

**IN THE SUPREME COURT OF VIRGINIA**

**CHRISTOPHER HYLAND, DENISE HYLAND, THOMAS HUTCHINSON, SHAWN  
EVANS, PAMELA EVANS, AND FLEET NATIONAL BANK, co-trustee of the Stillman  
Kelley Trust by DARLENE McDONALD, agent for this purpose**

Appellants,

v.

**BOARD OF ZONING APPEALS OF  
ALBEMARLE COUNTY, VA and  
FAULCONER CONSTRUCTION COMPANY, INC.,**

Appellees.

**PETITION FOR APPEAL**

Francis L. Buck  
VSB #12361  
Buck, Toscano & Tereskerz, Ltd.  
211 East High Street  
Charlottesville, VA 22902  
Phone: (434) 977-7977  
Fax: (434) 977-4847  
**TABLE OF CONTENTS**

Description

Page

Assignments of Error	3
Questions Presented	5
Table of Citations	6
Nature of the Case and Proceedings Below	8
Statement of Facts	8
Argument	13
Conclusion	27
Certificate	28

### **ASSIGNMENTS OF ERROR**

\_\_\_\_\_1. The Circuit Court applied the wrong standard of review when it stated that there is a presumption of correctness of the decision of the Board of Zoning Appeals (“BZA”) even as to legal issues. There is no presumption as to the BZA’s interpretation of law. The proper standard requires the court to reverse the decision of the BZA if it erroneously applies principles of law.

2. The petitioners overcame the statutory presumption of correctness by proving by a preponderance of evidence at trial that the zoning administrator provided the BZA with inaccurate information about Falconer’s proposed activities, including:

A. By describing *de minimas* repair and maintenance activities described as “weld or cut metal to replace a blade or sharpen a blade or something like that,” when in fact the evidence at trial disclosed that Faulconer employs fourteen people in its garage, including a chief mechanic, three mechanics, an assistant mechanic, a mechanic helper, and a welder who spend between 20% and 35% of their time at the garage repairing and working on Faulconer’s motor vehicles and other equipment;

B. By stating that Faulconer’s garage activities were the same as those of similar contractors located on light industrial zoned property when in fact the zoning administrator only visited two sites, one of which was Faulconer’s existing garage which is a non-conforming use located in a residential district, and the second was Haley, Chisholm & Morris yard, which was rezoned from agricultural to light industrial only because it was a pre-existing, non-conforming use, as noted by the Board of Supervisor at the time the rezoning was granted.

C. By not disclosing to the BZA that Faulconer’s garage operations fit within the definition of public garages in the ordinance, which are not permitted in light industrial districts.

3. The BZA and the Circuit Court erroneously defined “equipment storage yard” to include a motor vehicle repair garage.

4. The BZA and the Circuit Court erroneously defined “equipment storage yard” to include the storage of materials.

5. The BZA and the Circuit Court erroneously authorized in a light industrial district the operation of a motor vehicle repair shop, which falls within the ordinance’s definition of a public garage, and which is not permitted by right in a light industrial district.

6. The BZA and the Circuit Court erroneously defined “equipment storage yard” to authorize the existence of a warehouse operation to store dynamite, petroleum products, and other volatile substances, which are permitted in a light industrial district only by special permit.

7. The Circuit Court erroneously did not set aside the decision of the BZA even

though certain members of the BZA believed that the County Attorney was representing and advising the BZA at the time of the hearing.

8. The BZA and the Circuit Court erroneously determined that Faulconer's proposed use was an accessory use of a contractor's office and equipment storage yard.

9. The BZA and the Circuit Court erroneously determined that the storage of dynamite was an accessory use to a "contractor's office and equipment storage yard".

### **QUESTIONS PRESENTED**

1. Did the Board of Zoning Appeals erroneously interpret the Albemarle County Ordinance to permit a repair garage and buildings for the storage of materials as part of a "contractor's office and equipment storage yard?"

Assignments of Error Numbered 2,3,4,5,6,7.

2. Did the Circuit Court erroneously apply the wrong standard of review to the Board of Zoning Appeals application of legal principles?

Assignment of Error Numbered 1.

3. Did the Circuit Court erroneously uphold the Board of Zoning Appeals decision on the basis that the proposed use was an accessory use even though the Board's decision was not based on an accessory use? Even if the Circuit Court could properly consider whether the proposed use was an accessory use, did the evidence at trial prove that the proposed use was the primary use, not an accessory use?

Assignment of Error Numbered 8.

4. Did the trial court erroneously uphold the Board of Zoning Appeal's determination that storage of dynamite was an accessory use of a "contractor's office and equipment storage yard"?

Assignment of Error Numbered 9.

## **TABLE OF CITATIONS**

Cases:	<u>Pg. No.</u>
<u>Adam’s Outdoor Advertising v. Board of Zoning</u> 261 Va. 407, 544, S.E. 2d 315 (2001)	21
<u>Andrews v. Board of Super’s of Loudon County</u> 200 Va. 637, 107 S.E. 445(1959)	18
<u>Board of Supervisors v. Marshall</u> 215 Va. 756, 214, S.E. 2nd 146 (1975)	14, 15
<u>Board of Zoning Appeals v. 852 L.L.C.</u> 257 Va. 485, 514 S.E. 2nd 767 (1999)	12, 19
<u>Brown v. Lukhard</u> 229 Va. 316, 330, S.E. 2nd 84 (1985)	12
<u>Brown &amp; Co. Sec. Corp. v. Balbus</u> 933 F 2d. 246 (4th Cir. 1991)	19
<u>Donovan v. BZA</u> , 251, 467 S.E. 2nd 808 (1996)	25
<u>Foster v. Geller</u> 248 Va. 563, 449, S.E. 2d 802 (1994)	21
<u>Fritts v. Carolina Cement Company</u> 262 Va. 402, 405, S.E. 2d. (2001)	16
<u>Harrison and Bates, Inc. v. Featherstone Assoc.</u> 253 Va. 364, 484 S.E. 2nd 883(1997)	12
<u>Higgs v. Kirkbride</u> 258 Va. 567, 522 S.E. 2nd 861 (1999)	13
<u>Knowlton v. Browning-Ferris</u> 220 Va. 571, 260 S.E. 2d, 232 (1979)	23, 26
<u>Masterson v. Board of Zoning Appeals</u> 233 Va. 37, 353 S.E. 2d 727 (1987)	20
<u>Postal Telegraph Co. v. Farmville, &amp; R. Co.</u> 96 Va. 661, 32 S.E. 468 (1899)	15
<u>Sims Wholesale Co. v. Brown-Forman Corp.</u> 251 Va. 398, 468 S.E. 2d 905 (1996)	18
<u>Town of Blackstone v. Southside Elec. Cooperative</u> 265 Va. 527, 506 S.E. 2nd 773 (1998)	13

<u>Town of Mount Jackson v. Fawley</u> 53 Va. Cir. 49, 200 Va. Cir. LEXIS 414 (2000)	23
<u>Volkswagen of America v. Smit</u> 266 Va. 444, 587 S.E. 2d 526 (2003)	18
<u>Wiley v. County of Hanover</u> 209 Va. 153, 163 S.E. 2d 160 (1968)	23
<u>Winston v. City of Richmond</u> 196 Va. 403, 83 S.E. 2nd 728, (1954)	12

**NATURE OF THE CASE AND PROCEEDINGS BELOW**

The zoning administrator of Albemarle County made an official determination which was appealed to the Board of Zoning Appeals. The Board of Zoning Appeals conducted a hearing on September 11, 2001 and affirmed the determination of the zoning administrator. The Hylands and others (hereafter collectively the “Hylands”) filed a petition of appeal to the Circuit Court of Albemarle County and a writ of certiorari was issued on November 26, 2001. An evidentiary hearing was held on the appeal on August 18, 2003. The Circuit Court made its ruling by letter dated September 4, 2003, affirming the decision of the Board of Zoning Appeals, which was incorporated into an order entered on January 5, 2004. The Hylands filed a timely notice of appeal.

### **STATEMENT OF FACTS**

The Hylands and the other petitioners (except for Fleet Bank, Trustee) are residents of Ivy, Virginia, a rural area of Albemarle County, Virginia, which is served by narrow, country roads. In the center of this rural residential area, adjacent to a preschool and public elementary school, there are approximately 40 acres of land that are zoned light industrial by Albemarle County.

Faulconer Construction Company, Inc. (“Faulconer”) is a construction company engaged in developing land, building roads, power generators and railroad bridges. It employs approximately 180 employees. It operates a fleet of motorized vehicles ranging from pick-up trucks to dump trucks, flat bed trucks and trailers, bulldozers, backhoes, and heavy industrial earth moving equipment such as scrapers, pans, and DZ50s. See Trial Exhibits 4, 5, 6, 7 and 12.

Faulconer owns approximately 20 acres of the 40 acres zoned light industrial adjoining the residences of the Hylands. Faulconer submitted a preliminary site plan to the planning department of Albemarle County for the construction of an office building, a repair garage, and storage buildings on its land. Trial Exhibit 11. The planning director requested an official determination from the zoning administrator as to whether Faulconer’s proposed use was permitted by right on the property which was zoned light industrial. The zoning administrator made a determination that the proposed use was permitted in a light industrial district pursuant to

Section 27.2.1(9) of Albemarle County Zoning Ordinance which allows a “contractor’s office and equipment storage yard”. The administrator also determined that Faulconer’s storage of dynamite on the site would be permitted as an “accessory use.”

The Hylands appealed the administrator’s decision to the Board of Zoning Appeals (hereafter the “BZA”). On September 11, 2001, the BZA conducted its hearing to review the determinations by the zoning administrator. The zoning administrator appeared in person and was represented by Mr. Kamptner, the County attorney. The zoning administrator and Mr. Kamptner are normally the staff support and legal advisor of the BZA. The chairman of the BZA expressed his belief at the BZA hearing that Mr. Kamptner was representing both the BZA and administrator. BZA transcript p.4. Mr. Kamptner had provided the BZA with a memorandum in support of the zoning administrator’s decision. Mr. Rinehart, one of the three members of the BZA who voted in favor of affirming the decision of the administrator, testified that Mr. Kamptner was the legal advisor to the Board in the hearing. Trial transcript p. 155.

The zoning administrator spoke in support of her determination. The administrator’s presentation to the Board was inaccurate, incomplete, and consequently misleading. The mistakes were not corrected by Faulconer whose representatives were present.

The misleading nature of the zoning administrator’s statement is documented by comparing what the zoning administrator said to the BZA with what was disclosed at trial. At the BZA hearing the administrator stated:

The next component of the use is what I call the shop. It is basically the repair shop. They have parts and equipment and staff that do repair work for their own equipment. **They may have to weld or cut metal to replace a blade or sharpen a blade or something like that.** A lot of the repairs are going to be done on site. [referring to job sites] If something breaks on site and they are able to do it on site, they have the mobile repair crew and vehicle that will go to the site.

BZA transcript p.12. (emphasis and editorial note added.)

At the trial, it was established that Faulconer employs fourteen people at its “repair shop”, including a chief mechanic, three mechanics, two mechanic helpers and a welder, who do 20-35% of their mechanical work at the garage. Trial transcript p. 67-68. Although Faulconer attempts to do most of its repair work out on the job sites, much of the equipment will be repaired in the garage, often depending on the weather. The mechanical work can be minor tasks or major mechanical operations such as removing or installing transmissions and engines on large road building equipment such as Caterpillar backhoes, which can take three to four work days to remove the transmission. In July of 2003, the month before the trial, Faulconer’s mechanics spent 7 or 8 days in the garage removing and installing transmissions, replacing seals and working on the engine of a backhoe. Its employees also sand and paint vehicles and fabricate parts and equipment in the garage.

The proposed garage would be 142 feet long and 50-100 feet in width with a five ton hoist for removing and installing transmissions and engines for its road excavation machines. Trial transcript p. 74-75. At trial, the zoning administrator admitted that when she visited the existing Faulconer garage, she did not ask how many people worked there, what type of work they did in the garage, nor what percentage of the mechanical work was done at the garage. Trial transcript pp. 122-124. Contrary to the facts, the zoning administrator told the BZA that the only work that was done at the garage was inconsequential, such as “sharpening a blade or something like that”.

The second part of the zoning administrator’s analysis was that she compared the zoning history of Faulconer to two other similar contractors, Parham Construction Company and Haley, Chisholm & Morris. She noted that they are both located in light industrial zones. She related to the BZA that Haley, Chisholm & Morris’ offices and yard had been rezoned in 1981 from agricultural to light industry and that they also had a repair shop in their yard. At trial, she admitted that she was unaware that when the Haley, Chisholm & Morris property was rezoned, that the Board of Supervisors required a notation on the zoning map stating that the rezoning was approved only because it was a preexisting use. Trial transcript p. 120.

Although she stated that she relied upon the existence of Parham Construction Company's equipment storage yard in a light industrial zone district to bolster her opinion, at the time she made her determination and at the time of the BZA hearing in 2001, she had not visited its equipment storage yard. BZA transcript p. 9. By the time of the trial nearly two years later, she said she drove through Parham's yard but still did not know whether or not they had mechanics repairing equipment at their location. Trial transcript p. 117. She did not know whether other construction contractors had mechanics that performed mechanical repairs at their equipment storage yards. Trial transcript p. 136.

She also relied upon Faulconer's existing operation as evidence of what contractors do even though Faulconer's existing equipment storage yard and garage are not located in a light industrial district but instead are non-conforming uses located in a residential district.

The third part of the administrator's analysis was a review of the Albemarle County Zoning Ordinance and the list of permitted uses in light industrial zoning districts, particularly Section 27.2.1 (9), which permits a "contractor's office and equipment storage yard." This term is not defined in the ordinance. After advising the BZA that the words of the ordinance should be given their ordinary and plain meaning, she did not take the definition of equipment storage yard from a dictionary, but instead went to a publication called a Glossary of Zoning, Development, and Planning Terms and relied on its definition of a "contractor's storage yard", which is a more general phrase than "contractor's office and equipment storage yard." She used the ambiguous definition of a "contractor's storage yard," which was taken by the editors of the Glossary from the zoning ordinance of Wheeling, Illinois, to define the meaning of "contractor's office and equipment storage yard" in the Albemarle County Ordinance. Trial transcript, p. 135.

After engaging in that interpretative *legerdemain*, she then stated that because Faulconer and similar contractors use dynamite in their construction activities in the field at job sites, that the storage of dynamite was an accessory use to "a contractor's office and equipment storage yard."

In a 3-2 vote, the BZA affirmed the determinations of the zoning administrator.

With the benefit of legal counsel and pretrial discovery, the Hylands were able to introduce evidence at trial that demonstrated the superficiality of the administrator's investigation and, consequently, the inaccurate and incomplete facts presented to the BZA.

### ISSUES

**1. The ordinance permits a “contractor’s office and equipment storage yard” in a light industrial zoned district. The BZA erroneously interpreted “contractor’s office and equipment storage yard” to permit the construction and use of a repair garage and buildings for the storage of materials.**

The ordinance specifically permits a “contractor’s office and equipment storage yard” in a light industrial district. The Hylands recognize the legal right of Faulconer to build and operate its contractor’s offices and to store its equipment on property zoned for light industry. But the Hylands do vigorously object to Faulconer’s building and operating a garage that is one-third of an acre in size to repair its fleet of 150 or more motor vehicles and motorized earth moving equipment. They also object to Faulconer’s constructing three storage buildings to store materials and supplies including combustible materials. These proposed buildings, in which fourteen of Faulconer’s employees will be employed, are not authorized or permitted by right according to the terms of the ordinance.

“When an ordinance is plain and unambiguous, there is no room for interpretation or construction; the plain meaning and intent of the ordinance must be given it.” Board of Zoning Appeals v. 852 L.L.C., 257 Va. 485, 489, 514 S.E. 2nd 767, 769 (1999).

It is well established that “the province [of statutory] construction lies wholly within the domain of ambiguity”. Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E. 2nd 728, 731 (1954). When a statute is plain and unambiguous, a court may look only to the words of the statute to determine its meaning. Brown v. Lukhard, 229 Va. 316, 321, 330, S.E. 2nd 84, 87 (1985). Harrison and Bates, Inc. v. Featherstone Assoc., 253 Va. 364, 368, 484 S.E. 2nd 883, 885(1997).

The term “contractors office and equipment storage yard” is not defined in the ordinance,

but they are words of plain and common meaning. The zoning administrator claimed that a repair garage and storage buildings for materials are implicit in the phrase “equipment storage yard”. The word “equipment” is defined in Webster’s Third New International Dictionary as “the implements (as machinery or tools) used in an operation or activity”. “Storage” is defined in Webster’s as a place or space for storing or the act of storing goods or the state of being stored. “Yard” is defined in Webster’s as ground adjacent to, surrounding or surrounded by a building or a group of buildings and/or often enclosed and paved tract of ground used for a specific task, business or other activity. There is nothing in the ordinary meaning of “equipment storage yard” that implies or suggests (1) a garage for repairing vehicles or (2) buildings (as opposed to a “yard”)for storing materials (as opposed to “equipment”).

On what basis did the BZA and trial court conclude that the phrase “equipment storage yard” included within its meaning, a garage or repair shop employing seven people for the purpose of repairing Faulconer’s motorized equipment? They accomplished this by violating this Court’s instruction that “when considering the legislative act, the court may look only to the words of the statute to determine its meaning, and when the meaning is plain, resort to rules of construction, legislative history and extrinsic evidence is impermissible.” Higgs v. Kirkbride, 258 Va. 567, 574, 522 S.E. 2nd 861,864 (1999), quoting from Town of Blackstone v. Southside Elec. Cooperative, 265 Va. 527,533,506 S.E. 2nd 773,776 (1998).

Instead of consulting a dictionary, the zoning administrator consulted a publication called A Glossary of Zoning, Development and Planning Terms and used the definition of a “contractor’s storage yard,” which term was taken from the zoning ordinance in Wheeling, Illinois. Trial transcript, p.135. There is no reason why the zoning administrator should rely on the definition of “contractor’s storage yard” from the zoning ordinance of Wheeling, Illinois when the meaning of “equipment storage yard” is clear. The definition of “contractor’s storage yard” in the Wheeling, Illinois ordinance contained in the Glossary is as follows:

**Contractor’s storage yard.** An unenclosed portion of the lot or parcel upon which a construction contractor maintains its principal office or a permanent business office. Designation of the lot or

parcel as a contractor's storage yard would allow this area to be used to store and maintain construction equipment and other materials customarily used in the trade carried on by the construction contractor.

Even the Wheeling, Illinois definition does not specifically authorize the repair and servicing of motor vehicles and equipment. In the first sentence of the Wheeling, Illinois ordinance, it speaks in terms of the place where a contractor "maintains" an office. The word "maintains" is obviously used in the sense of continuing the existence or presence of the office. In the second sentence it speaks of the yard as the place where the constructor "maintains" equipment and materials. In the second sentence, the word "maintain" as it is used in reference to equipment could mean either the presence or existence of the equipment in the yard, or could mean the servicing or repair of the equipment. Inasmuch as the second sentence also refers to maintaining "materials customarily used in the trade", it is doubtful that word "maintains" is used in the ordinance to mean the repair or servicing of materials. The zoning administrator interpreted the Wheeling, Illinois Ordinance to give the word "maintain" one meaning in the first sentence, where it speaks about an office and a second, different meaning when it is used in the second sentence with regard to maintaining equipment and materials. Trial transcript, p.134. Of course this violates the rule of construction enunciated by this court in Board of Supervisors v. Marshall, 215 Va. 756, 761-762, 214, S.E. 2nd 146, 150 (1975), when the court stated:

Moreover, where a word is used in different sections of the statute and its meaning is clear in all but one instance, "the same meaning...will be attributed to it elsewhere unless there be something in the context which clearly indicates that the Legislature intended some other and different meaning...." Postal Telegraph Co. v. Farmville, & R. Co., 96 Va. 661,664, 32 S.E. 468, 470 (1899).

In order to interpret the phrase "equipment storage yard", which uses words of plain and common meaning, and which explicitly authorizes equipment storage, the zoning administrator relied upon a Glossary of terms for the definition of a more general term, "contractor's storage

yard”. The Glossary relies on a definition from the Wheeling, Illinois ordinance, which uses the word “maintain” in ways that are ambiguous. She then failed to apply the rule of construction enunciated in Marshall, *supra*, in order to come up with an expanded meaning for the phrase “equipment storage yard”. It is clear that the administrator was engaging in a rationalization to permit Faulconer to locate and operate a 15,000 sq. ft. garage for mechanical repairs on its proposed site in spite of the fact that the ordinance only permitted an “equipment storage yard”.

In that same Glossary, the term “contractor’s shop” is defined as explicitly authorizing the repair of equipment and fabrication of materials, activities conducted by Faulconer. If the Board of Supervisors of Albemarle County intended to authorize a “contractor’s shop,” we assume that it would have used words to that effect to carry out their intent. However, the Supervisors did not use such words, and therefore, did not intend to authorize a garage for mechanical repairs of motorized equipment when it used the term “equipment storage yard.”

In summary, the zoning administrator took unambiguous words of common and plain meaning and expanded their meaning by substituting a different phrase (“contractor’s storage yard”), and then used the definition of the substituted phrase taken from an ordinance in Wheeling, Illinois. This makes no sense.

The proposed activities by Faulconer in its repair garage fall within the definition of a “public garage” as defined by the Albemarle County ordinance, which use is not permitted in a light industrial district. There are two definitions of garages contained in Section 3.1 of the County ordinance, which defines specific terms. These definitions are as follows:

*Garage, Private:* Accessory building designed or used for the storage of automobiles owned and used by the occupants of the building to which it is accessory.

*Garage, Public:* A building or portion thereof, **other than a private garage**, designed or used for **servicing or repairing motor-driven vehicles**.

At the trial of the case, both the BZA and Faulconer argued that the definition of public garage is inapplicable because Faulconer does not service or repair motor-driven vehicles for the

general public. But the definition in the ordinance focuses on the nature of the activities (“servicing or repairing motor-driven vehicles”), not on who owns the vehicles. In Fritts v. Carolina Cement Company, 262 Va. 402, 405, S.E. 2d. (2001) in holding that silos were warehouses, this Court stated that it is the “function rather than the form of a structure”, which is relevant to defining use under a zoning ordinance. Similarly, from the perspective of the adjoining neighbors, it makes no difference whether the repair work and traffic are generated by the general public or by Faulconer’s 180 employees with its fleet of hundreds of motor-driven vehicles, many of which are oversized and create a safety hazard for traffic on the narrow country road leading to the proposed location.

Faulconer also proposes to construct three storage buildings of 8,530 sq. ft. each for the storage of equipment and materials. Trial transcript pp. 75-76. Thus, in addition to the repair garage of approximately 15,000 sq. ft., there are additional buildings proposed totaling more than 25,000 sq. ft. There is no authority for constructing such buildings pursuant to §27.2.1(9) of Albemarle County ordinance which permits “contractor’s office and equipment storage yard.” A “yard” is commonly used to describe the area around the buildings, but not the buildings themselves. The word “yard” is defined in Section 3.1, of the Albemarle County ordinance as follows: “An open space on a lot other than a court unoccupied and unobstructed from the ground upward except as otherwise provided herein.” By definition, Faulconer’s material storage buildings are not an “equipment storage yard.”

Faulconer’s proposed buildings, particularly the storage buildings, will function as warehouses. Section 27.2.1(17) permits by right:

Warehouse facilities and wholesale businesses **not** involving storage of gasoline, kerosene, or other volatile materials; dynamite blasting caps and other explosives; pesticides and poisons; and other such materials which could be hazardous to life in the event of accident.

Faulconer proposes to store at its proposed location, dynamite, petroleum products and other volatile materials. Consequently, warehouse facilities for the storage of such combustible or

explosive materials are not permitted by right but instead require a special use permit pursuant to Section 27.2.2(5) of the Albemarle County Ordinance. No special permit was applied for by Faulconer nor required by the Albemarle County zoning administrator.

The Hylands recognize that Faulconer has the right to locate its contractor's office and equipment storage yard on property which is zoned light industrial. However, the ordinance permits neither the construction and operation of a garage nor the construction and use of warehouses to store materials, including dynamite and other volatile substances. The zoning administrator's determination, which has been affirmed by the BZA and the trial court, has expanded the definition of "contractor's office and equipment storage yard" beyond its plain and common meaning to permit a garage and warehouses that are not permitted by right in a light industrial district, and is plainly wrong.

**2. The trial judge erroneously accorded a presumption of correctness to the Board of Zoning Appeals erroneous application of legal principles.**

Although Section 15.2-2314 of the Code of Virginia states that in the case of an appeal from a BZA to the Circuit Court of "the determination of a zoning administrator or other administrative officer in the **administration** or **enforcement** of any ordinance or provision of state law, the decision of the board of zoning appeals shall be presumed to be correct", that presumption of correctness does not apply to the BZA's erroneous interpretation of statutes or ordinances. The courts have to determine the proper interpretation of the ordinance as a matter of law.

It is well settled that zoning is a legislative power residing in the state which may be delegated to cities, towns and counties. Andrews v. Board of Super's of Loudon County, 200 Va. 637, 107 S.E. 445(1959). As the Court recently reaffirmed in Volkswagen of America v. Smit, 266 Va. 444, 453, 587 S.E. 2d 526, 531 (2003), an "erroneous interpretation of a statute by those charged with its enforcement cannot be permitted to override [the statutes'] clear meaning. Amendments of statutes can only be made by the legislature and not by the courts or administrative officers charged with their enforcement." As the Court stated in Sims Wholesale

Co. v. Brown-Forman Corp., 251 Va. 398, 404, 468 S.E. 2d 905, 908 (1996), “pure statutory interpretation is the prerogative of the judiciary.” On appeal, the appellate court reviews the interpretation of a statute *de novo*. Brown & Co. Sec. Corp. v. Balbus, 933 F 2d. 246 (4th Cir. 1991).

Instead of making a determination as to the proper construction and interpretation of the ordinance, the trial judge presumed the correctness of the BZA’s application of legal principles as stated in his letter opinion dated September 4, 2003:

The decision of the board of zoning appeals is presumed to be correct and can be reversed or modified only if the trial court determines that the BZA erred in its decision. Section 15.2-2314 of the Code of Virginia, as amended. **This presumption of correctness applies even when the issue is one that is of a purely legal nature.** (emphasis added)

In this case, the trial judge abdicated his responsibility to determine the correct meaning of the ordinance as a matter of law.

In Board of Zoning Appeals v. 852, L.L.C., 257 Va. 485, 514 S.E. 2nd 767 (1999), the zoning administrator interpreted an ordinance, which determination was appealed to the board of zoning appeals; the board affirmed the zoning administrator’s determination which was appealed to the trial court. The trial court found that the interpretations of the ordinance by the zoning administrator and the BZA were based on erroneous principles of law and reversed the board’s decision. On appeal, the Supreme Court stated:

“[A] decision of the Board of Zoning Appeals is presumed to be correct on appeal to a circuit court; the appealing party bears the burden of proof of showing that the Board applied erroneously principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance.”

Masterson v. Board of Zoning Appeals, 233 Va. 37, 44, 353 S.E. 2nd 727, 732-33 (1987).

In this case, the record demonstrated that the zoning administrator did not apply the correct rules of construction in interpreting the ordinance. The Hylands met their burden of proof. Instead of interpreting the ordinance himself, the trial judge mistakenly presumed the correctness to the BZA's application of principles of law to the interpretation of the ordinance.

Even with regard to purely factual issues, the presumption is weakened because the zoning administrator supplied inaccurate and incomplete information to the BZA. If the information is inaccurate and incomplete, the BZA's decision is likely to be flawed. The problem was compounded by the fact that the zoning administrator and County Attorney are the BZA's regular staff and legal advisor. Two of the BZA members appeared to believe that the County Attorney was their legal advisor. Therefore, the BZA did not exercise its judgment independently.

**3. The zoning administrator determined that Faulconer's proposed garage and storage structures were permitted uses as a "contractor's office and equipment storage yard." The Board of Zoning Appeals affirmed that determination. During the appeal to the circuit court, counsel for the BZA and Faulconer argued that if the proposed uses were not included within the phrase "contractor's office and equipment storage yard," that the proposed garage and storage facilities were permitted as accessory uses. The scope of the hearing in the circuit court cannot be expanded beyond the scope of the proceedings before the BZA and, therefore, the proposed garage and warehouse uses cannot be justified on the basis that they will be accessory uses. Even if considered on appeal, Faulconer's proposed uses are not accessory uses of a "contractor's office and equipment storage yard."**

At the hearing on September 11, 2001, the BZA heard the appeal of the zoning administrator's determination that Faulconer's proposed use fell within Section 27.2.1(9) of the Code permitting a "contractor's office and equipment storage yard" in a light industrial zone, and the determination that Faulconer's proposed storage of dynamite at its location was an accessory use. The BZA affirmed her determination. That decision was appealed to the Circuit Court. During the appeal process, the attorneys for the BZA and Faulconer argued that Faulconer's

proposed uses fell within the permitted “contractor’s office and equipment storage yard,” or alternatively, that the garage and storage facilities were accessory uses. Trial transcript, pp. 224 and 233-234. Although the judge’s opinion did not expressly discuss accessory use, he implicitly relied upon it in making his decision when he stated:

Petitioners have pointed to no other definition other than arguing that equipment storage yard is not defined in the Code and by its plain meaning storage is the only thing that is permitted-not maintenance. Common sense dictates that one should be able to maintain equipment that is stored.

Letter of September 4, 2003. In effect, the trial judge found that maintenance is an accessory use of equipment storage.

The Circuit Court’s review of the decision of the BZA is limited to the scope of the BZA proceeding and the reviewing court may only consider the correctness of the BZA’s decision. Adam’s Outdoor Advertising v. Board of Zoning, 261 Va. 407, 414, 544, S.E. 2nd 315, 319 (2001); Foster v. Geller, 248, Va. 563, 567, 449, S.E. 2nd 802, 805 (1994).

Therefore Faulconer and the BZA cannot bootstrap their case by claiming that even if the proposed uses of a garage and warehouse are not permitted by right, that they are accessory uses. Except for the consideration as to whether or not the storage of dynamite was an accessory use, there was no evidence or argument before the BZA that the proposed construction and operation of a garage and material storage facilities are permitted as accessory uses.

However, in the event that the Court determines that it should review this issue, the proposed uses do not qualify as accessory uses to the “contractor’s office and equipment storage yard.” At the time of the BZA hearing, the County ordinance defined accessory use in Section 3.1 as follows:

*Accessory use, buildings or structure:* A subordinate use, building or structure, customarily incidental to and located upon the same lot occupied by the main use or building.

That definition was modified by the Board of Supervisors on October 9, 2002 and

consequently at the trial of the appeal on August 18, 2003, the ordinance defined the term as follows:

*Accessory use, building, or structure:* A subordinate use, building, or structure customarily incidental to and located upon the same lot occupied by the primary use, building or structure and located upon lands owned to allow the primary use, building or structure.

Regardless of which definition of “accessory use” is utilized, the meaning and intent is clear. The definition also uses words of common and plain meaning. The word, “subordinate” is defined in Webster’s Third New International Dictionary as, “placed in a lower order, class or rank: holding a lower or inferior position.” The word “customarily” is an adverb meaning “commonly practiced or usual.” The word “incidental” is defined as “subordinate, nonessential, or attendant in position or significance.” Therefore an accessory use is a secondary or minor use, which commonly or usually occurs subordinate to the primary or main use.

Given that definition, one has to ask whether the Faulconer’s proposed garage facility and storage structures for materials are subordinate to and customarily incident to either a “contractor’s office” or an “equipment storage yard”. Whether the proposed use is “customarily incidental to the main or primary use of the property is a matter to be determined from the evidence adduced.” Wiley v. County of Hanover, 209 Va. 153, 157, 163 S.E. 2nd, 160, 163 (1968).

There was no evidence presented indicating that a repair garage and storage facilities are subordinate or customarily incidental to contractor’s offices. In fact, the evidence indicated that Faulconer’s current contractor’s office is located in an office park, physically separated and distant from the yard where its existing repair garage is located. There is no reason why business and office activities need to occur at the same location as the garage and the storage facilities.

There was at best minimal evidence that a repair garage and material storage facility are subordinate or customarily incidental to an “equipment storage yard”. Faulconer locates its current repair garage at the same location where it stores its equipment, but its equipment storage

yard is a nonconforming use located not in a light industrial district, but instead in a residentially zoned district. This court stated in Knowlton v. Browning-Ferris, 220 Va. 571, 575-6,260 S.E. 2nd, 232, 236 (1979) that “a use accessory or incidental to a permitted use cannot be made the basis for a nonconforming principal use.” In Town of Mount Jackson v. Fawley, 53 Va. Cir. 49, 52, 200 Va. Cir. LEXIS 414 (2000), the circuit court judge of Shenandoah County stated that “by like logic, a use incidental or accessory to an unlawful non-conforming use cannot be used as a basis to continue the nonconforming use of property.”

The zoning administrator only identified one other contractor that performed mechanical repair work at its equipment storage yard. She did not know whether other contractors employed mechanics to make mechanical repairs at their equipment storage yards. Trial transcript p. 136. Although there were other similar contractors located on light industrial zoned property, there was no evidence that they performed repair or mechanical work at their yards. Therefore, there is no factual basis for determining that mechanical work in a garage is customarily incidental to “contractor’s office and equipment storage yard.”

Even if for the sake of argument such mechanical or garage services are customarily incidental to equipment storage yards, the second question arises as to whether or not Faulconer’s proposed uses would be “subordinate” to the site’s primary or main use as an “equipment storage yard”.

The evidence at trial demonstrated that the primary use for the proposed garage was to perform mechanical work on its equipment, not storage. Faulconer employed seven mechanics and welders to make repairs on its equipment. Twenty to thirty-five percent (20-35 %) of their work was done at its existing garage. There were no employees who were hired for the purpose of equipment storage. Trial transcript p. 76. Faulconer proposes to build a 15,000 sq. ft. garage with a five ton hoist capable of removing engines and transmissions from its biggest equipment. Faulconer’s managers said that “their goal is to keep the equipment on the work site and out of that yard.” Trial Transcript p. 123. There can be no question that the primary or main use of the garage is going to be for mechanical work done in the garage and that equipment storage at the

yard is the secondary or subordinate activity. In fact, if the repair garage were not located on the site, it is questionable whether any equipment would be stored there.

With regard to the storage of materials in Faulconer's proposed warehouses, there was no evidence that such buildings are customarily incidental to "equipment storage yards".

Therefore, the repair garage and the storage buildings for materials cannot be justified as accessory uses to a "contractor's office and equipment storage yard".

Despite the presumption of correctness accorded the BZA's decision, the Hylands proved by a preponderance of the evidence that the decision was plainly wrong. Despite the presumption of correctness, when the decision is plainly wrong or based on erroneous legal principles, the court should reverse the decision. Donovan v. BZA, 251, 271, 467 S.E. 2nd 808 (1996). If the words of the ordinance are given their common and ordinary meaning, Faulconer's proposed garage and warehouses are not permitted. In this case the BZA's decision was plainly wrong and based on the erroneous application of legal principles.

**4. Did the trial court erroneously uphold the BZA's determination that storage of dynamite was an accessory use of a "contractor's office and equipment storage yard"?**

The evidence presented at the BZA hearing was that heavy earth moving contractors use dynamite at their job sites. There was also evidence that Faulconer and Haley, Chisholm & Morris stored dynamite at their equipment yards, for later transportation and use at the job sites. There was evidence that Parham Construction Company and other contractors do not store dynamite at their equipment yards, but instead subcontract such work with companies that specialize in the use of explosives. Based on the fact that Faulconer and similar contractors use explosives in the field on job sites, she concluded that the storage of explosives was an accessory use of "a contractor's office and equipment storage yard".

Although the use of dynamite or explosives in heavy construction may be customarily incidental to such work, there is no logical basis for concluding that the storage of explosives and dynamite is subordinate and customarily incidental to an “equipment storage yard”. It appears that the zoning administrator confused activities conducted by a contractor in the field at job sites with what is permitted in a district zoned light industrial. Following her logic, if U. S. Airways located its business offices in a business park such as Innsbrook Office Park, it would be authorized to store its airplanes in the office parking lot because it uses airplanes in its business. There was no evidence whatsoever that storage of explosives at “a contractor’s office and equipment storage yard” is subordinate and customarily incidental to the storage of equipment.

Furthermore, the storage of explosives and other volatile materials “which could be hazardous to life in the event of an accident” are only permitted by special permit in warehouse facilities in light industrial zoned land. Section 27.2.2(5) of the Albemarle County Ordinance. In effect, the zoning administrator has made a non-conforming use (storage of explosives), which requires a special permit, into a conforming use by claiming that it is an accessory use of “a contractor’s office and equipment storage yard”. This is in violation of the rule stated in Knowlton v. Browning-Ferris, 220 Va. at 575, 260 S.E. 2d at 236 that “a use accessory or incidental to a permitted use cannot be made the basis for a non-conforming principal use.”

### CONCLUSION

The Hylands request that the Court reverse the decision of the Circuit Court and enter an order determining that Faulconer’s proposed garage and warehouse facilities are not permitted by Section 27.2.1(9) of the Albemarle County Ordinance and that the storage of explosives is not an accessory use of a “contractor’s office and equipment storage yard.”

CHRISTOPHER HYLAND, *et al*

BY COUNSEL

Buck, Toscano & Tereskerz, Ltd.

211 East High Street

Charlottesville, VA 22902

Phone: (434) 977-7977

Fax: (434) 977-4847

By: \_\_\_\_\_

Francis L. Buck

VSB #12361

**CERTIFICATE**

I hereby certify that the Appellants are:

Christopher Hyland, Denise Hyland, Thomas Hutchinson, Shawn Evans, Pamela Evans, and Fleet National Bank, co-trustee of the Stillman Kelley Trust, by Darlene McDonald, agent for this purpose.

The Appellants are represented by:

Francis L. Buck

Buck, Toscano & Tereskerz, Ltd.

211 East High Street

Charlottesville, VA 22902

Phone: (434) 977-7977

Fax: (434) 977-4847

The Appellees are:

Board of Zoning Appeal of Albemarle County, VA

The Appellee is represented by:

Greg Kamptner

County Attorney's Office  
401 McIntire Road  
Charlottesville, VA 22902  
Phone: (434) 972-4067  
Fax: (434) 972-4068

and

Faulconer Construction Company, Inc.

The Appellee is represented by:

John W. Zunka  
Taylor, Zunka, Milnor & Carter, Ltd.  
414 Park Street, Charlottesville, VA 22902  
Phone: (434) 977-0191  
Fax: (434) 977-0198

Counsel for the Appellants desires to state orally in person the reasons why the petition should be granted. \_\_\_\_\_

### **CERTIFICATE**

I hereby certify that a true and accurate copy of the foregoing Petition for Appeal was mailed this \_\_\_\_ day of March, 2004, to Greg Kamptner, Esquire, County Attorney's Office, 401 McIntire Road, Charlottesville, VA 22902 and John W. Zunka, Esquire, Taylor, Zunka, Milnor & Carter, Ltd., 414 Park Street, Charlottesville, VA 22902.

---

Francis L. Buck