or care for six or more children under six years of age, during any part of the day between 6:00 a.m. and 6:00 p.m., including kindergartens, but not including family day care homes.

Office building. A building designed for or used as the offices of professional, commercial, religious, private, public or semi-public persons or organizations, and where no goods, wares, or merchandise are prepared or sold on the premises.

Office, government. Federal, state, or county offices, administrative, clerical or public services.

Office, medical or dental. A use providing outpatient consultation, diagnosis, therapeutic, preventative, or corrective personal treatment services by doctors, dentists, or similar practitioners of medical and healing arts for humans, licensed for such practice by the state. The term includes outpatient clinics and outpatient emergency centers, but not overnight care or ambulance receiving facilities.

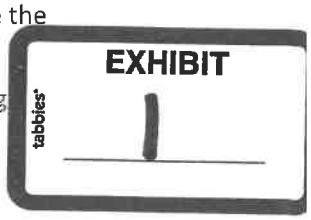
One-family detached. A residential building containing one dwelling unit designed for one family and located on a single lot with required yards on all four sides.

On-site. Located on the property that is the subject of an application for development.

Open-air market. An outdoor market held on a regular basis, and at which groups of individual sellers offer goods, new or used, for sale to the public. Open-air market shall not include garage sales not held on a regular basis, outdoor display or sales associated with retail establishments that are principally located in indoor facilities, or vehicle sales, rental or leasing facilities. See also §12.5.17

Outdoor café: An area that contains portable seating and tables, intended solely for the consumption of food and beverages that are also included in the standard menu of the restaurant, outside the exterior walls of a restaurant (excluding rooftops).

Outlot. A unit of land not usable as a building site and not meeting the requirements of this zoning ordinance.



VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

IN RE: JULY 13, 2016 DECISION OF THE
BOARD OF ZONING APPEALS OF
ARLINGTON COUNTY, VIRGINIA Case No. 16-2056
(BZA APPEAL APPLICATON V-11158-16-APP-1)

ARLINGTON COUNTY'S BRIEF IN OPPOSITION

Appellee, the County Board of Arlington County ("County") submits this brief in support of its opposition to the Petitioner's Appeal.

A. ISSUE

The issue on appeal before this Court is whether the Arlington County Board of Zoning Appeals, ("BZA") properly upheld the Zoning Administrator's February 11, 2016, determination ("Determination") that pursuant to Arlington County Zoning Ordinance ("ACZO") §12.8.5, a residentially zoned lot[1] located at 823 N. Kenmore, which was granted a use permit for a public parking lot as a transitional use in 1963, may not be used to satisfy the required parking provisions for the redevelopment of an adjacent commercial parcel located at 3330 Wilson Blvd. Currently, a motel is located at 3330 Wilson Blvd. and the owner wants to redevelop the property with a CVS pharmacy of such size that it requires more parking than can be accommodated on site. ACZO §12.8.5 states, *inter alia* "Transitional parking areas shall not be used to satisfy the provisions of parking required by this zoning ordinance". On appeal this to this Court the scope of review is: Was the BZA correct in upholding the Zoning Administrator's determination? The appellant who challenges the BZA's decision has the burden of proof. *Trustees of the Christ and St. Luke's*

[1] 823 n. Kenmore St is zoned R-6, which permits only a single-family detached dwelling, a religious institution or agricultural use by -right. Other uses are subject to use permit or site plan approval by the County Board.

Episcopal Church v. Board of Zoning Appeals of the City of Norfolk, 273 Va. 375, 380-381, 641 S.E.2d 104, 107 (2007). The appellant cannot meet this burden and this Court should deny this appeal. There are no facts in the BZA record in dispute.

B. **FACTUAL BACKGROUND**

Appellant 3336 Wilson Boulevard, LLC ("Appellant") owns two properties: one is located at 3330 Wilson Blvd, Arlington, VA, RPC # 19-014-022, improved as a motel (the Highlander Motor Inn, hereafter "Motel") zoned "C-2" Service Commercial-Community Business District under the Arlington County Zoning Ordinance (" ACZO"); and the other is 823 N. Kenmore Street, Arlington, VA, RPC # 19-014-021, (the "Kenmore Property") zoned "R-6" One-Family Dwelling District under the ACZO. The Kenmore Property is the first residential lot in from Wilson Blvd on Kenmore Street in the Lyon Park area of Arlington County. The Kenmore Property is bounded on three sides by other residential properties. (BZA bate stamp pg. 22).[2] As additional background, building permit drawings for the Motel, dated June 28, 1963, show approval of a 45 room hotel with 45 on-site parking spaces. (BZA bate stamp pgs. 82-85). At that time the 1962 ACZO required one parking space per unit. (BZA Record Exhibit 8. D). All required parking for the Motel was located on the property. (BZA Record Exhibit 8.G. also attached hereto as Appellee's Exhibit A). The Motel has been in operation since this time. In November 1963, the 823 N. Kenmore St. property was granted a use permit (U-1579-63-1) (the "1963 Use Permit") approving a transitional use to allow for a public parking lot (the "Public Parking Lot"), (BZA bate stamp pgs. 225-230). Conditions of the Use Permit approval included heavy screening and restrictions on vehicular access toward Wilson Blvd. (BZA bate stamp pg. 230). The staff report from the 1963 Use Permit

[2] Appellant filed a bate-stamped version of the BZA record although it is incomplete and omits pages from the certified BZA record filed with this Court. Most references in this brief are to the bate-stamped BZA record for convenience. **Otherwise where the bate-stamp version is lacking, a reference to the certified BZA record filed by Appellee with the Arlington Circuit Court is noted with the following: BZA Record, Exhibit #.**

approval stated that transitional parking lot will provide "parking above that required by the ordinance" [for the hotel]. (BZA bate stamp pg. 225). The Public Parking Lot has been used continuously since this time.

In 1983, a text amendment to the ACZO specifically prohibited the use of transitional parking areas for required parking. (BZA bate stamp pgs. 281-287).

In January 2016 the Appellant asked for a determination from the Zoning Administrator requesting the ability to use the Public Parking Lot for the required parking associated with the new a CVS pharmacy at the Motel site. (At that time the Applicant did not state why all parking could not be accommodated on-site; only later it was revealed that the Motel site could not accommodate parking for the new CVS because of the proposed size of the new building.[3] If the CVS building weren't so large, the ACZO parking requirements could be met.[4]) In support of its request, the Appellant cited §14.3.3. B.1 of the AZCO which applies to "Off-site parking in zoning districts other than R and RA districts."

The Zoning Administrator determined that ACZO §14.3.3. B.1 was inapplicable. She cited the more appropriate, applicable §12.8.5 of the AZCO regarding off-site parking, which states *inter alia* "Transitional parking areas shall not be used to satisfy the provisions of parking required by this zoning ordinance" (BZA Record Exhibit 8 E), and therefore she correctly determined that the Public Parking Lot at the Kenmore Property could not be used for required parking for the new CVS pharmacy at 3330 Wilson Blvd. Together with §12.8.5. D. of the ACZO, the Zoning Administrator relied on ACZO §1.4.1, which states where any zoning ordinance requirement

[3] Appellant dramatically asserts that the ZA determination "killed" the CVS redevelopment plan which is incorrect; Appellant could request a rezoning of 823 N. Kenmore to allow for parking or shrunk the footprint of the proposed CVS.

[4] ACZO allows for reduced parking for properties within close proximity of Metro. See ACZO §14.3.6 *et. seq.*

imposes a greater or lesser restriction on the use of buildings or land than imposed by another provision, the more restrictive provision applies. (BZA bate stamp pg. 150).

The Appellant appealed the Determination to the BZA which considered the matter on July 13, 2016. At the July 13, 2016 meeting, the BZA upheld the Zoning Administrator's Determination to deny the use of the Public Parking Lot at the 823 N. Kenmore Street property to satisfy the required parking requirements for the adjacent commercial use (the Motel redevelopment to the CVS pharmacy).

C. DISCUSSION

I. Standard of Review

The Virginia Supreme Court has held that a proceeding pursuant to Va. Code § 15.2-2314 is a proceeding in the nature of an appeal. The Circuit Court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance. *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 459, 657 S.E. 2d. 147, 150 (2008). [I]n the case of an appeal from the board of zoning appeals to the circuit court of a determination of a zoning administrator . . . the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. Va. Code §15.2-2314 (1950, as amended.) The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. *Id.* Any party may introduce evidence in the proceedings in the court. *Id.* However, evidence introduced in court must be in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Id.* The court shall hear any arguments on questions of law *de novo*. *Id.*

II. BZA's Decision to uphold the Zoning Administrator's determination is correct as a matter of law.

A. The Zoning Administrator determined that the Kenmore Property may not be used as off-site parking to satisfy parking required by the Motel/CVS.

To evaluate the Appellant's request for a determination pursuant to ACZO §14.3.3. B.1 to use the Kenmore Property for off-site parking required for the new CVS, the Zoning Administrator considered three things: 1) the underlying zoning for the Kenmore Property; 2) the 1963 Use Permit allowing a Public Parking Lot as a transitional use; and 3) all other applicable zoning ordinances.

1. The Zoning Administrator and the BZA properly rejected Appellant's request to use the Kenmore Property under ACZO§ 14.3.3. B.1.

In citing ACZO§ 14.3.3. B.1. in its request for determination from the Zoning Administrator, the Appellant points to the criteria under ACZO §14.3.3. B.1 which the Zoning Administrator must evaluate in approving off-site parking in zoning districts other than R and RA districts. This provision of the ACZO may authorize off-site parking in districts other than R and RA districts, as noted by the heading of §14.3.3. B: Off-site Parking, 1. Zoning Districts other than R and RA districts." (BZA bate stamp pg. 256). Explicitly, this provision applies only if the off-site parking is allowable principle use in R and RA districts. The Appellant overlooked that the underlying zoning for the Kenmore Property is R-6 - residential. Parking was not a permitted by-right use in the R-6 district in 1963, nor is it now a permitted by-right use in the R-6 district. (BZA bate stamp pg. 66.) In 1963 and now, parking is only permitted in an R-6 district with a use permit, (Id.) (More on the Use Permit below). Since parking isn't a permitted by-right use in the R-6 district, the Zoning Administrator properly rejected the Appellant's request under this ACZO

section and turned to evaluate whether the 1963 Use Permit was approved to satisfy required parking for the adjacent Motel.

2. The Zoning Administrator and the BZA correctly determined that the Use Permit for a Public Parking Lot on the Kenmore Property was not approved for parking required for the Motel commercial site.

As noted above, in 1963 the County Board approved a Use Permit on the Kenmore Property for public parking as a transitional use. (BZA bate stamp pg. 44,50 & 55). In 1963 a transitional use was defined, *inter alia,* as a use permitted on any transitional site under regulations for the district . . . and subject to all other regulations for the district" (BZA bate stamp pg. 65) Off-site parking for an adjacent commercial use was not permitted, either in the R-6 district or by the terms of the approved Use Permit. Appellant cites no evidence to the contrary.

The staff report for the 1963 Use Permit request before the County Board and in the BZA record are clear that the 1963 Use Permit was not approved to satisfy required parking for the Motel. Rather, the 1963 staff report for the Use Permit application stated that "It should be noted that this parking will be above that required by the ordinance" (BZA bate stamp Pg. 50).

It is the Appellant's burden to show that the Use Permit for the Public Parking Lot was approved for required parking for the adjacent Motel. *Knowlton v. Browning Ferris*, 220 Va. 571, 260 S.E. 2d 232 (1979), (standing for the proposition that the landowner has the burden of showing a lawful nonconforming use). The Appellants cannot make that case given the 1963 staff report in the BZA record indicating that the Use Permit was approved for parking "other than that required by the ordinance." (BZA bate stamp pg.225). The Appellant cannot meet their burden. The BZA record is clear on this point and for this reason, the Court should affirm the BZA's decision. [5]

[5] The Appellant's brief cites pg. 142 of the BZA record as evidence that the Kenmore Property was used for Motel parking, however there is no such support on page 142 of the BZA record.

Additionally, the BZA record shows that the 1963 building permit and plat for the Motel show all required parking on the Motel site. (emphasis added.) (See BZA bate stamp pgs. 83- 96). Specifically, the parking layout ("the Parking Plan") for the 45 room Motel shows 45 parking spaces as required by the 1962 ACZO. (BZA bate stamp Pg.74, showing 1962 parking requirements for guest accommodations, and certified BZA Record includes this Parking Plan also attached here to as Exhibit A.) As plainly shown on the Motel Parking Plan, the Motel site didn't need the Kenmore Property/ Public Parking lot for required parking. All required parking was on the Motel site.

The materials submitted in support of the 1963 Use Permit for the transitional parking area further bolster the Zoning Administrator's finding that the Use Permit was for a public parking lot, and not for required parking for the Motel. (BZA bate stamp pg. 40). The plat shows "Proposed Parking Area for Motel – now under construction" on the Motel property. Hence, the Zoning Administrator and the BZA concluded correctly that the Use Permit was not approved for required Motel parking.

3. The Zoning Administrator properly cited applicable ACZO§ 12. 8. 5. which prohibits the use of a transitional parking area for required parking for the Motel/CVS redevelopment.

A 1983 text amendment to the ACZO specifically prohibits transitional parking areas being used as required parking. (BZA bate-stamp pgs. 281-287). This 1983 text amendment was the result of an in-depth study of parking requirements county-wide, including granting flexibility to reduce parking in Metro corridors in additional to defining a transitional parking area as one which could not be used "for the provision of parking required by the ordinance ". (BZA bate-stamp pg. 286). ACZO §12.8.5. D. still prohibits this: "Transitional parking areas shall not be used to satisfy the provisions of parking required by the zoning ordinance." As additional support, the Zoning

Administrator cited ACZO section 1.4.1.A which states "[w]herever any part of this zoning ordinance imposes a greater or lesser restriction, . . . the provisions which are more restrictive shall control" (BZA bate stamp pg. 190). The BZA agreed; the Appellant provides no law or facts to support a reversal.

B. The Appellant's assertion that it has a vested right to use the Public Parking Lot for off-site required parking pursuant to Va. Code Section 15.2-2307 is erroneous.

The Appellant's brief states that the Zoning Administrator "concedes that the transitional parking area on the Kenmore Property may continue to be used without limitation 'so long as it is not discontinued for more than one year'". However, the Appellant takes liberty with the Zoning Administrator's Determination. The Determination stated that the "transitional parking area permitted by the Use Permit may continue to be used for additional parking as long as the use is not discontinued for more than one year." (BZA bate stamp pg. 190). The Zoning Administrator did not opine that the transitional parking area may be used without limitation. U

Under Virginia law, the Appellant must show that the use of the Public Parking Lot as a transitional use included off-site required parking for the Motel. *Knowlton v. Browning Ferris*, 220 Va. 571; 573, 260 S.E. 2d 232, 235. (1987). In *Knowlton* the landowner failed to show that the character of its asserted vested right to maintain a lawful nonconforming use included an extension of that nonconforming use. (*Id.*) The Public Parking Lot, in use continuously since 1963 was vested as lawful nonconforming use for public parking. The Appellant's have no support that this use included the right to use the Public Parking Lot for required parking for the Motel. Absent any evidence to the contrary, the Public Parking Lot may be used only for public parking as noted at the time of approval in 1963.

The intent of Va. Code 15.2-2307 (cited by the Appellant) is to provide protection from a subsequent change to a zoning ordinance once a property owner has received approval for a use

not otherwise permitted. *Goyonaga v. Bd. of Zoning Appeals*, 275 Va. 232, 657 S.E. 2d 153 (2008). Moreover, the burden of establishing the vesting of a right to an otherwise impermissible use of property falls on the property owner. *Goyonaga*, citing *Snow v. Amherst County Bd. of Zoning Appeals*, 248 Va. 404, 407 448 S.E. 2d 606 at 608 (1994). The Appellants cannot show that the Public Parking Lot Use Permit was approved for required parking for the Hotel.

Further in enacting zoning ordinances, the government may expressly restrict the manner in which a nonconforming use can be extended. *Patton v. Galax*, 269 Va. 219, 228, 609 S.E. 2d 601, (2005). In *Patton,* the landowners asserted that their vested right in a nonconforming residential use of a portion of their property included the expansion of this vested right. The *Patton* court disagreed stating "[I]t is settled Virginia law that for a prior use of land which violates a newly enacted zoning restriction to be considered lawful nonconforming, the use must have been lawful and in existence on the effective date of the new restriction." (*Id.)* In this case, the Use Permit for a Public Parking Lot remains a valid nonconforming use per the Zoning Administrator's Determination and the subsequent zoning ordinance amendment prohibiting transitional parking area from being used as required parking does not interfere this. However, the Zoning Administrator correctly determined that ACZO §12.8.5. D. prohibits the use of the Public Parking Lot for required parking for the redevelopment of the Motel to a CVS, because there was no evidence that the Public Parking Lot was ever approved to satisfy required parking for the Motel. The BZA agreed. Accordingly, the BZA's decision should be affirmed as a matter of law.

C. Appellants argument that the BZA erred in finding that the transitional parking area was contingent on the continued operation of the Highlander motel is false.

The BZA made no such finding nor did the Zoning Administrator make any such Determination. Rather, the BZA staff report noted that *if* for the sake of argument, the Public Parking Lot *was* approved to satisfy required parking for the Highlander, it does not follow that

the Public Parking Lot is approved for any and all other required parking related to future development on the Motel site. *Goyonaga v. Board of Zoning Appeals*, 275 Va. 232, 657 S.E. 2d 153 (2008). Goyonaga obtained relief from a zoning requirement in order to build an addition to his house. Goyonaga's approval for the variance was approved given the nonconforming status of the original house. When the original house was completely demolished, the variance was no longer valid and Goyonaga was required to comply with all applicable zoning provisions. *(Id.)* This is analogous to the argument that *if the* Use Permit *were* approved for the benefit of the Motel, once the Motel no longer exists, then any permission allowing this nonconforming use is no longer valid. The foregoing notwithstanding, the BZA made no specific findings on this and the Appellant cannot point to any support in the BZA record. Conversely, the BZA record is rife with ample evidence (cited *supra*) on which the BZA relied to support the Zoning Administrator's Determination that the Kenmore Property/Public Parking Lot may not be used for off-site parking. Accordingly, the Appellant fails to meet its burden of proof that the BZA and the Zoning Administrator erred.

D. The Appellants argument that the Use Permit for the Public Parking Lot didn't prohibit off-site parking required for the Motel and therefore it is allowed, is unavailing.

The Appellant argues that the absence of a condition prohibiting use of the Public Parking Lot for required parking means that it is permitted. Not only is this erroneous, it is illogical. It is a formal fallacy and a leap of logic. It is akin to saying that the Use Permit allowed parking but since it didn't prohibit a circus, the Use Permit permits a circus. This is an absurd conclusion. In support, the Appellant's relies on a 1987 Winchester circuit court case of *Omps v. Bd. of Zoning Appeals*, 8 Va. Cir 433, (1987), and this is flawed. That circuit case is not controlling law and the facts are not on point. In *Omps* the issue was whether the BZA in that case had the right to amend

a previously granted special exception to include verbal representations made by the landowner. (Id. at 435.) This is not the case here. The *Omps* case provides the Appellants no support and should be ignored.

WHEREFORE, the County respectfully requests that the July 13, 2016 decision of the BZA be affirmed, and that this matter be finally dismissed, with prejudice.

Respectfully submitted,

COUNTY BOARD OF ARLINGTON COUNTY
By Counsel

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C R Sanders

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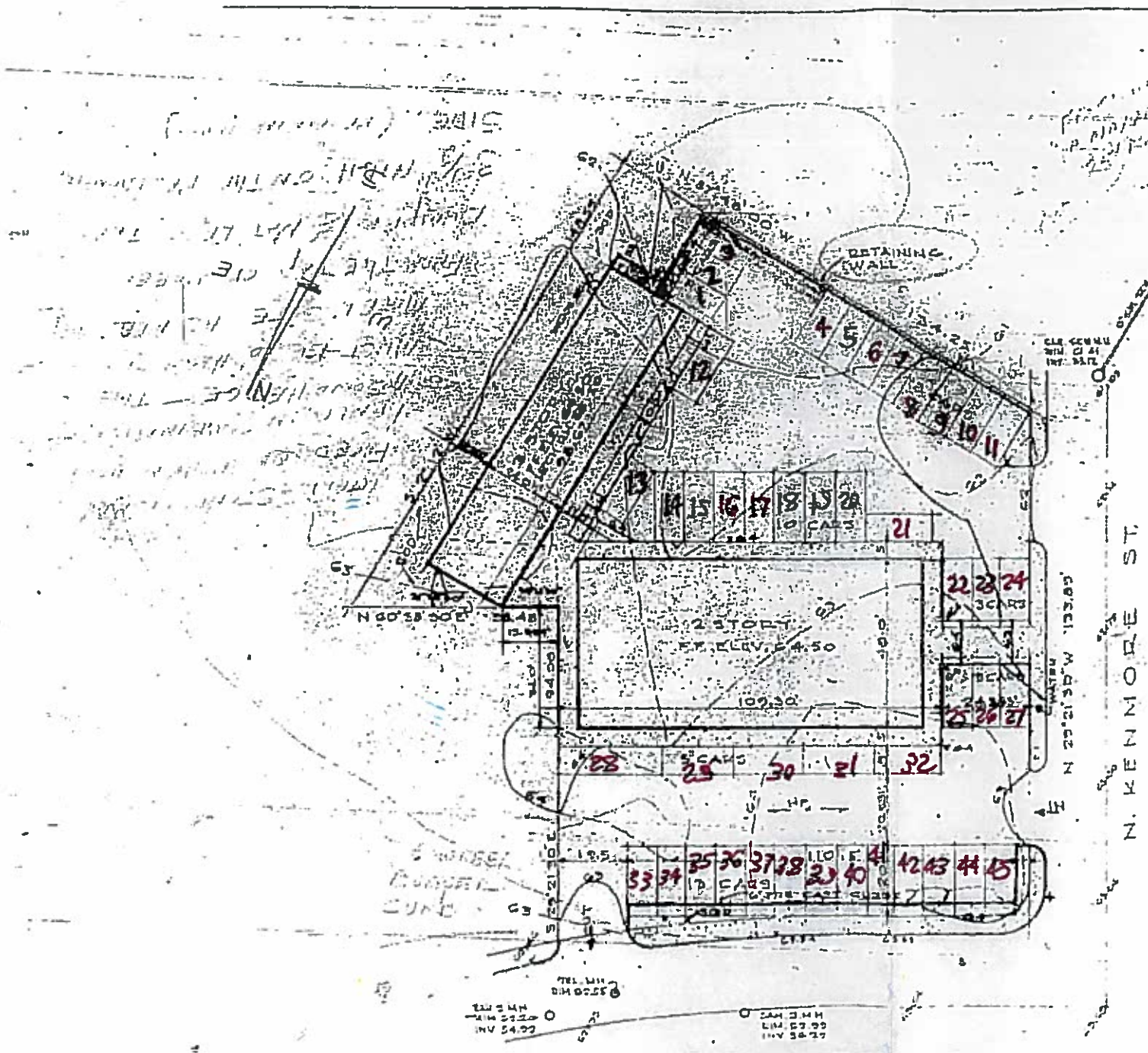
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Record of the Arlington County Board of Zoning Appeals in the above-captioned matter was emailed and mailed, first class postage prepaid, on this 24 day of July, 2017 to Zachary G. Williams (VSB# 77473) Bean Kinney & Korman P.C. 2300 Wilson Blvd. 7th Floor Arlington VA 22201.

C R Sanders

Christine R. Sanders



P L O T P L A N

SCALE 1=20'-0"

SYMBOLS

- EXIST. GRADE
- FINISH GRADE
- SPOT ELEVATIONS
- HP - HIGH POINT
- C.C.
- ASPHALT PAVING

M O T E L

ZONE C-2
LOT AREA 27,232
DENSITY 45 UNITS @ 27,000 ##
PARKING = 45 CARS

OWNER - [redacted]
2014 N. 16TH ST. ARLINGTON, VA.

SHERIDAN AND BEHM ARCHITECTS
2030 N. 16TH ST. ARLINGTON, VA

H. ALLISON & ASSOC. - STRUCTURAL ENGINEER
144 CONGRESSIONAL LANE, ROCKVILLE, MD.

INDEX TO DRAWINGS

DWG NO.	TITLE
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E-1	1ST FL. PLAN
E-2	2ND FL. PLAN
E-3	3RD FL. PLAN
E-4	TYPICAL UNITS

EXHIBIT
tabbies
A