

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

CHRISTOPHER HYLAND; DENISE HYLAND; )  
THOMAS HUTCHINSON; SHAWN EVANS; )  
PAMELA EVANS; and, FLEET NATIONAL BANK )  
Co-Trustee of the Stillman Kelley Trust, by Darlene )  
MacDonald, agent for this purpose; )

Petitioners )

In Chancery #: \_\_\_\_\_

v. )

BOARD OF ZONING APPEALS )  
OF ALBEMARLE COUNTY, VIRGINIA )

and )

FALCONER CONSTRUCTION COMPANY, INC. )

Defendants )

Serve: Board of Zoning Appeals  
Larry W. Davis  
Albemarle County Attorney  
401 McIntire Road  
Charlottesville, Virginia 22902

Faulconer Construction Company, Inc.  
Registered Agent  
Jack W. Sanford, Jr.  
2496 Old Ivy Road  
Charlottesville, Virginia 22903

**PETITION FOR WRIT OF CERTIORARI**

1. Christopher Hyland, et al. (“Petitioners”), by counsel and pursuant to § 15.2-2314 of the Code of Virginia, file this action for a writ of certiorari to review the decision of the Albemarle County Board of Zoning Appeals (“BZA”), finding that the proposed use of a parcel of land by Faulconer Construction Company, Inc., (“Faulconer”) was consistent and in compliance with a

“contractors office and equipment storage yard” as such term is applied under the Albemarle County Zoning Ordinance. Petitioners assert that the BZA decision initially made by the BZA on September 11, 2001, and affirmed and/or modified October 2, 2001, was made without legal authority, was arbitrary and capricious and unreasonable, and made without following required legal procedure.

#### Jurisdiction and Venue

2. Jurisdiction of this action, and venue in this Court, are founded on § 15.2-2314 of the Code of Virginia.

3. Petitioners Christopher and Denise Hyland are residents of Albemarle County, Virginia who own land adjacent to the subject parcel. The Hylands are aggrieved by the decision of the BZA in that they will suffer a loss of value of their land, and a loss of use and enjoyment of their property as a result of the BZA decision to allow an improper land use under the zoning code.

4. Petitioner Thomas Hutchinson also owns land adjacent to the subject parcel, and will suffer a loss of value of his land and a loss of use and enjoyment of his land as a result of the BZA decision to allow an improper land use under the zoning code.

5. Petitioners Shawn and Pamela Evans are residents of Albemarle County, Virginia. The Evans also own land adjacent to the subject parcel, and are aggrieved by any decision of the BZA permitting an unauthorized land use which causes a loss of value of their land and a loss of use and enjoyment of their land.

6. Petitioner Fleet National Bank, by Darlene MacDonald, is Co-Trustee of the Stillman Kelly Trust, which holds land in trust located adjacent to the subject parcel, and who has a trustee responsibility for the protection and maintenance of land value and uses under its trusteeship. The

Bank's trust land holdings are adversely affected by any land use decision which causes a reduction in property value.

7. The Albemarle BZA is the statutory body with authority to hear and decide appeals from a decision of the Zoning Administrator.

8. Respondent Faulconer Construction, Inc. is the owner of the parcel of land subject to the BZA decision, and is made a party Defendant to this cause not due to its acts, but because it is a party having an interest in this matter.

#### History

9. Faulconer owns a 27+ acre parcel of land, located within a drinking water watershed, in the Ivy area of Albemarle County, Virginia, shown as parcel 37 on Tax Map 58. The lot lies in an area known as the "Ivy Industrial Park", and currently is at least partially zoned "light industrial". The parcel is encumbered by a two hundred foot (200') wide buffer running the length of its western boundary which, upon information and belief, is zoned agricultural or residential. Faulconer currently occupies an area at another location in Albemarle County for equipment storage purposes, and upon information and belief, seeks to develop and relocate to the 27-acre parcel.

10. On or about April 26, 2001, Faulconer, its agent or employee, submitted a request to the Albemarle County Department of Planning and Community Development (SDP#01-037) for preliminary site plan approval of its proposed use of the parcel. The proposed use includes: construction of one (1) 3,500 + square foot office building, construction of three (3) 2,400 square foot storage buildings, construction of one (1) 14,800 + square foot repair shop, an equipment storage yard, an access road, storage of explosives, and, upon information and belief, installation of at least eighty-five

(85) parking spaces. Because Faulconer's desired development of the parcel is hampered by the existence of tributary streams having steep banks, its proposal also included a request for waiver of the critical slope provision of the Albemarle County Zoning Ordinance, a request which would permit Falconer to destroy stream buffers with little or no impact mitigation.<sup>1</sup>

11. During the review process of Faulconer's preliminary site plan, it became apparent to the Department of Planning and Community Development that Faulconer's proposed use might not be, in fact, a "by right" use. Consequently, the Albemarle County Zoning Administrator ("Zoning Administrator") was requested to review Faulconer's proposed use of the parcel and to determine which zoning category use applies.

12. On or about June 27, 2001, the Zoning Administrator, having reviewed the proposed use by Faulconer for a "contractor's office and equipment storage yard", determined that such use was a permitted "by right" use.

13. The Zoning Administrator's determination failed to adequately or properly consider, evaluate or assess evidence that the stated proposed use of the majority of the parcel would be for purposes other than merely an office and related outside equipment storage; nor did the Administrator properly consider the 200' restrictive buffer and its impact upon such determination, or the type of services, uses and functions proposed by Faulconer.

14. The Zoning Administrator's authority to interpret local ordinance terms and

---

<sup>1</sup>It appears that the April 23, 2001 preliminary site plan for the parcel makes no provision for the maintenance of the tributary streams, but instead includes a "lake" in the center of the parcel, and a sediment basin at the southern end.

provisions arises under § 31.1.3 of the Albemarle County Zoning Ordinance, (“Interpretation by Zoning Administrator:). Section 31.1.2 which states:

In the case of any dispute over the meaning of a word, phrase or sentence, whether defined herein or not, the zoning administrator is hereby authorized to make a definitive determination thereof, being guided in such determination by the purposes and intent of this ordinance as set forth in section 1; ... . (emphasis added).

15. Section 1 of the Albemarle County Zoning Ordinance at § 1.4 (“Purpose and intent”) and § 1.5 (“Relation to Environment”) state, describe and list many parameters which the Zoning Administrator must consider in making ordinance language determinations. These include, *inter alia*, the improvement of public health, safety and welfare; provisions that residential areas be provided with healthy surroundings for family life; provisions for the reduction and prevention of congestion in public streets; the creation of a convenient attractive and harmonious community; the protection against danger and congestion in travel and transportation; and the protection of surface and groundwater.

16. The Zoning Administrator’s report to the BZA fails to describe or document consideration of the aforementioned parameters required by the ordinance.

17. The Zoning Administrator’s decision is further flawed in that it fails to properly apply the laws governing the interpretation of zoning ordinances in that it is the function, not the form of a facility, that must control the zoning determination. In this case, though part of the proposed form of the development can be described as being for a contractor’s office and associated storage area, that use is by no means an accurate description of the true extent or function of the facility.

18. Finally, information available in the files of the Planning Department regarding the subject parcel indicate the presence of a 200’ wide buffer running the length of the western boundary

of the parcel, an area that has not, based on information and belief, been properly rezoned “light industrial”. This buffer was originally created along with a conditional use permit granted to a prior landowner on or about 1970, and throughout subsequent re-zonings of the parcel, including the comprehensive re-zoning of 1980 which created the “light industrial” district, the zoning of the buffer remained unchanged.

19. The preliminary site plan submitted by Faulconer shows construction of a repair shop within the buffer area, which is not zoned industrial, and amounts to an illegal zoning of such buffer lands.

20. Pursuant to § 15.2-2286(A)(4), the zoning administrator’s authority includes (1) remedying violations of the ordinance, (ii) insuring compliance with the ordinance through legal action, and (iii) in specific cases, making findings of fact in regard to vested rights under § 14.1-1207, Code of Virginia, and may be delegated the authority to grant certain variances. See § 15.2-2286(A)(4) Code of Virginia.

21. In finding that the Faulconer land use proposal was permitted as a by-right use, the Administrator failed to comply with statutory authority, wrongly interpreted the relevant ordinance, and approved a land use inconsistent with existing zoning.

22. In addition to improperly modifying the zoning of the subject parcel, the Zoning Administrator’s determination would permit Faulconer to violate County Zoning Code §§ 18-26-3, § 18-26-12.1, and will constitute a waiver of set backs which would otherwise be applicable to the Faulconer facility under the heavy industrial zoning category.

23. Petitioners timely objected to and appealed the determination of the Zoning

Administrator to the BZA.

24. On September 11, 2001, the BZA heard Petitioners' appeals, and voted three for and two against (3-2) to affirm the decision of the Zoning Administrator. Consequently, the Zoning Administrator, by letter of September 12, 2001, notified Petitioners of the BZA decision affirming the decision of the Zoning Administrator, and advising Petitioners of the 30-day appeal provision of the code.

25. Thereafter, on October 2, 2001, the BZA issued a written decision stating, inter alia, that Zoning Administrator had correctly determined that the primary use proposed by Faulconer was for a contractor's office and equipment storage yard, and further that the Zoning Administrator had correctly determined that the storage of explosives related to Faulconer's construction activities was accessory to the primary office and equipment storage yard use.

26. The storage of explosives is expressly disallowed in the light industrial zone in warehouses.

27. The Zoning Administrator improperly ruled that the prohibition against storage of explosives in the light industrial zone was not applicable to a contractor's yard, and that such explosives could be stored as an accessory use, thereby negating the intent and purpose of the ordinance to bar storage of explosives in the light industrial zone.

28. The October 2, 2001 BZA decision letter states that the BZA decision was made by vote of four of the five BZA members (voting 4-1 to affirm the decision), one member being designated as absent. The October 2, BZA decision is different from the reported vote of the September 11, 2001, when all five members were reported present and voted 3-2.

**Count I**

**VIOLATION OF STATUTORY AUTHORITY**

29. Petitioners incorporate and reallege the allegations contained in Paragraphs 1 through 28.

30. The BZA decision violated statutory authority by affirming a land use which included rural agricultural zoned land as a by right industrial use.

31. The Zoning Administrator exceeded statutory authority in making a determination for a contractor's yard which was contrary to the County zoning ordinance and the authority granted the Zoning Administrator.

**Count II**

**IMPROPER DECISION**

32. Petitioners incorporate and reallege the allegations contained in Paragraphs 1 through 31.

33. The BZA decision of October 2, 2001, if made as it appears to be, i.e., a separate and new decision regarding Petitioners' appeal, was without proper notice or opportunity for public participation, and is therefore void.

34. To the extent that the October 2, 2001 decision of the BZA changed, altered or reddecided the September 11, 2001 decision, such September 11 decision is void, null and without effect.

**Count III**

**ARBITRARY, CAPRICIOUS AND UNREASONABLE**

35. Petitioners incorporate and reallege the allegations contained in Paragraphs 1 through 34.

36. The BZA's September 11, 2001 determination that the use proposed by Faulconer was for a "contractor's office and equipment storage yard" and so was permitted by right on the subject parcel, was arbitrary and capricious in that the methodology applied for the decision was improper, and the information relied on was inaccurate and misleading; violated the purpose and intent of the applicable zoning ordinance in that uses proposed by Faulconer are not intended to be permitted in areas zoned "light industrial"; was *ultra vires*, in that it amounts to a zoning modification which the BZA had no authority to effect; and an abuse of discretion in granting industrial uses within the 200' buffer area, an area not zoned for industrial purposes.

#### **Count IV**

#### **ARBITRARY, CAPRICIOUS AND UNREASONABLE**

37. Petitioners incorporate and reallege the allegations contained in Paragraphs 1 through 36.

38. Should the October 2, 2001 decision of the BZA be found to be a procedurally valid decision of the BZA, such decision was *ultra vires*, arbitrary and capricious, an abuse of discretion, and violated the purpose and intent of the applicable zoning ordinance for those same reasons as stated in regard to the September 11, 2001 decision.

#### **RELIEF REQUESTED**

**WHEREFORE**, your Petitioners respectfully pray that this Court allow a writ of certiorari to review the decision(s) of the BZA affirming and deciding the June 26, 2001 determination of the Zoning

Administrator, and find such determination void for failure to follow proper procedure, and otherwise arbitrary, capricious and unreasonable; allow Petitioners their costs as provided by § 15.2-2314 of the Code of Virginia, and its attorney fees incurred as may be provided for by law; and provide such other and further relief as this cause may require or to equity may seem meet.

Respectfully submitted,

Christopher Hyland, et al.  
By counsel

---

Rae H. Ely and Associates  
Rae H. Ely, Esq. (VSB#: 23715)  
One Courthouse Square  
Post Office Box 1550  
Louisa, Virginia 23093  
Tel: 540-967-0096  
Fax: 540-967-1308

Date: October 11, 2001