To: **Town of Purcellville Board of Zoning Appeals**
Department of Planning and Zoning
221 South Nursery Avenue
Purcellville, Virginia 20132

Town of Purcellville Zoning Administrator
Department of Planning and Zoning
221 South Nursery Avenue
Purcellville, Virginia 20132

Re: **BZA 15-02: Appeal by James Alfred Mason and Barbara T. Mason of Determination made by the Purcellville Zoning Administrator regarding property located at 341A Maple Avenue, Purcellville, Virginia (Parcel Identification Number 487-10-5817)**

Memorandum In Support of Appeal

James Alfred and Barbara T. Mason ("Appellants"), by counsel, state as follows in support of their Appeal, BZA 15-05, challenging the Zoning Administrator's May 14, 2015 determination ("Determination"). The Zoning Administrator determined that Green Acres Lawn Care, Inc. is an additional nonconforming use that is impermissible based on the expiration of Appellants' business license on the site in 2007. This Determination is not supported by the Zoning Ordinance, Town Code or the law of the Commonwealth of Virginia. Appellants respectfully request that the Board of Zoning Appeals determine that that Green Acres Lawn Care, Inc. may continue to use the area of the subject property previously and continually used as a contractor's storage yard and that the occupancy permit for this use may be issued.

Facts

Appellants are the owners of 341 North Maple Street, Purcellville, Virginia (the "Property"). The Property consists of approximately 3.55 acres shown on that certain plat described as "Above Ground Fuel Storage Tanks Canopy & Modular Space" by Bowers & Associates, P.C. dated February 9, 1999 (the "Plat"). The Plat illustrates entry features, parking stalls, a 12,780 square foot metal building, two modular buildings of approximately 980 square

feet each, a 30 x 30 concrete tank pad with three fuel tanks (1 gasoline and 2 diesel; 10,000 gallons each) a 24 x 24 canopy with six dispensing pumps, and an impound gravel area covering at least 80% of the Property (collectively the "Property Improvements").

The Zoning Administrator's Determination acknowledges the Property was zoned M-1 since at least 1982 when Appellants commenced using the Property for a contractor's storage yard, a use permitted under M-1 zoning applicable for the Property at that time. The Determination acknowledges that on July 27, 2010 the Town of Purcellville (the "Town") issued Heritage Site Development, Inc. ("Heritage") an occupancy permit for a contractor's storage yard on the Property and that Heritage has continued to use the Property for a contractor's storage yard, a use that is consistent with Owners' use of the Property since at least 1982. The Determination acknowledges that Heritage's continued use of the Property as a contractor storage yard is permissible under the Town Zoning Ordinance (the "Zoning Ordinance").

The Determination concludes Green Acres Lawn Care, Inc. ("Green Acres") applied on February 25, 2015 for an occupancy permit on the Property for a contractor's storage yard, but the proposed Green Acres contractor's storage yard is a prohibited additional use under the Town Zoning Ordinance. The Determination is based on the conclusion that Appellants did not renew their business license, which expired in 2007 and, therefore, Green Acres' use is not a continuation of the valid nonconforming use.

Argument and Authorities

The Determination that Green Acres' storage yard use is an additional, nonconforming and impermissible use finds no support in the law. The Determination that Green Acres is an additional use on the site that did not replace an existing use – Heritage – is based on the faulty

premise that Green Acres is not a continuation of Appellants' original and permissible nonconforming use. The Zoning Administrator's Determination rests on the incorrect assumption that Appellants' status as conducting a permitted nonconforming use ended when Appellants' business license expired in 2007.

However, under Virginia law, the expiration of a business license does not mean a legal nonconforming use has been discontinued. As one Virginia Circuit Court has recently stated, **"[t]he contention that a violation [of business licensing requirements] should carry a virtual death penalty for the business operating as a nonconforming use simply cannot be supported . . . ."** *JBA One, L.L.C. v. Zoning Appeals Board*, 84 Va. Cir. 394, 397 (City of Norfolk Cir. Ct. 2012).

The Circuit Court of the City of Norfolk considered this very issue in *JBA One, L.L.C. v. Zoning Appeals Board*. A copy of *JBA One* is attached as **Exhibit 1.** In *JBA One*, a site was leased to auto dealers for their auto sales businesses. 84 Va. Cir. at 395. The use began in 1985 and ran through 2009. *Id*. In 1998, the zoning ordinance was amended to require a special exception for the auto sales use on the subject property; however, the site was allowed to continue as a nonconforming use. *Id*. at 394-95. In 2004, one of the auto sales entities leasing the site – which had a local business license – discontinued its business. *Id*. at 395. Later in 2004, another entity began operating an auto sales business on the site but did not obtain a business license. *Id*. That entity operated for about five years until 2009 when it discontinued its business. *Id*.

In 2009, the landowner sought to establish its own auto sales business. *Id*. To do so, it first had to obtain a zoning certificate. *Id*. The zoning administrator refused to issue the zoning certificate, claiming the nonconforming use terminated when the last business license for the site

expired in 2004. *Id*. The zoning administrator claimed any use after 2004 was not lawful because it was conducted without a business license and, therefore, the nonconforming was "discontinued" within the meaning of the zoning ordinance. *Id*. The zoning administrator claimed "the way we have to measure use is clearly by an official activity that the city has acknowledged." *Id*.

The Circuit Court disagreed. The court first noted that the City's zoning ordinance was silent about the effect of some violation of law that transpired after the effective date of the zoning amendment. *Id*. at 395-96. Similar to the zoning ordinance in *JBA One*, the Purcellville Zoning Ordinance also does not speak to the effect of a violation of law occurring after the effective date of a zoning amendment.

From there, the *JBA One* court focused on the fact that the zoning ordinance did not provide that failure to obtain a business license would result in discontinuation of a valid nonconforming use. The court relied on authority from the Virginia Supreme Court in the Court's decision in *Donovan v. Board of Zoning Appeals*, 251 Va. 271 (1996). A copy of *Donovan* is attached as **Exhibit 2**. The *Donovan* case involved an automobile graveyard that was a valid nonconforming use. 251 Va. 272-73. Following a zoning amendment, the business in *Donovan* failed to file for a required "permit with screening plan." *Id*. at 273.

The Virginia Supreme Court in *Donovan* did not buy the argument that failure to file for the permit terminated the right to continue the nonconforming use. *Id*. at 274-76. The Virginia Supreme Court reasoned as follows: "The ordinance identifies certain circumstances which result in the termination of a valid nonconforming use. The failure to screen an automobile graveyard is not identified as a circumstance which terminates the status of the use as a valid

nonconforming use, nor is termination of such status listed as the penalty for violation of or failure to conform to the screening provisions contained in the zoning ordinance." *Id*. at 276.

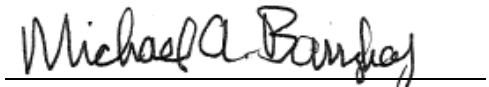
In this appeal, just like the zoning ordinances in *JBA One* and *Donovan*, the Purcellville Zoning Ordinance does not identify the failure to obtain a business license as a circumstance discontinuing the status of a valid nonconforming use. In addition, Chapter 18, Art. II of the Purcellville Town Code dealing with business licenses does not provide that the penalty for failure to obtain a business license is termination of the status as a valid nonconforming use. Whether a business license has expired has no bearing on a determination that a lawful nonconforming use has been discontinued. The Determination recognizes that the permitted nonconforming use on the Property has continued since at least 1982, and that fact applies equally to Green Acres as it does to Heritage. The Zoning Administrator's Determination that Green Acres' use is an impermissible, additional nonconforming use by virtue of the fact that Appellants' business license expired in 2007 is wrong and should be overturned.

Conclusion

Based on the foregoing, the reasons stated in Appellants Appeal and Appellants' arguments at the forthcoming hearing, Appellants respectfully request that the Board of Zoning Appeals determine that that Green Acres Lawn Care, Inc. may continue to use the area of the subject property previously and continually used as a contractor's storage yard and that the occupancy permit for this use may be issued

Respectfully submitted,

James Alfred and Barbara T. Mason
By counsel



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Dated: July 22nd, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Memorandum in Support of Appeal was sent by overnight mail this 22nd day of July, 2015 to:

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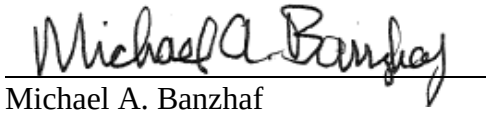

Michael A. Banzhaf

Exhibit 1

Pagination
* Va. Cir.

Majority Opinion >

Virginia Circuit Court, City of Norfolk

JBA One, L.L.C.

v.

Zoning Appeals Board of the City of Norfolk

March 21, 2012
Case No. *CL11-4851*

BY JUDGE MARY JANE HALL

The matter came before the Court following issuance of a Writ of Certiorari pursuant to **Virginia Code § 15.2-2314** for review of a decision of the Board of Zoning Appeals that denied Petitioner's request for an appeal of a March 22, 2011, decision by the Zoning Administrator. The Zoning Administrator refused to issue a Zoning Certificate to state that the use of Petitioner's property at 951 East Little Creek Road complied with the provisions of the Zoning Ordinance, without which Petitioner may not obtain a business license to operate a used automobile sales business at the location. The Zoning Administrator determined that the prior nonconforming use of the site for the conduct of automobile sales had been discontinued for more than two years pursuant to § 12-9 of the Zoning Ordinance and therefore may not be renewed or reestablished. The Board of Zoning Appeals denied Petitioner's appeal by letter dated May 20, 2011.

Because the Board of Zoning Appeals applied an erroneous principle of law in its interpretation of the Zoning Ordinance, the Court reverses the board's decision.

Factual and Procedural Background

The facts were not contested. The 1998 amendment to the Zoning Ordinance requires a special exception to be granted before any automobile sales establishment may be permitted to operate at the Petitioner's site. An automobile sales establishment operating at the site before enactment of **[*395]** the amendment, however, may continue operations as a nonconforming use subject to the terms of the Zoning Ordinance.

Beginning in 1985 and through April 2009, the site was continually used as an automobile sales business by entities that leased the site from Petitioner. One such entity, National Used Auto Sales, discontinued its business in 2004. The subsequent tenant, J.D. Valley Auto Sales, L.L.C., commenced its operation of auto sales in December of 2004 but did so without obtaining either the Zoning Certificate required by § 19.1 of the Zoning Ordinance or the business license required by § 24-25.3 of the Code of the City of Norfolk. J.D. Valley did have a license to operate an auto sales business issued by the Virginia Motor Vehicle Dealer Board. J.D. Valley operated for approximately five years with no business license.

After J.D. Valley discontinued its business in 2009, Petitioner sought to establish its own auto sales business at the site and applied to the Zoning Administrator for a Zoning Certificate. The Zoning Administrator rejected Petitioner's request to declare that the site could properly be used for automobile sales as a permitted nonconforming use of the property. He declared that the nonconforming use terminated upon the 2004 expiration of the last business license that was issued for the site. He stated that the subsequent use of the property for auto sales was not lawful because it was conducted without a business license; thus, the nonconforming use was discontinued for more than two years within the meaning of the statute: "If a nonconforming use is discontinued for a period of two years ..., the nonconforming use shall not be renewed or re-established." Zoning Ordinance, § 12-9. The Zoning Administrator explained his position to the Bard that the sole determinant of use was the business license:

> Mr. Newcomb: Section 12-9 says "If a nonconforming use is discontinued for a period of two years" and that is the language. Now, the way we have to measure use is clearly by an official activity that the city has acknowledged. The business license is the way that you conduct business in Norfolk. If you are a business ... you're required to have a business license.

Transcript, May 19, 2011, Hearing at 16. The cover page of the Hearing Transcript bears the date of May 19, 2010, which the Court finds to be an error. The correct date of May 19, 2011, appears on page 2 of the transcript.

Petitioner's timely petition for writ of certiorari to this Court followed.

Discussion

The City insists that a property is not being "used" for purposes of the nonconforming use determination unless it is being "lawfully used," a requirement that does not appear in the Zoning Ordinance. The City points **[*396]** to the definition of "nonconforming use" in § 2-3 of the ordinance in support of its argument that an unlawful use may not qualify as nonconforming: "a use lawfully established prior to and being conducted on the effective date of these regulations or any amendment hereto which renders the use nonconforming, which does not conform to the requirements of these regulations for the Zoning District in which it is located."

The use of Petitioner's site as an automobile sales operation, however, was lawful prior to and on the date of the relevant amendment to the Zoning Ordinance. The use did not become "unlawful" until J.D. Valley commenced operations with no business license in 2004. Section 2-3, quoted above, is silent about the effect of some violation of law that transpires after the effective date of the amendment.

The City relied on several Virginia Supreme Court decisions that this Court does not consider to be controlling. In *Knowlton v. Browning-Ferris Industries of Va., Inc.*, **220 Va. 571** , **260 S.E.2d 232** (1979), the property owner converted a hog farming and general trucking business engaged in hauling random cargo, which utilized four small trucks parked on unimproved land, to a specialized commercial enterprise engaged in the collection and disposal of trash with a fleet of eighteen large trash compactors, a spacious garage, and two underground gasoline tanks. The Court determined that the character of the nonconforming use in existence when the zoning restriction was enacted had been changed; thus, the operation of the commercial trash enterprise was not the continuation of a protected nonconforming use. There is no similar allegation in the case at bar that the nature or character of the automobile sales operation has changed in any way other than the change from licensed to unlicensed.

The City also cites *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, **243 Va. 373** , **416 S.E.2d 680** (1992), a case that did not involve a nonconforming use of property but rather, an entirely illegal use of property. The Court stated, "in the present case, the analysis necessarily begins with the proposition that the landowner's use of the subject property was unlawful from the moment of occupancy

and remains so." ***Id.*** **at 379** , **416 S.E.2d at 683** . In contrast, the use of Petitioner's property was lawful when the zoning amendment issued. The decision does not support the City's position that a nonconforming use terminates as a matter of law when the business license lapses.

The facts in *Donovan v. Board of Zoning Appeals*, **251 Va. 271** , **467 S.E.2d 808** (1996), are much more similar to the case at bar. The Donovans had operated their property as an automobile graveyard prior to the enactment of the County's first Zoning Ordinance in 1969 which established their zone as agricultural. The Ordinance permitted the continuation of nonconforming uses that were in existence on the effective date, and their use of the parcel as an automobile graveyard continued without interruption through 1994. The Donovans failed, however, to file for a required "permit with screening **[*397]** plan." The Zoning Administrator determined that their failure to file for the permit with the screening plan terminated their right to continue the nonconforming use. The county made essentially the same argument that the City makes in the instant case, contending that the Donovans lost their status as a valid nonconforming use when their operation became no longer "lawful." ***Id.*** **at 274** , **467 S.E.2d at 810** . The Court rejected the county's argument, holding that the owner's violation of the screening provision did not invalidate the nonconforming use itself: "The ordinance identifies certain circumstances which result in the termination of a valid nonconforming use. The failure to screen an automobile graveyard is not identified as a circumstance which terminates the status of the use as a valid nonconforming use, nor is termination of such status listed as the penalty for violation of or failure to conform to the screening provisions contained in the zoning ordinance." ***Id.*** The Court concluded that the interpretation of the Zoning Ordinance by the Zoning Administrator as approved by the BZA was plainly wrong and based on erroneous principles of law: "Nothing in the ordinance provides that the failure to screen an automobile graveyard terminates a valid nonconforming use." ***Id.***

Norfolk's Zoning Ordinance likewise does not provide that the failure to obtain a business license terminates the business' status as a valid nonconforming use. The license requirement itself appears in § 24-25.3 of the City Ordinance, and it does not specify that a penalty for violation could include the business' termination of a valid nonconforming use. To the contrary, it authorizes only the relatively modest penalty of ten percent of business tax owed or $10, whichever is greater. ***Id.*** The contention that a violation should carry a virtual death penalty for the business operating a nonconforming use simply cannot be supported by the ordinance.

Instead of looking to the actual uninterrupted use of the site, the Zoning Administrator looked to the period of "licensed" use or "lawful" use to conclude that a discontinuance had taken place. That was error. The Joint Stipulation establishes that the site was used for automobile sales with no interruption and therefore qualified as a nonconforming use under the Zoning Ordinance.

Exhibit 2

Pagination
* Va.
** S.E.2d

In the Supreme Court of Virginia.

EDWARD DONOVAN, ET AL. v. BOARD OF ZONING APPEALS OF ROCKINGHAM COUNTY, ET AL.

Record No. 951196

March 1, 1996

Present: All the Justices

[*272] Appeal from a judgment of the Circuit Court of Rockingham County. Hon. Joshua L. Robinson, judge designate presiding.

Reversed and final judgment.

C. Waverly Parker for appellants.

G. Chris Brown (Glenn M. Hodge; Wharton, Aldhizer &Weaver, on brief), for appellees. **[**809]**

JUSTICE LACY delivered the opinion of the Court.

In this appeal we consider whether the trial court properly upheld a decision by the board of zoning appeals affirming the zoning administrator's interpretation and application of a zoning ordinance.

Rockingham County enacted its first zoning ordinance in 1969. At that time, property currently owned by appellants, Edward, Jean, Brownie, and David Donovan, Jr., (collectively, the Donovans) and used by them as an automobile graveyard, was zoned A-1, agricultural. Automobile graveyards were not a permitted **[*273]** use in an A-1 district; however, the 1969 ordinance allowed the continuation of nonconforming uses which were in existence on the effective date of the ordinance. The use of the Donovans' parcel as an automobile graveyard has continued without interruption.

In 1994, the zoning administrator of Rockingham County notified the Donovans by letter that they were in violation of the Rockingham County Code (hereafter, County Code). According to the zoning administrator, the 1969 ordinance required the Donovans to file for an "automobile graveyard permit with a screening plan" by 1972 and failure to file for the permit terminated the right to continue the nonconforming use granted by the 1969 ordinance. Because the Donovans had not filed for such a permit, Rockingham County did not consider the Donovans' present operation to be valid nonconforming use. The zoning administrator informed the Donovans that they could validate the operation of their automobile graveyard by obtaining a special use permit and an automobile graveyard permit with a screening plan. **[fn1]**

The Donovans appealed the decision of the zoning administrator to the Board of Zoning Appeals (BZA). **[fn2]** Following a hearing, the BZA upheld the zoning administrator's decision and refused to consider whether that **[**810]** interpretation of the ordinance resulted in a conflict between the ordinance and Code 15.1-492. The Donovans filed a petition for writ of certiorari in the circuit court. The Donovans argued that the zoning administrator and the BZA incorrectly applied and interpreted the 1969 ordinance, and failed to

consider the Donovan's contention that such an interpretation conflicted with their vested rights established by the Virginia Constitution and Code 15.1-492.

The circuit court found that the 1969 ordinance as interpreted by the zoning administrator applied to the Donovans' property and dismissed the writ of certiorari. In its order, the circuit court stated that the determination of whether a zoning ordinance conflicts with a statute is beyond the court's jurisdiction in a certiorari **[*274]** proceeding because it involves the validity of the ordinance, and that the effect of the court's holding was "to affirm the decision of the Board of Zoning Appeals of Rockingham County." We awarded the Donovans an appeal and, because we conclude that the zoning administrator's interpretation of the 1969 zoning ordinance was incorrect, we will reverse the order of the circuit court.

The principles relevant to the construction of a zoning ordinance are well established. The words of the ordinance are to be given their plain and natural meaning. *McClung v. County of Henrico,* **200 Va. 870**, 875, **108 S.E.2d 513**, 516 (1959). The purpose and intent of the ordinance should be considered but the ordinance should not be extended by interpretation or construction beyond its intended purpose. *Gough v. Shaner,* **197 Va. 572**, 575, **90 S.E.2d 171**, 174 (1955). In reviewing a decision of the BZA, we give "great weight" to the interpretation of the ordinance by those officials charged with its administration, and we will reverse the decision only if it is plainly wrong or based on erroneous legal principles. *Cook v. Board of Zoning Appeals of the City of Falls Church,* **244 Va. 107**, 111, **418 S.E.2d 879**, 881 (1992); *Masterson v. Board of Zoning Appeals of the City of Virginia Beach,* **233 Va. 37**, 44, **353 S.E.2d 727**, 732-33 (1987).

The county does not contest the Donovans' assertion that their operation of the automobile graveyard was a valid nonconforming use following the adoption of the 1969 zoning ordinance. The county maintains, however, that the Donovans' automobile graveyard lost its status as a valid nonconforming use because they failed to screen the operation from public view by 1972. Thus, at the time of the county's enforcement action, although the cross-references to sections dealing with automobile graveyards had been deleted in 1984, the Donovans' automobile graveyard no longer was "a lawful use of land" entitling them to continue the operation as a nonconforming use under the provisions of the current zoning ordinance, County Code 17-161.

The county's position is based on its application of the following portions of the 1969 ordinance:

ARTICLE 8 NONCONFORMING USES

. . .

8-1-1. If at the time of enactment of this ordinance, any legal activity, except those dealt with in *section 7-2-5*, **[*275]** which is being pursued, or any lot or structure legally utilized in a manner or for a purpose which does not conform to the provisions of this ordinance, such manner of use or purpose may be continued as herein provided

. . . .

ARTICLE 7 INDUSTRIAL, GENERAL, DISTRICT M-1

. . . .

7-2-5. Automobile graveyards and junkyards in existence at the time [of] the adoption of this ordinance are to be considered as nonconforming uses. They may be allowed up to three (3) years after adoption of this ordinance in which to completely screen on any side open to view from a public road. . . .

The county contends that even though Chapter 7 relates to M-1 districts, the reference in County Code **8-1**-1 to 7-2-5 extends the screening requirements of that section to all automobile graveyards existing **[**811]** in 1969. Any other interpretation, the county asserts, would allow automobile graveyards in districts other than M-1 to remain unscreened, a condition inconsistent with the purpose of the ordinance.

We agree with the county's assertion that one of the purposes of the 1969 zoning ordinance was to require screening of all automobile graveyards, and we will assume, without deciding, that County Code **8-1**-1 made the screening provisions of County Code 7-2-5 applicable to all automobile graveyards existing on the effective date of the ordinance. Nevertheless, a provision requiring that a particular nonconforming use be screened from public view is not the same as a provision invalidating the nonconforming use itself for failure to comply with the screening requirement.

The ordinance identifies certain circumstances which result in the termination of a valid nonconforming use: if the use is discontinued for more than two years after the enactment of the ordinance, it is deemed abandoned, County Code **8-1**-3; if the use is changed to a more limited use, the prior, more expansive use is lost, County Code **8-1**-4; and after two years advertising structures must be relocated to districts where they are permitted **[*276]** uses, County Code **8-1**-1. The failure to screen an automobile graveyard is not identified as a circumstance which terminates the status of the use as a valid nonconforming use, nor is termination of such status listed as the penalty for violation of or failure to conform to the screening provisions contained in the 1969 zoning ordinance.

The ordinance is silent as to any specific consequences of the failure to screen. The absence of a specific consequence does not render the requirement meaningless, however. County Code **11-2** states that a violation of the ordinance is a misdemeanor which subjects the violator to a fine of up to $250 for each day the ordinance is violated. Furthermore, under the authority of Code 15.1-491 and -499, the county could have enforced the screening requirement by seeking an injunction to prevent the Donovans from operating the automobile graveyard until they complied with the screening requirement. *McNair v. Clatterbuck,* **212 Va. 532**, 533, **186 S.E.2d 45**, 46 (1972).**[fn3]** Enforcement of the screening requirement by injunction would be consistent with the purpose of screening all automobile graveyards from public view without terminating a valid nonconforming use arising under County Code **8-1**-1.

Applying the principles applicable to the construction of zoning ordinances, we conclude that the interpretation of the 1969 zoning ordinance by the zoning administrator as approved by the BZA was plainly wrong and based on erroneous principles of law. Nothing in the ordinance provides that the failure to screen an automobile graveyard terminates a valid nonconforming use. Therefore, the failure of the Donovans to screen their automobile graveyard within three years of the effective date of the 1969 ordinance did not terminate the status of their operation as a valid nonconforming use.**[fn4]**

Accordingly, we will reverse the order of the circuit court and enter final judgment in favor of the Donovans.

Reversed and final judgment.

[fn1] The current zoning classification for the Donovans' property, A-2, permits the operation of an automobile graveyard with a special use permit. County Code 17-27. Chapter 5 of the County Code enacted in 1973 pursuant to Code 15.1-28, regulates automobile graveyards and includes the current screening requirements. County Code 5-2.

[fn2] The Donovans also filed a screening plan under County Code 5-2, but the county has deferred action on the plan pending the outcome of this litigation.

[fn3] The zoning ordinance was amended in 1984 to specifically give the zoning administrator the authority to insure compliance with the chapter by instituting legal action including injunctions. County Code 17-200.

[fn4] In light of this conclusion, we need not address the Donovans' other arguments.