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December 10, 2015

Helen P. Ross, Chair
Fredericksburg Board of Zoning Appeals
715 Princess Anne Street
Fredericksburg, Virginia 22401

Re: Variance application V15-01
814 Cornell Street

Dear Ms. Ross:

On behalf of Zoning Administrator Michael Craig, I request that the Board of Zoning Appeals table the variance application for modifications to the fence at 814 Cornell Street, due to the pending appeal of the BZA's September 21, 2015 decision regarding the existing fence. BZA action on the variance application is essentially preempted by the landowner's appeal because the BZA and the Circuit Court would be working at cross purposes with each other – the BZA has been asked to grant a variance to a regulation that the Circuit Court has been asked to decide does not apply. Under these circumstances, the BZA should table further consideration of the variance application until the judicial review of its earlier decision is final.

History of the Petition for Writ of Certiorari:

The BZA upheld the Development Administrator's denial of a permit for the existing fence on September 21, 2015. The landowner filed an appeal of the BZA decision in the Fredericksburg Circuit Court on October 20, 2015. Under Code of Virginia §15.2-2314, the form of the appeal is a petition for a writ of certiorari, which is an order from a higher tribunal (the Circuit Court) to a lower one (the BZA) to produce the record of its decision for judicial review.

The Circuit Court entered the Writ, which orders the production of the record, on October 28, 2015. The Petition and Writ were served on me on November 19, 2015. The BZA made its return of the record on November 30, 2015. The Petition for Writ of Certiorari asks the Circuit Court to:

1. [Issue a writ of certiorari]
2. Determine that the BZA and Development Administrator were incorrect to deny the Petitioners fence permit;
3. Reverse the decision of the BZA;
4. Find that the existing fence is compliant within the meaning of the applicable City's ordinance; and

5. Grant Petitioners their attorney's fees and costs . . . ¹

This appeal is now pending in the Fredericksburg Circuit Court.

History of the variance application:

The landowner's application for a variance was filed on October 16, 2015. The BZA opened its public hearing on the variance on November 16, 2015. However, since only three members of the BZA were present, the BZA agreed to continue the public hearing until January 5, 2016, when more members could be present. The presence of additional members increases the applicant's odds of gaining the required affirmative vote of three of the five BZA members. The variance application does not mention the filing of the appeal, and the applicant did not mention the appeal during the November 16 meeting.²

Virginia Supreme Court precedent – West v. Mills:

The Virginia Supreme Court addressed a similar situation in the 1989 case of *West v. Mills*.³ There, a developer sought approval of a subdivision plat. The local planning commission disapproved the first version. The developer submitted a second, revised plat, which was also disapproved, first by the planning commission and on appeal by the town council. The developer filed a third revised plat, and then appealed the town council's disapproval of the second plat to the circuit court. The planning commission refused to consider the third version of the subdivision plat due to the appeal. The landowner sued, seeking a court order to compel the planning commission to consider the third plat.⁴

The Virginia Supreme Court upheld the planning commission's refusal to consider the third plat on two grounds. First, the developer elected his remedy by appealing the disapproval of the second plat. That remedy was inconsistent with the pursuit of approval of a revised plat for the same property. The planning commission should not be required to consider a plat for the same property that was the subject of an earlier disapproved plat, when that disapproval was on appeal. Second, requiring the commission to act on the third plat, while the court was reviewing the second plat, resulted in simultaneous consideration of inconsistent plats for development for the same property by the commission and the court. Approval of both plats could lead to conflict and confusion.⁵

Applying West v. Mills to the variance application:

The same reasoning applies to the variance application. The landowners elected their remedy when they filed their appeal to Circuit Court. The BZA should not be required to consider a

¹ The Petition for Writ of Certiorari is enclosed.

² In the future, if similar circumstances present themselves, my office will check with the Circuit Court Clerk to see if an appeal has been filed, before the BZA commences to consider a variance application arising out of the same set of facts.

³ *West v. Mills*, 238 Va. 162 (1989), enclosed.

⁴ These facts appear on pages 3 – 4 of the printed decision.

⁵ This conclusion appears on page 5 of the printed decision.

variance for a modification to the same fence that was disapproved, while that disapproval is on appeal. Requiring the BZA to act on the variance application, while the court is reviewing the permit denial, would result in simultaneous consideration of inconsistent applications for fence plans for the same property.

The *West v. Mills* case involved a series of subdivision plats, as opposed to the two different types of applications – an appeal and a variance -- before the BZA. I believe, however, that the same principles apply, and that the result is the same. Either the denial of the permit was correct, in which case the variance application is in order, or the denial of the permit was incorrect, in which case no variance is required or legally authorized. The BZA should refuse to consider the variance application while the appeal is pending.

Conclusion:

On behalf of Zoning Administrator Michael Craig, I request that the BZA adopt a motion tabling further consideration of variance application V15-01 while the appeal of the BZA's September 21, 2015 decision is pending.

Sincerely,



Kathleen Dooley
City Attorney

enc.: Petition for Writ of Certiorari
West v. Mills, 238 Va. 162 (1989)

ec: Members of the BZA
Jeannie P. Dahnk, counsel for the applicants