

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

STAFFORD LAKES LIMITED PARTNERSHIP,)
1304 Vincent Place)
McLean, Virginia 22101,)

Complainant,)

v.)

IN CHANCERY NO. Ch05-662

BOARD OF ZONING APPEALS)
OF STAFFORD COUNTY, VIRGINIA,)
SERVE: Rachel Hudson, Secretary)
Board of Zoning Appeals of)
Stafford County)
1300 Courthouse Road)
Stafford, Virginia 22555,)

DANIEL J. SCHARDEIN,)
Stafford County Zoning Administrator,)
1300 Courthouse Road)
Stafford, Virginia 22555,)

LINDA FELLERS,)
192 Indian Point Road)
Stafford, Virginia 22554,)

-and-)

JACK FELLERS,)
192 Indian Point Road)
Stafford, Virginia 22554,)

Respondents.)

**BILL OF COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE
RELIEF AND APPLICATION FOR WRIT OF PROHIBITION**

The Complainant, Stafford Lakes Limited Partnership ("Stafford Lakes"), by
counsel, submits the following as its Bill of Complaint against the Respondents, the
Board of Zoning Appeals of Stafford County, Virginia (the "BZA"), Daniel J. Schardein

10/15/05
JUROR COURT

("Schardein"), and Linda Fellers and Jack Fellers (collectively, the "Fellers"). Stafford Lakes also makes an Application to this Court for a Writ of Prohibition against the BZA pursuant to Va. Code Ann. § 8.01-644 (Michie 2000 Repl. Vol.).

Identification of the Parties

1. The Complainant is Stafford Lakes. Stafford Lakes is a Virginia limited partnership with offices in McLean, Virginia. Stafford Lakes is also the owner of the Property at issue in this cause, known as "Crow's Nest," and which is more particularly described below.

2. The BZA is a quasi-judicial public body that is constituted as the board of zoning appeals in Stafford County, Virginia pursuant to Va. Code Ann. §15.2-2308 (Michie 2003 Repl. Vol.) and the Code of Stafford County, Virginia Article XIX, Section 28-341. The BZA has the powers and duties prescribed by Va. Code Ann. §15.2-2309 (Michie 2003 Repl. Vol.).

3. Schardein is the Director of Code Administration of Stafford County Virginia. Schardein is also the Zoning Administrator for Stafford County, a position with the duties and responsibilities as set forth in Va. Code Ann. §15.2-2286(A)(4).

4. The Fellers, are individuals who, upon information and belief, reside at 192 Indian Point Road, Stafford, Virginia 22554. The Fellers are affiliated with an organization known as "Save Crow's Nest," a group that seeks to prevent development of the "Crow's Nest" property owned by Stafford Lakes.

Jurisdiction and Venue

5. Jurisdiction and venue are proper in this Court pursuant to the provisions of Va. Code Ann. §§ 8.01-184 to -191, -261, -620, -621, -644, -645 and -650 (Michie

2000 Repl. Vol. & 2005 Supp.), and Va. Code Ann. § 15.2-2208 and -2311(B) (Michie 2003 Repl. Vol & 2005 Supp.).

6. Stafford Lakes is aggrieved by the actions of the Respondents as alleged further below.

The Crow's Nest Property and the Preliminary Subdivision Plan

7. Stafford Lakes is the owner of certain land located in Stafford County, Virginia consisting of approximately 3,230 acres, and identified as Tax Map Parcels 48-1 and 49-27 (the "Property").

8. On December 12, 2004, Stafford Lakes submitted for review by applicable County planning and community development staff, a preliminary subdivision plan for the "Crow's Nest" subdivision (the "Preliminary Plan"). The Preliminary Plan seeks to subdivide the Property into 688 lots to be used for residential purposes allowed by-right under the Stafford County Zoning Ordinance. Stafford County planning staff have identified the Preliminary Plan as "SUB241944."

9. Since submitting the Preliminary Plan more than one year ago, Stafford Lakes has encountered a series of long delays in the County staff's review and processing of the Preliminary Plan. Stafford Lakes has expended a substantial amount of money responding to numerous staff comments in an effort to comply with all applicable ordinances.

10. The Preliminary Plan presently meets all applicable ordinance requirements for approval. Under Virginia law, approval of the Preliminary Plan is, therefore, a purely ministerial function to be carried out by the Stafford County Planning Commission (the "Planning Commission") pursuant to the authority conferred upon it by the Stafford County Subdivision Ordinance to approve preliminary subdivision plans.

The Failed Kurpiel BZA Appeal

11. In early 2005, Patricia Kurpiel (“Kurpiel”) filed papers with the BZA seeking to appeal certain actions of the Stafford County planning staff relating to the Preliminary Plan (the “Kurpiel BZA Appeal”). Upon information and belief, Kurpiel is a leader of the “Save Crow’s Nest” activist group with which the Fellers are affiliated.

12. Schardein correctly determined in that case that the BZA had no jurisdiction to hear or consider matters concerning the review of preliminary subdivision plans, and, therefore, he refused to submit the Kurpiel BZA Appeal to the BZA. In a March 21, 2005 memorandum to Kurpiel, Schardein explained that the Kurpiel BZA Appeal “application is inappropriate for appeal to the Board of Zoning Appeals” because “[t]he application submitted to the Planning Department by Stafford Lakes Ltd. Partnership is a Preliminary Subdivision plan which falls under the Subdivision Ordinance.” An accurate and authentic copy of Schardein’s March 21, 2005 memorandum to Kurpiel is attached as Exhibit “A” to this Bill of Complaint. Kurpiel then appealed Schardein’s action to the BZA.

13. On June 28, 2005, the BZA upheld Schardein’s decision to refuse to submit the Kurpiel BZA Appeal to the BZA. An accurate and authentic copy of the Minutes of the June 28, 2005 Meeting of the BZA relating to the Kurpiel BZA Appeal is attached as Exhibit “B” to this Bill of Complaint.

14. Schardein’s March 21, 2005 decision and the BZA’s decision of June 28, 2005 reflect clear precedent, policy and practice in Stafford County that matters concerning the subdivision review process are not subject to appeal to the BZA. As

noted further below, this is fully consistent with the governing law of the Commonwealth of Virginia.

The Planning Director Recommends Planning Commission Approval of the Preliminary Plan at the December 19, 2005 Planning Commission Meeting

15. On or about December 1, 2005, Stafford Lakes was informed by the Stafford County planning staff that the Preliminary Plan would be placed on the Planning Commission's docket for review at its December 7, 2005 regular meeting.

16. Also on December 1, 2005, Stafford County Planning Director Jeffrey A. Harvey, AICP, issued a report to the Planning Commission relating to the Preliminary Plan (the "Staff Report"). An accurate and authentic copy of the Staff Report is attached as Exhibit "C" to this Bill of Complaint.

17. The Staff Report, *inter alia*, expressed the Planning Director's view that the Preliminary Plan "has been revised to address all comments received at TRC [Technical Review Committee] and subsequent meetings. The plan meets all requirements of the Stafford County Code." (Exhibit "C" at 4). The Staff Report concluded with the Planning Director's recommendation that the Planning Commission approve the Preliminary Plan.

18. Due to the lateness of the hour, the Planning Commission adjourned its December 7, 2005 meeting before it could review and vote on the Preliminary Plan. The Planning Commission moved to reconvene its meeting on December 19, 2005 at 7:30 p.m., at which time the Commission would consider the Crow's Nest Preliminary Plan and the other matters that it was unable to address during the December 7, 2005 meeting.

The Fellers BZA Appeal and their Demand of a Stay to Prohibit the Planning Commission's Review of the Preliminary Plan

19. Having been placed on the Planning Commission's December 19, 2005 Docket, after more than a year of delays in the review of its Preliminary Plan, Stafford Lakes was at the verge of receiving the final approval action on its Preliminary Plan, and obtaining the valuable vested rights that arise from approval of a preliminary subdivision plan pursuant to Va. Code Ann. §15.2-2307.

20. This changed, however, when, on December 7, 2005, the Fellers filed papers with the Stafford County Department of Code Administration requesting an appeal to the BZA (the "Fellers BZA Appeal"). The Fellers BZA Appeal seeks to appeal to the BZA the Planning Director's statement in the Staff Report that the Preliminary Plan met all applicable Stafford County Code requirements. An accurate and authentic copy of the Fellers BZA Appeal is attached as Exhibit "D" to this Bill of Complaint.

21. The Fellers BZA Appeal also insisted that the Planning Commission be prohibited from reviewing the Preliminary Plan because of the "stay" provisions of Va. Code Ann. §15.2-2311(B) and Section 28-349(b) of the Stafford County Zoning Ordinance ("Zoning Ordinance") applicable to matters under appeal to the BZA.

22. As is more fully explained in Count I below, the BZA has no jurisdiction whatsoever to hear, consider or decide subdivision-related matters of the type the Fellers have attempted to raise in the Fellers BZA Appeal.

23. On December 14, 2005, Schardein, acting in his capacity as Zoning Administrator, issued a Memorandum to Deputy Zoning Administrator, Rachel T. Hudson (the "Schardein Memo"), submitting the Fellers BZA Appeal to the BZA for consideration at its February 28, 2006 meeting. An accurate and authentic copy of the

Schardein Memo is attached as Exhibit "E" to this Bill of Complaint. In addition, the Schardein Memo also specifically stated that "[a]ll action regarding project #241944, Crow's Nest is to be stayed as of this date."

24. Schardein's decision to submit the Fellers BZA Appeal to the BZA, and to order all action on the Preliminary Plan to be stayed, is not only contrary to controlling law, but contrary to the action that he took in the Kurpeil BZA Appeal. In the Kurpiel BZA Appeal, under substantially similar circumstances, Schardein ruled that it was improper for such matters to be heard by the BZA, or for there to be any stay of the underlying proceedings, and the BZA agreed with his decision.

25. Accordingly, after more than a year of reviews and delays after delays, Stafford Lakes is now being denied the opportunity for final approval action on its Preliminary Plan at the December 19, 2005 Planning Commission meeting by the same frivolous BZA appeal tactic that Schardein and the BZA have previously rejected. Unless this Court immediately prohibits the BZA from hearing or acting upon the Fellers BZA Appeal, Stafford Lakes will be subjected to yet further needless costs, delays and hardship, and forced to suffer the burden and expense of a BZA appeal process for which the BZA has no jurisdiction whatsoever. Alternatively, the Court should issue a restraining order pursuant to Va. Code Ann. § 15.2-2311(B) vacating the "stay" placed upon any further action on the Crow's Nest Preliminary Plan.

26. Stafford Lakes lacks any remedy, other than the relief sought in this Bill of Complaint, that would enable it to avoid the unlawful, needless delays and attendant losses that it will suffer if it is forced to wait, yet again, until after the BZA meets to hear the Fellers BZA Appeal more than two months from now. Stafford Lakes also should not

be forced to endure an appeals process with the BZA on a matter over which the BZA neither has jurisdiction, nor any power or authority to consider its own jurisdiction.

27. As a result, an actual controversy exists justifying this Court to issue declaratory relief pursuant to the Declaratory Judgment Act, Va. Code Ann. §§ 8.01-184 to -191. Va. Code Ann. § 8.01-186 specifically authorizes the Court to issue all further relief that may be necessary or proper. Also, Va. Code Ann. §§8.01-621 and -628 authorize Stafford Lakes to seek permanent and temporary injunctive relief, respectively. In addition, Va. Code Ann. §§ 8.01-644 authorizes this Court to issue writs of prohibition to restrain judicial and quasi-judicial tribunals, like the BZA, from attempting to take action when they lack any power or jurisdiction to take that action. Finally, Va. Code Ann. §8.01-650 authorizes the Court to suspend the proceedings sought to be prohibited until a final decision of the cause is reached by the Court.

COUNT I

DECLARATORY JUDGMENT THAT THE BZA HAS NO JURISDICTION TO HEAR OR CONSIDER THE FELLERS BZA APPEAL, OR TO STAY THE PLANNING COMMISSION'S REVIEW AND ACTION ON THE PRELIMINARY PLAN

28. The allegations contained in paragraphs 1-27 above are restated and incorporated into this Count.

29. The BZA "is a creature of statute possessing only those powers expressly conferred upon it." *Lake George Corp. v. Standing*, 211 Va. 733, 735, 180 S.E.2d 522, 523-24 (1971). The BZA has no power or authority to consider appeals or other matters when this power has not been conferred upon it by statute, and any attempt by it to exercise such review powers is wholly null and void. *Id.*

30. The BZA's enabling legislation confers no authority to hear appeals in matters concerning subdivision review and approval. *E.g., Mason v. Board of Zoning Appeals*, 25 Va. Cir. 198 (Fairfax County 1991) (holding that a "BZA has no jurisdiction to hear and decide appeals relating to subdivision applications."). Under Va. Code Ann. §15.2-2311 and §28-349 of the Stafford County Zoning Ordinance, the BZA has authority to hear appeals concerning only matters related to application, interpretation and enforcement of zoning ordinance provisions. Zoning administration and subdivision review are two entirely separate components of land use regulation in Virginia, and are the subjects of separate and distinct Articles of Chapter 22 of Subtitle II of Title 15.2 of the Code of Virginia. (*E.g.*, Article 6, Land Subdivision and Development and Article 7, Zoning).

31. Appeals of preliminary subdivision plan decisions are governed exclusively by the statutory appeals process specified in Va. Code Ann. §15.2-2260(C) and (D) (Michie 2003 Repl. Vol.), which entails an appeal to Circuit Court by a subdivider who is aggrieved by the local government's action or inaction on the plan. The BZA plays no role in the subdivision review or appeal process whatsoever.

32. The fact that preliminary plan review and approval must include a finding that a preliminary subdivision plan meets all zoning ordinance requirements does not render consideration of that plan a zoning matter for which a BZA appeal is allowed, as the Fellers incorrectly argue. Under Section 22-60 of the Stafford County Subdivision Ordinance, every preliminary subdivision plan must meet the applicable requirements of the Stafford County Zoning Ordinance. Thus, under the Fellers' incorrect argument every preliminary subdivision plan recommended for approval could be appealed to the

BZA by a neighboring property owner. That is not the law in the Commonwealth of Virginia.

33. The incorrectness of the Fellers' argument is reinforced by the Supreme Court of Virginia's recent holding in *Shilling v. Jimenez*, 268 Va. 202, 209, 597 S.E.2d 206, 209 (2004). In *Shilling*, the Court held that the General Assembly has not authorized third-parties to challenge a local government's subdivision decisions, as such challenges improperly impinge upon a local government's *exclusive* right to administer and enforce the subdivision process under Va. Code Ann. §15.2-2255. Allowing BZA appeals of subdivision decisions by third parties, like the Fellers, runs directly afoul of the Supreme Court's holding in *Shilling*, and the intent of the General Assembly to preclude such third-party challenges.

34. Furthermore, even if the BZA were somehow permitted to consider subdivision-related issues (which it is not), under Va. Code Ann. §15.2-2311(A), its jurisdiction would extend only to review "any *order, requirement, decision or determination*" made by County staff. (Emphasis added). The Fellers BZA Appeal involves no such thing. It seeks to appeal only the Planning Director's statement in the Staff Report that the Crow's Nest Preliminary Plan "meets all requirements of the Stafford County Code."

35. Under the Stafford County Subdivision Ordinance, the Planning Director has no power to approve Subdivision Plans. Rather, that power is conferred upon the Planning Commission. *See* Stafford County Subdivision Ordinance § 22-62. The statement at issue in the Staff Report is not binding upon the Planning Commission. It is only a statement of the Planning Director's opinion as to whether or not the Preliminary

Plan meets the requirements for subdivision approval. Accordingly, there is no “order, requirement, decision or determination” from which the Fellers may appeal, and so the BZA lacks any jurisdiction to hear or decide the appeal for this reason as well.

36. Nor are the Fellers “aggrieved” within the meaning of Va. Code Ann. §15.2-2311(A) sufficient to confer authority upon the BZA to hear the Fellers BZA Appeal. To be “aggrieved” under the statute, the Fellers must have suffered “a denial of some personal or property right, legal or equitable” by the Planning Director’s statement in the Staff Report which they erroneously seek to appeal. *Virginia Beach Beautification Comm’n v. Bd. of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d. 899, 902-03 (1986). The Planning Director’s statement in the Staff Report does nothing to harm the Fellers in any way. It is a mere abstract statement of opinion that neither approves the Preliminary Plan, nor is it binding on the Planning Commission.

WHEREFORE, the Court should issue a declaratory judgment that the BZA lacks any and all jurisdiction to hear, consider or decide the Fellers BZA Appeal; that the Fellers lack standing to pursue any appeal of the Planning Director’s opinion; and that the “stay” on the Planning Commission’s review of the Preliminary Plan is, therefore, void *ab initio*, invalid and illegal.

COUNT II

PRELIMINARY AND PERMANENT INJUNCTION TO PROHIBIT THE BZA FROM HEARING, CONSIDERING, OR DECIDING THE FELLERS BZA APPEAL AND PROHIBITING ANY STAY OF THE PLANNING COMMISSION’S REVIEW OF THE PRELIMINARY PLAN

37. The allegations contained in paragraphs 1-36 above are restated and incorporated into this Count.

38. Because the BZA is completely without jurisdiction to hear, consider or decide the Fellers BZA Appeal in any way, such proceedings are a nullity which serve no purpose other than to subject Stafford Lakes to yet further needless delay and expense, and to prevent Stafford Lakes from obtaining timely Planning Commission review and approval action on its Preliminary Plan after more than a year of delays. Forcing Stafford Lakes to suffer the expense and burden of having to participate in an appeal over which the BZA has no jurisdiction is also improper, and only this Court can provide the relief necessary to avoid that unnecessary hardship.

39. Stafford Lakes lacks any remedy other than the relief sought in this Bill of Complaint that would enable it to avoid the unlawful delays and attendant losses that it will suffer if it is forced to wait until after the BZA meets to hear the Fellers BZA Appeal more than two months from now.

40. Having been forced to endure two frivolous BZA appeals, Stafford Lakes also faces the prospect of yet more frivolous appeals to the BZA by others like Kurpiel and the Fellers who are determined to prevent Stafford Lakes from exercising its constitutionally-protected right to develop the Property in accordance with existing laws and ordinances. A judicial determination that appeals like the Fellers BZA Appeal are improper, and should be enjoined, will curb such abuses in the future.

WHEREFORE, the Court should enter a Decree enjoining the BZA, preliminarily and permanently, from hearing, considering or deciding the Fellers BZA Appeal, and also prohibiting any stay of the Planning Commission's review of the Preliminary Plan. Alternatively, the Court should issue a Decree vacating the stay of further action on the Preliminary Plan pursuant to the authority expressly granted in Va. Code Ann. § 15.2-

2311(B) and Stafford County Zoning Ordinance § 28-349(b) to issue a “restraining order” against such a stay for good cause shown.

COUNT III

WRIT OF PROHIBITION TO PROHIBIT THE BZA FROM EXERCISING JURISDICTION OVER THE FELLERS BZA APPEAL, AND TO PROHIBIT ANY STAY OF THE PLANNING COMMISSION’S REVIEW OF THE PRELIMINARY PLAN

41. The allegations contained in paragraphs 1-40 above are restated and incorporated into this Count.

42. Virginia Code Ann. § 8.01-644 authorizes this Court to issue writs of prohibition. A writ of prohibition is properly issued to restrain a quasi-judicial body from exceeding or attempting to exceed its powers. *E.g., Bee Hive Mining Co. v. Indust. Comm’n*, 144 Va. 240, 242-43, 132 S.E. 177, 178 (1926).

43. The BZA is a quasi-judicial body. By statute, it is authorized to make determinations of law, and to apply fact to law, as to certain matters concerning the administration and interpretation of the Stafford County Zoning Ordinance. *E.g., Va. Code Ann. §15.2-2309.*

44. The BZA is completely without jurisdiction to hear, consider or decide the Fellers BZA Appeal. Accordingly, Stafford Lakes is entitled to the immediate issuance of a Writ of Prohibition that prohibits the BZA from attempting to hear, consider or decide the Fellers BZA Appeal, and that also prohibits any stay of the Planning Commission’s review of the Preliminary Plan.

WHEREFORE, the Court should immediately issue a Writ of Prohibition that prohibits the BZA from attempting to hear, consider or decide the Fellers BZA Appeal, and which also prohibits the stay of any further action on the Crow’s Nest Preliminary

Plan. Should the Court decline to enter an immediate Writ of Prohibition, the Court should issue a Decree, *pendente lite*, pursuant to Va. Code Ann. §8.01-650 suspending the Fellers BZA Appeal proceedings until a final decision on the merits in this cause.

RELIEF REQUESTED

Stafford Lakes respectfully requests that this Court enter a Decree granting it the following relief:

- A. A Declaratory Judgment that the BZA lacks any and all jurisdiction to hear, consider or decide the Fellers BZA Appeal, and that the “stay” on the Planning Commission’s review of the Preliminary Plan is void *ab initio*, invalid and illegal;
- B. An injunction enjoining the BZA, preliminarily and permanently, from hearing, considering or deciding the Fellers BZA Appeal, and also prohibiting any stay of the Planning Commission’s review of the Preliminary Plan. Alternatively, the Court should issue a Decree vacating the stay of further action on the Crow’s Nest Preliminary Plan, pursuant to the authority expressly granted in Va. Code Ann. § 15.2-2311(B) and the Stafford County Zoning Ordinance Section 28-349(b), to issue a “restraining order” against such a stay for good cause shown;
- C. A Writ of Prohibition that prohibits the BZA from hearing, considering or deciding the Fellers BZA Appeal, and that also prohibits any stay of the Planning Commission’s review of the Preliminary Plan. Should the Court decline to grant an immediate Writ of Prohibition, the Court should issue a Decree pursuant to Va. Code Ann. §8.01-650 suspending the Fellers BZA Appeal proceedings until a final decision on the merits in this cause; and
- D. An award to Stafford Lakes of all costs, fees, and/or other expenses to which it may be entitled to recover under applicable law, together with any other additional relief that the Court adjudges to be equitable and appropriate.

Respectfully submitted:

STAFFORD LAKES LIMITED
PARTNERSHIP

By: _____

Counsel

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*Counsel for the Complainant,
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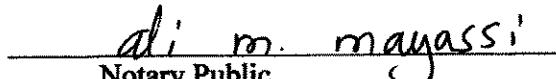
VERIFICATION

I, Kamel M. Tabbara, a duly-authorized representative of Stafford Lakes Limited Partnership, affirm, under penalty of perjury, that each of the factual allegations made in this Bill of Complaint for Declaratory Judgment, Injunctive Relief and Application for Writ of Prohibition is true to the best of my belief.


KAMEL M. TABBARA

COMMONWEALTH OF VIRGINIA,
FAIRFAX COUNTY:

On December 15, 2005, Kamel M. Tabbara personally appeared before me and, having been placed under oath, signed the above Verification before me.


Notary Public

My Commission Expires March 31, 2008

My Commission Expires: _____



VIRGINIA:

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1304 Vincent Place)
McLean, Virginia 22101,)
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v.)

IN CHANCERY NO. 05-662

BOARD OF ZONING APPEALS)
OF STAFFORD COUNTY, VIRGINIA,)

DANIEL J. SCHARDEIN,)
Stafford County Zoning Administrator,)
1300 Courthouse Road)
Stafford, Virginia 22555,)

LINDA FELLERS,)
192 Indian Point Road)
Stafford, Virginia 22554,)

-and-)

JACK FELLERS,)
192 Indian Point Road)
Stafford, Virginia 22554,)

Respondents.)

MOTION FOR EMERGENCY INJUNCTIVE RELIEF AND APPLICATION FOR WRIT OF PROHIBITION

The Complainant, Stafford Lakes Limited Partnership (“Stafford Lakes”), by counsel, moves the Court for the entry of emergency injunctive and other equitable relief as follows:

1. Stafford Lakes requests the Court to entertain this motion for emergency equitable relief, and to grant Stafford Lakes the following relief:
 - (a) A Decree enjoining the Board of Zoning Appeals of Stafford County, Virginia (the “BZA”), preliminarily and permanently, from hearing,

considering or deciding an appeal filed by Respondents Linda A. and Jack Fellers on December 7, 2005 (the “Fellers BZA Appeal”) concerning the Preliminary Plan for the “Crow’s Nest” Subdivision (the “Preliminary Plan”);

- (b) Prohibiting any stay of the Stafford County Planning Commission’s review of the Preliminary Plan; and/or
- (c) Vacating the stay of further action on the Preliminary Plan, pursuant to the authority expressly granted in Va. Code Ann. § 15.2-2311(B) and the Stafford County Zoning Ordinance Section 28-349(b).

2. Stafford Lakes also requests the Court to issue a Writ of Prohibition: (i) prohibiting the BZA from hearing, considering or deciding the Fellers BZA Appeal; and (ii) prohibiting any stay of the Planning Commission’s review of the Preliminary Plan.

Should the Court decline to grant an immediate Writ of Prohibition, the Court should issue a Decree pursuant to Va. Code Ann. §8.01-650 suspending the Fellers BZA Appeal proceedings until a final decision on the merits in this cause.

3. The grounds for, and legal authorities supporting, the Complainant's Motion for Emergency Injunctive Relief and Application for Writ of Prohibition are stated in the Bill of Complaint for Declaratory Judgment, Injunctive Relief and Application for Writ of Prohibition in this cause, which is incorporated by reference.

4. The Court can and should permanently enjoin the BZA’s consideration of the Fellers BZA Appeal at this juncture, since the BZA, as a matter of law, has no jurisdiction to hear, consider or decide the Fellers BZA Appeal. *Mason v. Board of Supervisors*, 25 Va. Cir. 198, 199-200 (Fairfax County 1991) (holding that “the BZA has no jurisdiction to hear or decide appeals relating to subdivision matters.”).

5. The equities and the balance of the hardships tip decidedly in favor of Stafford Lakes. Unless this Court issues the requested emergency temporary injunctive

relief and Writ of Prohibition, Stafford Lakes will be deprived of its right, after more than a year of delay, to have prompt consideration of its completed Preliminary Plan by the Stafford County Planning Commission.

6. In any event, there can be no hardship to the Fellers if the Court decides only to issue temporary injunctive relief from the “stay” of action on the Preliminary Plan, as is expressly permitted under Va. Code Ann. §15.2-2311(B) and the Court’s equitable powers under Va. Code Ann. §8.01-628, and Va. Code Ann. § 8.01-650. Such action would enable the Planning Commission to act on the Preliminary Plan prior to the BZA hearing presently scheduled for February 28, 2006, but leave open the possibility that the BZA would decide to hear the Fellers BZA Appeal, if this Court ultimately rules in the Fellers’ favor.

7. On the other hand, if the Court denies Stafford Lakes’ request, it will be forced to endure yet further delays in the review and approval of its Preliminary Plan, and the attendant costs associated with such delays, for which there is no adequate remedy at law. Such delays, caused by a BZA appeal for which there is no jurisdiction, interfere with and injure Stafford Lakes’ constitutional right to develop its property in accordance with existing law.

8. Without this Court’s relief, Stafford Lakes also would be forced to suffer the expense and hardship of being involuntarily subjected to an administrative proceeding for which the BZA has no jurisdiction. Attempts to appeal subdivision matters such as the Fellers BZA Appeal are “wholly void” because “the BZA has no jurisdiction to hear or decide appeals relating to subdivision matters.” *Mason*, 25 Va. Cir. at 199-200 (Fairfax County 1991).

9. In addition, the question of whether the BZA has authority to hear matters such as the Fellers BZA Appeal is a pure question of law which entails exercise of the judicial power which only the judicial branch of government possesses. *E.g., Town of Jonesville v. Powell Valley Village Ltd. Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997); *Holland v. Johnson*, 241 Va. 553, 555-56, 403 S.E.2d 356, 357-58 (1991). Thus, only this Court can decide the threshold jurisdictional issue that is presented by the Fellers BZA Appeal.

10. The public interest also favors granting the emergency equitable relief sought by Stafford Lakes. It is contrary to the public interest to prevent the lawful and constitutionally-protected development of real property through the invocation of a wholly void and improper administrative process for which there is no jurisdiction. It is also contrary to the public interest to allow the BZA to make a legal determination as to the scope of its lawful jurisdiction which, under the Constitution of Virginia, only this Court can make.

Respectfully submitted,

STAFFORD LAKES LIMITED
PARTNERSHIP

By: 

Counsel

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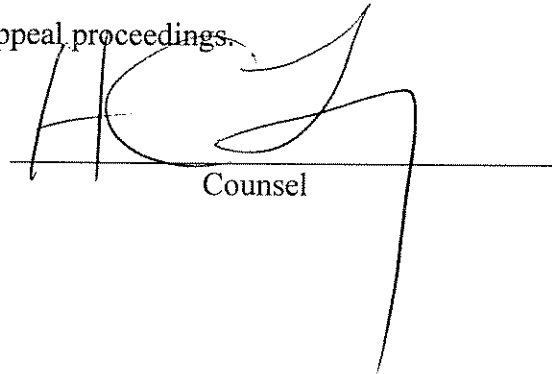
-and-

H. Clark Leming (VSB No. 24633)
John E. Tyler, Jr. (VSB No. 37394)
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Tel: (540) 659-5155
Facsimile (540) 659-1651

*Counsel for the Complaint, Stafford Lakes
Limited Partnership*

CERTIFICATE OF SERVICE

I certify that, on December 15, 2005, a copy of this Motion was served by first-class mail on all parties to this cause at the address listed in the Bill of Complaint. A copy was also mailed to Joseph L. Howard, Jr., Esquire, County Attorney, County of Stafford, 1300 Courthouse Road, P.O. Box 339, Stafford, Virginia 22555, and to David S. Bailey, Esquire, 16397 Triple Creek Lane, Beaverdam, Virginia 23015, counsel for Linda and Jack Fellers in the BZA appeal proceedings.


Counsel