

**The following are provided in this document:**

- 1. City's Summary of Case on Appeal**
- 2. Thomas J. Fannon's Reply to the City's Summary of Case on Appeal**
- 3. City of Alexandria's Response to Thomas J. Fannon's Reply to the City's Summary of Case on Appeal**
- 4. Fannon's Stipulated Findings of Fact**

**Due to the length, all supporting exhibits will only be available for viewing and copying at the Department of Planning & Zoning**

Docket Item # 1  
BZA CASE # 2008-0034

Board of Zoning Appeals  
December 11, 2008

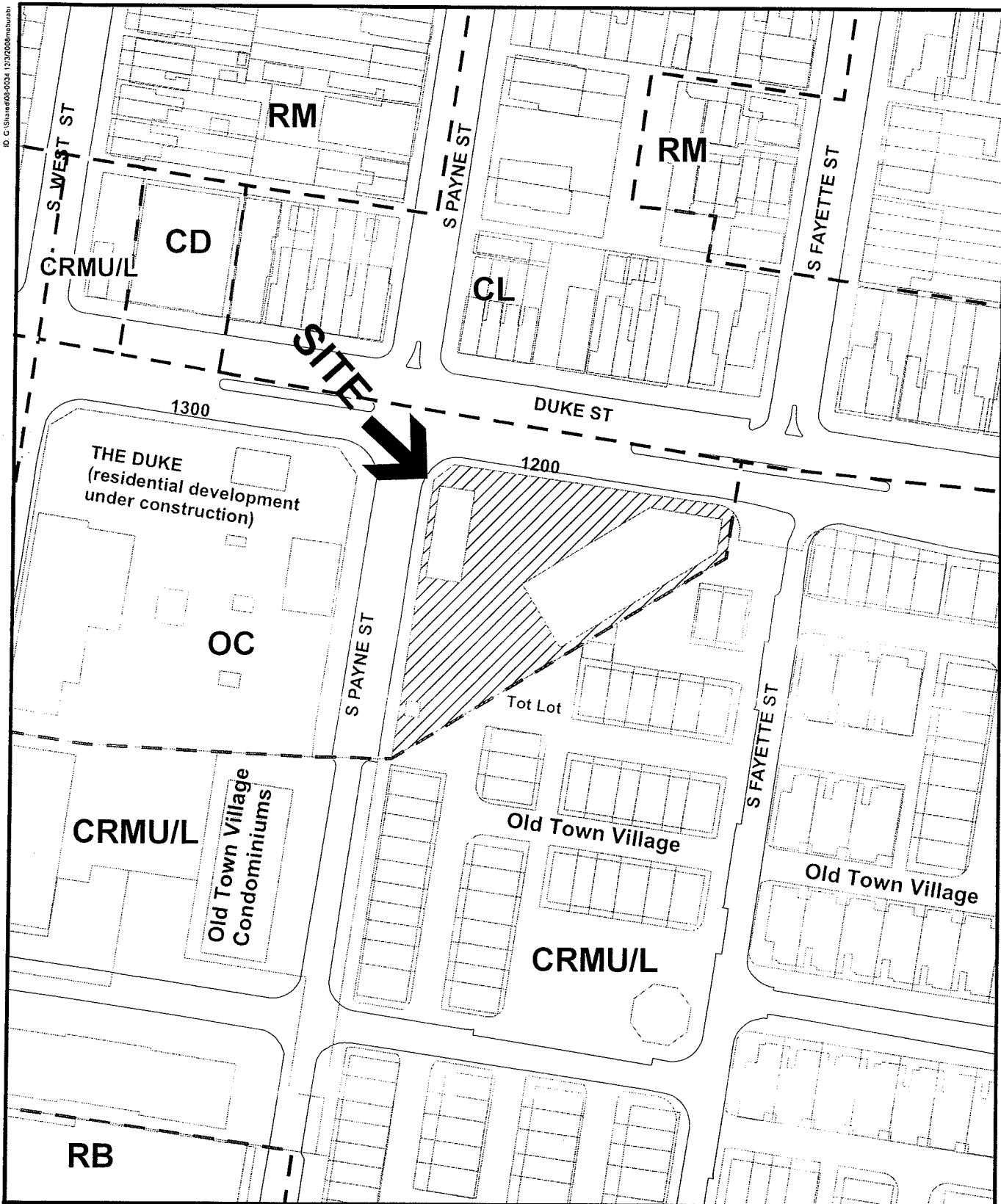
**ADDRESS:** 1200 DUKE STREET  
**ZONE:** OC/OFFICE COMMERCIAL  
**APPLICANT:** THOMAS J. FANNON

**ISSUE:** Appeal from the determinations of the Director of Planning and Zoning that (1) applicant has materially failed to comply with a required condition of a November 3, 2003 determination letter allowing certain business activities at 1200 Duke Street, and (2) as a result, the November 3, 2003 zoning determination letter allowing certain business activities is revoked.

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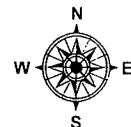
SUMMARY OF CASE ON APPEAL

This case concerns the authority of the Director of Planning and Zoning ("Director") under Section 11-205 of the Zoning Ordinance to revoke certain development rights when a property owner materially fails to comply with one or more conditions on which the approval of the development rights was based. In this case, the Director issued a letter determination on November 3, 2003 allowing Thomas J. Fannon & Sons, Inc. ("Fannon & Sons") to transfer heating fuel storage and vehicle repair uses from 1300 Duke Street, where a separate family corporation, Fannon Petroleum Services, Inc., conducted a fuel distribution business, to 1200 Duke Street, where Fannon & Sons operates an air conditioning, heating systems, and heating fuel retail distribution business. The Director determined that the transfer of uses would be consistent with the uses in existence at 1200 Duke Street in 1981, when a zoning amendment was passed and Fannon & Sons' operations were allowed to continue as a grandfathered use. The Director's determination was predicated on the expectation that the transfer of uses would not intensify zoning impacts and on the condition that Fannon & Sons submit and obtain approval of a landscaping plan to screen the activities at the site. Nearly five years after the Director's conditional development approval, Fannon & Sons failed to submit a reasonable plan despite lengthy discussions with the City and neighboring property owners. Due to Fannon & Sons' material failure to comply with an express condition of the November 3, 2003 determination letter, on August 8, 2008 the Director revoked the previously approved development authorization. On appeal, Fannon & Sons challenges the Director's authority to revoke the November 3, 2003 determination letter and the reasonableness of that decision. See Exhibit #1. The Staff recommends that the appeal be denied.



**BZA CASE #2008-0034**

**12/11/2008**



## FACTUAL BACKGROUND

Thomas J. Fannon & Sons, Inc. ("Fannon & Sons") has operated an air conditioning, heating systems, and heating fuel distribution business at 1200 Duke Street since the 1940s. The property consists of an office building, a garage, and a parking lot, on a triangle-shaped lot which is bordered by Duke and South Payne streets on two sides and upscale townhomes on the third. Fannon & Sons stored heating oil at 1200 Duke Street in seven above-ground storage tanks beginning in 1940. In 1962, Fannon Petroleum Services, Inc. ("Fannon Petroleum") was incorporated and obtained a special use permit to construct and operate a fuel distribution facility at 1300 Duke Street, on the other side of South Payne Street across from Fannon & Sons' operations. Fannon Petroleum maintained twenty-six underground fuel storage tanks and also housed a vehicle repair facility both for its trucks and Fannon & Sons' distribution vehicles.

In 1981, the City passed zoning amendments that eliminated petroleum storage as a permitted or special-permit use, but the 1981 amendments grandfathered all lawfully existing uses, allowing Fannon & Sons to maintain its operations at 1200 Duke Street as they existed at that time. In 1992, the seven above-ground storage tanks were removed from 1200 Duke Street as part of an environmental remediation at the site. Fannon & Sons maintained its heating fuel operations, however, by receiving heating fuel directly from Fannon Petroleum at 1300 Duke Street. Also in 1992, the property at 1200 Duke Street was zoned from I-2 Industrial to Office Commercial (OC), but Fannon & Sons' operations continued to be permitted under the grandfather provisions passed in 1981.

In or before 2001, Fannon Petroleum decided to realign its business and relocate its primary operations to Gainesville, Virginia. The 1300 Duke Street property was sold to Van Metre Companies for a new residential development. Because Fannon & Sons desired to maintain a limited fuel oil retail operation after the sale of the 1300 Duke Street site, it requested to add two 20,000-gallon underground storage tanks for petroleum heating fuel at the 1200 Duke Street site. Additionally, Fannon & Sons requested to renovate a storage garage at 1200 Duke Street to serve its vehicle repair needs, which had been handled at the 1300 Duke Street site for a number of years. In 2005, the Board of Architectural Review (BAR) granted a certificate of appropriateness (COA) to construct a one-story garage addition at 1200 Duke Street.

In a five-page letter dated November 3, 2003, the Director of Planning & Zoning determined that the uses transferred to 1200 Duke Street would not constitute an intensification of the uses that existed at the site in 1981 and would therefore continue to be grandfathered, provided that Fannon & Sons adhered to the changes as proposed and several other conditions. *See Exhibit #2.* In particular, the Director required Fannon & Sons to operate under the same hours and have no more than the number of employees and trucks it had before the 1981 grandfathering amendment. In addition, the Director required Fannon & Sons to install landscaping along Duke Street in order to screen its business activities and to submit a landscaping plan for City approval prior to installation. *See id.*

In December 2006, Thomas J. Fannon, owner of Fannon & Sons, applied for a permit to install three underground storage tanks at 1200 Duke Street: the originally requested two 20,000-gallon tanks and a third 8,000-gallon tank. *See Exhibit #3.* On December 28, 2006, the Acting Director approved the permit request, finding that it was consistent with the intent of the

original November 3, 2003 zoning determination. *See Exhibits #4 and #5.* By letter dated February 26, 2007, the Acting Director informed Mr. Fannon that the permit approved on December 28, 2006 covered only the storage tanks, and did not cover a requested fuel dispenser structure, for which a separate permit was needed. *See Exhibit #6.* The Acting Director also reiterated the requirement for a landscaping plan and reconstruction of a brick screening wall facing South Payne Street that was removed by Fannon to install the three underground storage tanks.

On March 2, 2007, after receiving complaints from neighbors and finding that a number of zoning and building code determination compliance issues needed to be resolved, particularly regarding the storage tanks and fuel dispenser and the lack of landscaping plans, the City issued a Stop Work Order to Fannon & Sons at 1200 Duke Street. At this time, the City became aware that Fannon & Sons intended to use the 8,000-gallon storage tank for gasoline fuel for its service trucks. In a letter dated April 30, 2007, the City Manager informed Mr. Fannon that Fannon & Sons' apparent intention to use the 8,000-gallon tank for gasoline fuel for his trucks rather than for fuel oil for delivery exceeded the 2003 zoning determination of approved uses. As a result, the City informed Mr. Fannon that the 8,000 gallon tank could not be permitted without further investigation into whether the use of the tank for gasoline storage constituted intensification of the grandfathered uses on the site. *See Exhibit #7.*

Planning and Zoning staff met with Mr. Fannon several times and requested that Mr. Fannon submit a complete plan for 1200 Duke Street. At the same time, despite the Stop Work Order, the City continued to receive complaints from neighbors of the property regarding the unsightly appearance of the property, outdoor storage of materials, and other problems. Fannon & Sons eventually submitted a site plan at the end of October, 2007. Upon review, however, the Department of Planning and Zoning along with other City Departments determined that the plan was inadequate due to major omissions and that additional information would be needed to bring the plan into compliance. The staff made more than fifty substantive recommendations. *See Exhibit #8.* Although Planning and Zoning staff continued to try to work with Mr. Fannon into 2008, Mr. Fannon did not submit a timely revised, complete site plan addressing the landscaping and other issues.

By letter dated August 8, 2008, the Director of Planning and Zoning revoked the November 3, 2003, zoning determination letter. *See Exhibit #9.* The Director stated that Fannon & Sons' installation of fuel storage tanks at the site exceeded the scope of the uses authorized in the 2003 letter in that the installation was not limited to heating oil, but instead included gasoline and related dispensing facilities for use by the retail delivery and service vehicle fleet. In addition, the Director stated that the previous conclusion that the transfer of uses to 1200 Duke Street would not intensify zoning impacts relied on the commitment of Fannon & Sons to install screening landscaping.

Because Fannon & Sons failed to submit a viable landscaping plan for nearly five years following the 2003 determination, despite the City's efforts to work with Mr. Fannon during that time, the Director revoked the November 3, 2003 zoning determination, and prohibited any fuel storage or delivery to 1200 Duke Street or any other changes. Mr. Fannon filed a timely appeal of the Director's August 8, 2008 determination to the Board of Zoning Appeals. *See Exhibit #1.*

## DISCUSSION

### A. The Zoning Ordinances at Issue

The Director's authority to revoke the November 3, 2003 determination letter derives from Section 11-102 of the Zoning Ordinance, which gives the Director the duty and authority to interpret and enforce the Zoning Ordinance. In addition, Section 11-205(a) grants the Director authority to revoke development approvals under certain circumstances, stating:

In addition to any other remedy . . . , development approval may be suspended or revoked as follows: In the event any person . . . materially fails to comply with any statute, code, ordinance or regulation pertaining to the use or development of any land for which an approval has been granted under the provisions of this ordinance, or *materially fails to comply with any condition* proffered or required by the approving agency as part of such approval, the director may suspend or revoke such approval in whole or in part and on such terms and conditions as he deems necessary to effect the cure of such failure to comply.

*See* Zoning Ordinance § 11-205(a) (2008) (emphasis added).

### B. Standard of Review: Deference to the Director

The Board of Zoning Appeals ("BZA") is authorized to hear appeals where it is alleged there is error from any order, requirement, decision or determination made by the Director in the administration or enforcement of the Zoning Ordinance. *See, e.g.*, Zoning Ordinance § 11-1201. The BZA's decision on an appeal must be based on its judgment of whether the Director's decision was correct. In making its decision, the BZA shall consider the purpose and intent of any applicable ordinances, laws, and regulations. The BZA may, in conformity with the provisions of the Zoning Ordinance, reverse or affirm wholly or partly or may modify the order, requirement, decision, or determination appealed from.

In deciding an appeal from a decision of the Director, the BZA should apply a deferential standard of review. Under the Zoning Ordinance, "[t]he [D]irector is charged with the responsibility for the administration" of the Ordinance. *See* Zoning Ordinance § 11-101. The Supreme Court of Virginia has ruled that regarding interpretation and application of zoning ordinances, "[t]hat decision, or judgment call, is 'best accomplished by those charged with enforcing' the [local] Zoning Ordinance, *i.e.*, the zoning administrator . . . ." *Trustees for Christ & St. Luke's Episcopal Church v. Board of Zoning Appeals for the City of Norfolk*, 273 Va. 375, 382 (2004) (quoting *Lamar, Co. v. Board of Zoning Appeals*, 270 Va. 540, 547 (2005)). *See also* *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 196 (2007) ("We . . . afford great weight to the interpretation given a zoning ordinance by the officials charged with its administration." (citation omitted.)). The BZA acts in a quasi-judicial capacity in hearing appeals from decisions of the Director. *See* City Attorney; Opinion to the Chairman and Members of the Board of Zoning Appeals, at 2-3 (April 12, 1989) (available for review). Therefore, like the courts, the BZA should not substitute its judgment for that of the Director but should determine whether the Director acted reasonably.

C. The Director Had the Authority to Revoke the November 3, 2003 Determination Letter and Acted Reasonably in Revoking the Letter

In filing his appeal on behalf of Fannon & Sons, the applicant has challenged the Director's authority to revoke the November 3, 2003 zoning determination letter that allowed Fannon & Sons to transfer certain uses from 1300 Duke Street to 1200 Duke Street. The applicant also challenges the reasonableness of the Director's revocation decision. *See* Exhibit #1. The law is clear that the Director has the authority to interpret and enforce the Zoning Ordinance under Section 11-102 of the Ordinance, and to revoke a previously granted development approval under Section 11-205(a) of the Ordinance in the event of material noncompliance with any condition of the approval. In this instance, the Director acted reasonably in exercising the authority granted by these provisions to revoke the November 3, 2003 zoning determination letter, and her decision should be upheld.

1. The Director Reasonably Revoked the 2003 Determination Letter Due To Fannon & Sons' Failure to Submit an Adequate Landscaping Plan

In the November 3, 2003 zoning determination letter, the Director stated that the Department of Planning and Zoning had received "a commitment from [Fannon & Sons] to install landscaping along Duke Street at 1200 in order to screen the parking and activities that are proposed to occur there." The Director required "a plan of the proposed landscaping" to be submitted prior to installation. This landscaping was to act as a "buffer" in order to "ameliorate any impacts from the use." *See* Exhibit #2. As the Director stated in the August 8, 2008 letter revoking the 2003 determination letter, the Director's earlier reliance on this commitment was an essential predicate for the 2003 finding that Fannon & Sons' proposed changes would not constitute an intensification of the grandfathered use and would not have an adverse impact on zoning.

Fannon & Sons failed to meet this express condition of the 2003 approval nearly five years after the approval was granted. In her August 8, 2008 revocation decision, the Director reasonably noted "the paucity of effort to comply that has been demonstrated" by Fannon & Sons "notwithstanding numerous requests . . . and ample opportunity . . ." *See* Exhibit #9. Fannon & Sons did not submit landscaping plans when it obtained architectural approval for a garage addition in June 2005, nor when it applied for a permit for three fuel tanks in December 2006. On February 26, 2007, the Acting Director wrote a letter to Fannon & Sons reiterating the requirement of the November 3, 2003 letter for a landscaping plan. This letter also noted that a screening wall that was torn down had to be reinstalled. The March 2, 2007 Stop Work Order was at least in part based on the failure of Fannon & Sons to provide a landscaping plan. *See* Exhibit #10. The lack of screening landscaping, or a plan for such landscaping, exacerbated concerns of Fannon & Sons' neighbors, who complained of the intensifying "dust, noise, odor, refuse matter, etc." at 1200 Duke Street. *See, e.g.,* Exhibit #11.

The Director continued to try to work with Fannon & Sons to no avail. Fannon & Sons submitted a simple "screening concept" plan on April 27, 2007, but the Director found it inadequate and incomplete. Correspondence from the Director to Fannon & Sons' neighbors on July 13, 2007 noted that "the current state of the site leaves a lot to be desired, and . . . it's taking too long to get it fixed," and furthermore that the Director was continuing to talk to Thomas J.

Fannon to request high quality plans and to get reasons why they were taking so long to complete. *See* Exhibit #12. Even the Mayor of Alexandria wrote to Mr. Fannon on September 28, 2007, “strongly urg[ing him] to submit and complete the plan, per City requirements, as quickly as possible.” *See* Exhibit #13. Fannon & Sons finally submitted some plans on October 26, 2007, but review by City staff “found major omissions and additional information needed to bring the plan into compliance with the Department of Planning’s requirements as well as verbal commitments made between [Fannon & Sons] and the City and in discussions with the community.” *See* Exhibit #8. The City made more than fifty substantive comments and recommendations, including requesting that landscaping appear on the site plan, which in the submission it did not.<sup>1</sup> Nevertheless, no improved and adequate plan was submitted to the Director over the next 10 months, despite continuing complaints well into 2008 about 1200 Duke Street’s increasingly unsightly appearance and other problems that could have been largely addressed with adequate screening landscaping.

This five-year history of material failure to comply with the landscaping plan condition required by the Director as part of the 2003 determination letter approval justifies the Director’s 2008 decision to revoke the approval under Zoning Ordinance Section 11-205(a). In the 2008 revocation, the Director found that “[n]o reasonable plan, indeed no minimally adequate or complete plan, has ever been presented for approval . . . .” Given the extent of the additions that would have been needed to make the October, 2007 plan adequate and the fact that none of these additions were submitted, this determination was reasonable.

2. Fannon & Sons’ Installation of a Third Fuel Storage Tank to Hold Gasoline, Rather Than Heating Oil, Exceeded the Scope of the 2003 Approval And Further Justified the Director’s Decision to Revoke

The Director’s August 8, 2008 Letter also notes that while the November 3, 2003 letter authorized the transfer of fuel storage for retail distribution to 1200 Duke Street, the installation of fuel storage tanks which actually occurred

exceeded the scope of the authorization . . . in that the installation was not limited to heating oil, as requested and discussed in the letter, but included gasoline and related dispensing facilities, for use by the retail delivery and service vehicle fleet.

*See* Exhibit #9. The Director reasonably concluded that adhering to the actual fuel-storage-related changes which had been proposed and approved in 2003 constituted a “condition,”

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<sup>1</sup> In his application for appeal, Thomas J. Fannon appears to misstate some dates. No site plan, let alone a “complete site plan,” was submitted “in the spring of 2008.” This summary therefore addresses the plan submitted in the fall of 2007. Mr. Fannon also appears to mischaracterize City staff’s recommendations as “proffers.” Proffers are a component of conditional zoning; when accepted, they become part of the zoning ordinance. *See Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 455-56 (2001). The recommendations and requirements were needed to bring Fannon & Sons’ plan into compliance with Department of Planning & Zoning and City grading plan requirements and were not proffers.



violation of which was grounds for revoking the previously granted development approval under Zoning Ordinance Section 11-205(a). In the November 3, 2003 letter, the Director had emphasized that the grandfathered use of 1200 Duke Street was specifically “as a heating fuel distribution business.” Any change in or intensification of this use would not be grandfathered and would be a zoning violation, so the approval depended on Fannon & Sons continuing only this grandfathered use. Dispensing of on-road fuel is a distinct and different core use of the property and was not a use that was grandfathered by the 1981 zoning amendments.<sup>2</sup> By exceeding the scope of the grandfathering determination, Fannon & Sons has materially failed to comply with an express condition required by the Director as part of the 2003 approval. The Director was therefore reasonable to revoke that development approval on this ground as well.

D. Fannon & Sons Has No Vested Rights From the November 3, 2003 Zoning Determination Letter And Has No Rights Based on Detrimental Reliance

1. Fannon & Sons Had No Vested Rights At 1200 Duke Street

In his appeal to the BZA, Thomas J. Fannon, on behalf of Fannon & Sons, implies that he obtained a vested right to develop the property at 1200 Duke Street through the November 3, 2003 zoning determination letter and that the Director improperly revoked that right. *See* Exhibit #1. This argument is misplaced.

The determination and protection of vested rights is governed by Virginia Code Section 15.2-2307, which provides:

Without limiting the time when rights might otherwise vest, a landowner’s rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Va. Code § 15.2-2307. This provision is inapplicable in this case for two reasons. First, Fannon & Sons never acquired a vested right under the November 3, 2003 determination letter because the development approval granted by that letter was conditioned on Fannon & Sons meeting certain terms, including submitting an adequate landscaping plan, which Fannon & Sons failed to meet. Any development rights Fannon & Sons may claim based on the November 3, 2003 determination letter cannot be considered to have vested when Fannon & Sons failed to meet the conditions on which the development approval was based.

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<sup>2</sup> In his appeal application, Exhibit #1, Thomas J. Fannon states that “most” of the information that the City requested after its March 2, 2007 Stop Work Order was “contained in the 2003 letter,” but that letter did not address any information that the tanks were to be used for an on-road diesel and gasoline fueling station. This information was not provided to the Department of Planning & Zoning until several years after the 2003 letter.

Moreover, to the extent the November 3, 2003 determination letter is considered a “significant affirmative governmental act”, the vesting provisions of Virginia Code Section 15.2-2307 still do not apply. Under subpart (i), the Director properly revoked the 2003 development approval under the authority granted her under Section 11-205(A) of the Zoning Ordinance; thus, the determination letter did not “remain[] in effect” as required for a development right to be deemed to have vested. Under subpart (ii), Fannon & Sons failed to rely in good faith on the November 3, 2003 determination letter because it failed to comply with the terms of that letter. Fannon & Sons sought to use one underground storage tank for gasoline, rather than heating fuel, which exceeded the scope of the determination letter, and it failed to submit an adequate landscaping plan as expressly required. Finally, under subpart (iii), Fannon & Sons did not engage in “diligent pursuit” of the project approved under the November 3, 2003 determination letter. As the Director noted in the August 8, 2008 revocation letter, and the record supports, Fannon & Sons displayed a “paucity of effort to comply” with the terms of the determination letter over nearly five years. Under these circumstances, no development rights vested through the application of Virginia Code Section 15.2-2307.

Furthermore, Virginia Code Section 15.2-2307 also does not apply in this case because that statutory provision is triggered only when previously approved development rights are revoked through an amendment to the Zoning Ordinance. *See Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 243-44 (2008) (finding that zoning administrator’s decision that complete demolition of house voided its non-conforming status did not amount to a “subsequent amendment to a zoning ordinance” implicating the vested rights provisions under Section 15.2-2307). No such zoning ordinance amendment is at issue here. Rather, the Director revoked the November 3, 2003 determination letter under authority granted through Section 11-205(A) of the Zoning Ordinance. For these reasons, the vested rights provisions of Virginia Code Section 15.2-2307 do not apply.

## 2. The 60-Day Rule Does Not Apply

The facts of this case also potentially implicate Virginia Code Section 15.2-2311(c), which states:

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed . . . where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud.

This sixty-day rule does not apply, however, because Fannon & Sons has *not* relied in good faith on the November 3, 2003 determination letter. The determination letter required Fannon & Sons to comply with certain conditions, including adherence to the development rights granted in the letter and submission and approval of a landscaping plan. Fannon & Sons failed to meet these conditions by seeking to use one storage tank for gasoline, rather than heating fuel, and by failing to submit a complete and adequate landscaping plan. By failing to comply with the conditions of

the November 3, 2003 determination letter, Fannon & Sons forfeited any right to rely on Virginia Code Section 15.2-2311(c).

### CONCLUSION

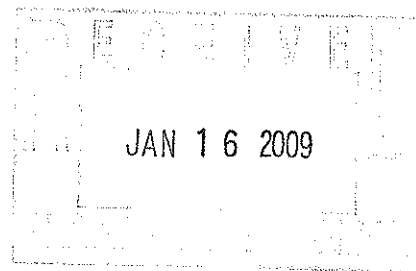
The Director of Planning & Zoning properly exercised her authority under Zoning Ordinance Section 11-205(a) to revoke the development approval granted on November 3, 2003, based on Fannon & Sons' material failure to comply with several conditions required by the Director as part of that approval. The Director reasonably found that Fannon & Sons had failed to submit a landscaping plan, which was required for the Director's 2003 finding that moving heating fuel storage and vehicle repair functions to Fannon & Sons' property at 1200 Duke Street would not constitute a change in or intensification of the grandfathered uses at the site. The Director also reasonably found that Fannon & Sons had failed to adhere to the conditions of the approval by changing the scope and the nature of the fuel that would be stored to include gasoline for on-road use. The Director's authority to revoke the 2003 determination letter is not affected by any vested rights based on the determination letter. For all of the above reasons, the appeal should be denied.

## EXHIBITS

- EXHIBIT #1: September 5, 2008 Application for Appeal by Thomas J. Fannon to Board of Zoning Appeals.
- EXHIBIT #2: November 3, 2003 Letter from Director of P&Z to Mr. Duncan Blair, Attorney for Fannon & Sons
- EXHIBIT #3: December 15, 2006 Mechanical Application MEC2006-04202 by Thomas J. Fannon to Alexandria Code Enforcement Bureau to “Install 3 Oil Tanks in Ground”
- EXHIBIT #4: December 28, 2006 Memorandum from Acting Director of P&Z re: Grandfathered use at Fannon property (1200 Duke Street) – MEC2006-04202
- EXHIBIT #5: January 9, 2007 Mechanical Permit Issued by Alexandria Code Enforcement Bureau to “Install Three Oil Tanks in Ground”
- EXHIBIT #6: February 26, 2007 Letter from Acting Director of P&Z to Thomas J. Fannon
- EXHIBIT #7: April 30, 2007 Letter from City Manager to Thomas J. Fannon
- EXHIBIT #8: Staff Recommendations
- EXHIBIT #9: August 8, 2008 Memorandum from Director of P&Z to Thomas J. Fannon Revoking November 3, 2003 Letter
- EXHIBIT #10: March 12, 2007 Email from Acting Director to Mayor and Council
- EXHIBIT #11: March 28, 2007 Letter from Old Town Village Owners Association to Councilman Krupicka
- EXHIBIT #12: July 13, 2007 Email from Director of P&Z to Fannon & Sons’ Neighbors
- EXHIBIT #13: September 27, 2007 Letter from Mayor Euille to Thomas J. Fannon

**IN THE BOARD OF ZONING APPEALS  
OF THE CITY OF ALEXANDRIA**

**BZA CASE NO. 2008-0034**



**THOMAS J. FANNON'S REPLY TO THE  
CITY'S SUMMARY OF CASE ON APPEAL**

COMES NOW Thomas J. Fannon ("Fannon") and submits this Reply to the City's Summary of Case on Appeal. Fannon submits this Reply as a party aggrieved and as a representative of Thomas J. Fannon & Sons, Inc. All references to "Fannon" herein will be, collectively, to Thomas J. Fannon and his business, Thomas J. Fannon & Sons, Inc.

**I. INTRODUCTION**

The issue in this appeal is whether the Director acted lawfully in revoking a zoning determination dated November 3, 2003 (the "Zoning Determination"). The Zoning Determination is attached to the City's "Summary of Case on Appeal" (the "Summary") at Exhibit 2. The Director's August 8, 2008 revocation of the Zoning Determination (the "Revocation") is attached to the Summary at Exhibit 9. In the Zoning Determination, the Director's predecessor determined that certain "additional features" that would be transferred from 1300 Duke Street to 1200 Duke Street would "not change or intensify the grandfathered use" on 1200 Duke Street. *See* Summary, Exhibit 2, page 5.

The Revocation is void and of no effect because it violated Virginia Code § 15.2-2311(C). This provision protects landowners who materially change their positions in good faith reliance upon zoning determinations. The Revocation was also void and of no effect because Fannon is entitled to the protection of its vested rights pursuant to Va. Code § 15.2-2307. This provision protects landowners who rely in good faith and incur extensive obligations or

substantial expenses in diligent pursuit of a specific project in reliance upon a significant affirmative governmental act, such as the Zoning Determination.

The Revocation is also without support in the City of Alexandria Zoning Ordinance (the “Zoning Ordinance”). The Director relied upon Zoning Ordinance § 11-205(A). Section 11-205 (A), however, does not provide a legal basis for the Revocation because the Zoning Determination was not a “Development Approval” as set forth in the Zoning Ordinance. Further, the Zoning Determination did not approve any sort of development. Development was instead authorized by subsequent and separate City acts, such as the City’s December 28, 2006 approval of a site plan for the installation of three oil tanks and an on-road fuel dispensing machine (attached hereto as **Exhibit 1**), and the companion January 9, 2007 mechanical permit (**Exhibit 2**; Summary, Exhibit 5).

## **II. STANDARD OF REVIEW**

As stated by the City in the Summary, Section 11-1201 of the Zoning Ordinance empowers the Board of Zoning Appeals to hear appeals where it is alleged that there is error from any order, requirement, decision or determination made by the Director in the administration or enforcement of the Zoning Ordinance. Here, the error alleged is that the Revocation was unlawful. Further, the BZA is empowered to make legal determinations because it acts in a quasi-judicial capacity.<sup>1</sup> As such, the BZA must follow the same rules as courts in reviewing interpretations of zoning ordinances. The rules pertaining to judicial review of questions of law have changed with respect to zoning determinations rendered since July 1,

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<sup>1</sup> During its December 11, 2008 meeting, when Fannon’s request for a continuance was considered, at least one member of the BZA stated that he did not believe that the BZA was empowered to make legal determinations. On the contrary, as a quasi-judicial body, the BZA has a duty to make legal determinations pertaining to the administration of the Zoning Ordinance. *See also*, Summary, Page 5 wherein the City acknowledges that the BZA “acts in a quasi-judicial capacity in hearing appeals from decisions of the Director.”

2006.<sup>2</sup> Under that new standard for judicial review, the BZA is required to review questions of law *de novo* (afresh and without a presumption of correctness to the Director). Therefore, the BZA must consider *de novo* (1) whether Va. Code § 15.2-2311(C) applies to render the Revocation illegal; (2) whether Fannon is protected against the Revocation by the vested rights protection in Va. Code § 15.2-2307; and (3) whether the Zoning Determination was a “Development Approval” subject to revocation pursuant to Zoning Ordinance 11-205(A). Under the new legal standard, the BZA may not defer to the judgment of the Director about these questions of law, but must determine them *without* a presumption of correctness to the Director’s decision.

### III. VA. CODE § 15.2-2311(C) RENDERS THE REVOCATION UNLAWFUL

#### A. The Code Provision

This case is controlled by Va. Code § 15.2-2311(C) (the “Code Provision”). The Code Provision provides that

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<sup>2</sup> On page 5 of the Summary, the City cites the case of *Adams Outdoor Advertising v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d 271 (2007) in support of its contention that “the BZA should not substitute its judgment for that of the Director but should determine whether the Director acted reasonably.” In that case, however, the Supreme Court of Virginia expressly noted that it was according deference to the decisions of the BZA with respect to the meaning of terms in the City of Virginia Beach Zoning Ordinance based on the version of Va. Code § 15.2-2314 that was in effect **before** amendments of July 1, 2006 that required the Court to hear arguments on questions of law *de novo*. See, 274 Va. 195, n. 3; 645 S.E.2d 274, n. 3. See also, *Goyonaga, et al. v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 241, n. 3, 57 S.E.2d 153, 158, n. 3 (2008). All of the other authorities cited by the City on page 5 of the Summary also predate the July 1, 2006 amendments, including the City Attorney’s opinion to the BZA dated July 12, 1989 (which cites *no* Virginia law). Therefore, these authorities do not support the City’s contention that the BZA is prohibited from substituting its judgment for that of the Director with respect to questions of law (such as the meaning of terms used in the Zoning Ordinance or the applicability of Va. Code § 15.2-2311). Since July 1, 2006, the General Assembly has required that judicial review of such determinations be *de novo*. As a quasi-judicial body that must follow the same review standard as courts, therefore, the BZA should not accord any deference to the Director with respect to legal determinations.

In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical or other nondiscretionary errors.

**B. Fannon Materially Changed his Position in Good Faith Reliance upon the Zoning Determination and other Determinations**

The evidence will show that Fannon materially changed its position in good faith reliance upon the Zoning Determination, as well upon the other determinations set forth in the City's Summary, during the near five-year period that elapsed between the November 3, 2003 Zoning Determination (Summary, Exhibit 2) and the August 8, 2008 Revocation. These material changes in position include:

- marketing of 1300 Duke Street;
- negotiation amongst the various individual owners of 1200 and 1300 Duke Street with respect to the sale of 1300 Duke Street and the transfer of business activities from 1300 Duke Street to 1200 Duke Street consistent with the Zoning Determination;
- negotiation and execution of a contract for the sale of 1300 Duke Street that would finance the tank removal at 1300 Duke Street and the reconstruction at 1200 Duke Street;
- removal of fuel tanks and environmental remediation at 1300 Duke Street;
- expenditure of professional fees for the redevelopment of 1200 Duke Street, including obtaining a Board of Architectural Review (BAR) permit to demolish an old wall and part of the existing one-story garage at 1200 Duke Street (**Exhibit 3**);



- obtaining a Certificate of Appropriateness from the BAR for alterations and additions to that garage (**Exhibit 3**);
- removal of a tank used for the storage of on-road fuel at 1200 Duke Street<sup>3</sup> (**Exhibit 4**);
- obtaining a building permit for the one-story addition and renovation of the garage at 1200 Duke Street (**Exhibit 5**);
- obtaining a sheeting and shoring permit for the excavation of tanks at 1300 Duke Street (**Exhibit 6**);
- professional fees for a site plan and mechanical permit for the installation of tanks, including sheeting and shoring of those tanks at 1200 Duke Street (**Exhibits 1, 2**), (Summary, Exhibit 5);
- reconstruction of the garage and the installation of three tanks and commencement of construction of fuel dispensing unit at 1200 Duke Street pursuant to said permits and site plan;<sup>4</sup>
- expenditure of professional fees for a site plan submitted on October 26, 2007, for 1200 Duke Street (**Exhibit 7**), including the development of a twenty-four page Environmental Management Plan as part of the that site plan application (**Exhibit 8**);
- development and submission of a landscaping plan on April 27, 2007 for 1200 Duke Street (**Exhibit 9**);
- expenditure of professional fees to respond to fifty-one (51) comments to the October 26, 2007 site plan submission (**Exhibit 10**, Summary, Exhibit 8);

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<sup>3</sup> The storage and dispensing of on-road fuel at 1200 Duke Street was part of the historical operation of that property and, therefore, within the 1981 grandfathering ordinance.

<sup>4</sup> As set forth in more detail at pp. 6-7, *infra*, Fannon also relied upon the December 28, 2006 determinations of Acting Director Josephson in installing the three fuel tanks and fuel dispensing unit.

- expenditure of professional fees for the preparation of a revised site plan responsive to said fifty-one (51) comments (**Exhibit 11**); and
- expenditure of staff time and expenditure of professional fees in pursuit of a site plan that would permit the 8,000 gallon tank and fuel dispensing unit to remain in return for removal of the two 20,000 gallon fuel tanks following a meeting with City officials about a compromise, following complaints by the Old Town Village Owners Association (**Exhibit 12**).

**C. Fannon Materially Changed its Position in Reliance Upon Other Determinations**

Fannon also materially changed its position with respect to the installation of the three tanks in reliance upon a determination dated December 28, 2006 by Rich Josephson, Acting Director of Planning and Zoning. *See* Summary, Exhibit 4. In the determination entitled “Grandfathered use at Fannon property (1200 Duke Street),” Mr. Josephson wrote that:

On December 15, 2006, the owner T.J. Fannon, applied for a mechanical permit (ME2006-04202) to install three underground tanks (two 20,000 gallon tanks and one 8,000 tank) and a fuel dispensing machine. By this memo, Planning and Zoning Staff acknowledges the additional tank and the fuel dispensing machine and concludes that the original intent of the November 3, 2003 letter is still met.

*Id.*

On the same day as this determination, Mr. Josephson or his staff approved Fannon’s site plan “for the installation of three (3) underground tanks and dispensing machine per plans consistent w/letter to D. Blair, Nov. 3, 2003” (**Exhibit 1**). By letter dated February 26, 2007, Mr. Josephson left intact his earlier zoning determination that the 8,000 gallon tank and the fuel dispensing unit were within the intent of the Zoning Determination. *See* Summary, Exhibit 6. With respect to the fuel dispensing unit, while Mr. Josephson expressed concern about its size, appearance, and whether the fuel dispenser fell under the scope of the Zoning Determination, he

did not in any way alter his previous determination that the fuel dispensing unit met the intent of the November 3, 2003 Zoning Determination. Rather, he stated only that a separate mechanical permit would be necessary. *Id.* With respect to the 8,000 gallon tank, Mr. Josephson specifically reaffirmed that the previously-issued mechanical permit allowed that installation.<sup>5</sup>

Fannon materially changed its position in reliance upon these determinations by Mr. Josephson by installing all three fuel tanks and beginning work on the fuel dispensing unit. During this time, more than sixty days passed between Mr. Josephson's December 26, 2006 and February 27, 2007 determinations (Summary, Exhibits 4, 6) and the City Manager's April 30, 2007 letter to the Old Town Village Owners Association, with a copy to Fannon, reversing Mr. Josephson's determinations.<sup>6</sup> Under Va. Code § 15.2-2311(C), therefore, Fannon was protected against the reversal of Mr. Josephson's determinations that the 8,000 fuel tank and fuel dispensing unit were allowable under the Zoning Determination.

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<sup>5</sup> *Id.* With respect to the landscaping plan, while Mr. Josephson asked Mr. Fannon to advise him when a landscape plan would be submitted, Mr. Josephson did not state when the plan needed to be submitted or what details it should contain. Indeed, Mr. Josephson left these matters to Fannon: “[p]lease provide staff with a landscape plan showing the additional landscaping you propose and include a timeframe for when this will be completed.”

<sup>6</sup> The March 2, 2007 stop work order referenced in the City Manager's April 30, 2007 letter did not reverse Mr. Josephson's determinations that the 8,000 gallon tank and fuel dispensing unit were allowable under the Zoning Determination. On March 5, 2007, City Staff met with Fannon about the Stop Work Order and “advised [Fannon] that no additional work and no dispensing of fuel (either fuel oil or gasoline) would be permitted until all issues related to storage and dispensing of fuel were adequately addressed, including submission of plans to rebuild an existing brick wall that previously screened the surface parking lot at the 1200 Duke Street site which faces South Payne Street, submission of plans *to screen any dispensing equipment* when viewed from the neighboring residences, and the provision of landscaping/screening along Duke Street and along the south property line between Old Town Village and the 1200 Duke Street Lot.” Summary, Exhibit 7, p. 2 (emphasis added). These communications to Fannon about the nature of the Stop Work Order reaffirmed that the 8,000 gallon tank and fuel dispensing unit were allowable under the Zoning Determination.

#### **D. The City's Arguments About the Code Provision are Erroneous**

The City argues that Fannon did not rely in good faith on the Zoning Determination because it failed “to comply with certain conditions, including adherence to the development rights granted in the letter and submission and approval of a landscaping plan.” Summary, p. 9. Continuing, the City argues that, as a result of these failings, Fannon “forfeited any right to rely upon Virginia Code § 15.2-2311(C).” *Id.*

The City's argument is erroneous. The Code Provision does not support the notion that a landowner's right to rely upon a zoning determination is “forfeited” after the landowner has already “materially changed his position in good faith reliance” thereon. Virginia Code § 15.2-2311(C) does not empower the current Planning Director to legislate, some five (5) years after the act of her predecessor, that only certain acts could have constituted material change of position in good faith reliance. Yet the City's arguments would confer such *ex post facto* legislative authority upon the Planning Director in violation of well-established law which holds that the Director is not empowered to legislate. *See Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 805 (1994) (“Neither the BZA nor the director . . . possesses the power to amend or repeal portions of zoning ordinances”).

Further, Virginia has long followed and still adheres to the Dillon Rule of strict construction of statutory provisions. Under this Rule, municipal corporations (and their officers) have only those powers expressly granted and those necessarily or fairly implied therefrom. *See City of Richmond v Board of Supervisors*, 199 Va. 679, 684-85, 101 S.E.2d, 641, 644-65 (1958). The Dillon Rule requires a narrow interpretation of all powers conferred on local governments and their officials. *See Board of Supervisors v. Countryside Investment Co.*, 258 Va. 497, 522 S.E.2d 610 (1999). Therefore, any doubt as to the existence of power must be resolved against

the locality. 2A Eugene McQuillen, *The Law of Municipal Corporations* § 10.19, at 369 (3<sup>rd</sup> Ed. 1996).

Section 15.2-2311(C) does not expressly grant the Director the power to legislate what acts constitute material reliance upon a determination, let alone the power to do so five (5) years after the issuance of a determination. Nor could such power be necessarily implied from the powers granted to the Planning Director in the Code Section. Implying such power would make a mockery of the protection granted by the Code Section. It would put every landowner who changes its position in good faith reliance upon a zoning determination at risk that the Planning Director might some years later legislate that only a certain act (*e.g.*, the submission of a landscaping plan) can constitute acts of material change in position in good faith reliance. In every case, therefore, the landowner would be at risk of having all protection offered by the Code Section eviscerated, depending upon the post-facto whim of the Planning Director (or her successor). Under the Dillon Rule of strict construction, therefore, the Planning Director was without authority to legislate, in the Revocation, that only certain acts by Fannon (*i.e.*, submission of a landscaping plan) could constitute material change in position in good faith reliance upon the Zoning Determination.

The City's argument with respect to the landscaping plan is particularly specious because the Zoning Determination shows itself *not* to have been conditioned upon the submission of a landscaping plan, let alone the submission of a landscaping plan by a certain date. Summary, Exhibit 2, p. 5. Nor did the Zoning Determination state the specifics of what the landscaping plan should contain. Therefore, the submission of a landscaping plan of a certain type by a certain date was never a condition of the Zoning Determination even if the Planning Director

was empowered to determine--some five years after the act of her predecessor--what conduct should constitute Fannon's material change in position in good faith reliance.

The City also argues that Fannon forfeited its right to rely on the Zoning Determination because Fannon's conduct exceeded "the development rights granted." Summary at p. 9. This argument, however, is illogical, in addition to being legally unfounded. It does not follow that a landowner forfeits his rights to rely upon a zoning determination by engaging in conduct that "exceeded the scope of the authorization granted." (Summary, Exhibit 9, p. 1). If a landowner engages in conduct beyond that authorized by the zoning determination, the City's remedy is to issue a zoning violation, not to revoke the very determination of rights upon which it relies to support its position that the landowner engaged in uses beyond those authorized by the determination.

In this case, the ordinance at issue was the City's 1981 zoning ordinance that grandfathered Fannon to continue its lawfully existing uses, including petroleum refining and storage. *See* Summary, Exhibit 2, p. 3. The Zoning Determination found that certain additional activities proposed for 1200 Duke Street "do not change or intensify the grandfathered use" and were, therefore, within the uses allowed by the 1981 grandfathering ordinance. *See* Summary, Exhibit 2, p. 5. *See also* Summary at p. 3. The Director justified the Revocation, in part, on her finding that the activities at 1200 Duke Street exceeded the activities determined to be within the 1981 grandfathering ordinance because the installation of fuel tanks "was not limited to heating oil, as requested and discussed in the [Zoning Determination] but included gasoline and related dispensing facilities, for use by retail delivery and service vehicle fleet." Summary, Exhibit 9, p. 1. To the extent the Director is correct that the installation of a gasoline fuel tank and dispensing machine is outside the 1981 grandfathering ordinance, as set forth in the Zoning Determination

(which Fannon disputes), the Director's remedy is to bring an action for violation of the 1981 grandfathering ordinance. *See* Zoning Ordinance §§ 11-204, 206 or 207. The City cannot logically or legally revoke the very Zoning Determination upon which it would rely to support a violation. A party is not allowed to occupy inconsistent positions in the same case.

**IV. FANNON HAS A VESTED RIGHT TO CONTINUE PETROLEUM STORAGE AND DISTRIBUTION, AS WELL AS AIR CONDITIONING, HEATING RETAIL SALES AND REPAIRS AND ACCESSORY USES (INCLUDING SERVICE VEHICLE FUELING)**

**A. Fannon is Entitled to Vested Rights Protection Against the Revocation by Virtue of Va. Code § 15.2-2307**

In addition to the protection granted to it by virtue of the 60-day rule set forth in Va. Code § 15.2-2311(C), Fannon enjoys protection of its vested rights in reliance upon the Zoning Determination and Mr. Josephson's determinations by virtue of Va. Code § 15.2-2307. This provision provides, in pertinent part, that:

[n]othing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act<sup>7</sup> which remains in effect allowing development of a specific project, (ii) relies in good faith on a significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance upon the significant affirmative governmental act.

As noted above with respect to Fannon's right to protection under Va. Code § 15.2-2307, Fannon was the beneficiary of the Zoning Determination and the other determinations by Mr. Josephson, including Mr. Josephson's December 28, 2006 approval on the site plan explicitly

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<sup>7</sup> The statute also gives examples of "significant affirmative governmental acts." It is important for the BZA to understand that these examples are not exhaustive. The statute expressly states that the examples are "without limitation." Therefore, the Zoning Determination qualifies as a significant affirmative governmental act as apparently conceded by the City in its Summary. Further, Mr. Josephson's determinations qualified as significant affirmative governmental acts because they involved zoning sign-off on the site plan/plan of development for the three tanks (including the 8,000 gallon tank) and the fuel dispensing unit. *See Exhibit 1.*

acknowledging “three underground tanks and dispensing machine per plans consistent with letter to D. Blair Nov. 3, 2003.” *See Exhibit 1, p. 1.* Fannon relied in good faith on these determinations and incurred extensive obligations and substantial expenses by, among other things, changing its position to sell 1300 Duke Street, obtaining site plan approval, BAR and Mechanical permits, securing the approval of plans and installing the three underground tanks and beginning work on the fuel dispensing unit all before being arrested by the stop work order. *See pp. 4-6, supra.* After Fannon so relied upon the determinations in good faith, the Planning Director amended the zoning of 1200 Duke Street by revoking the Zoning Determination and, by extension, also revoking Mr. Josephson’s determinations. This sort of governmental about-face after good faith reliance by a landowner is precisely the type of action the statute was enacted to prevent. Therefore, Fannon is entitled to the vested rights protection of Va. Code § 15.2-2307 against the Revocation.

**B. The City’s Arguments Against Vested Rights Under Va. Code Ann. § 15.2-2307 Are Without Merit.**

The City argues that Fannon does not have a vested right to continue the very air conditioning and heating retail and repair and fuel storage and distribution businesses that the Zoning Determination found to be within the 1981 grandfathering ordinance. The City argues that Fannon is not entitled to the protection of vested rights with respect to these uses under Va. Code Ann. § 15.2-2307 because: (1) the Zoning Determination “was conditioned on Fannon & Sons meeting certain terms, including submitting an adequate landscaping plan,” (2) the Zoning Determination “did not remain in effect” because it was properly revoked under Zoning Ordinance § 11-205(A); (3) Fannon exceeded the scope of the Zoning Determination because it sought to install an underground storage tank for gasoline, rather than heating oil; (4) Fannon “did not engage ‘in diligent pursuit’” of a plan of development; and (5) the Revocation was not



part of an amendment to the Zoning Ordinance. *See* Summary at pp. 8-9. The City’s arguments are legally and factually erroneous.

**C. The Zoning Determination was not Conditioned Upon Certain Terms**

The City is wrong when it argues that the Zoning Determination was conditioned upon Fannon meeting “certain terms,” including submitting an “adequate” landscaping plan prior to the date of Revocation. The Zoning Determination speaks for itself in showing that it was not so conditioned. *See* Summary, Exhibit 2. The Zoning Determination states only that:

[f]inally, we have received a commitment from T.J. Fannon and Sons to install landscaping along Duke Street at 1200 in order to screen the parking and activities that are proposed to occur there. A plan of the proposed landscaping will be submitted for my approval prior to installation. That buffering will *further* ameliorate any impacts from the use.

Summary, Exhibit 2, p. 5 (emphasis added).

Prior to the Director’s mention of the landscaping plan, the Director had already determined that Fannon’s proposed uses were consistent with the 1981 grandfathering ordinance. Specifically, she had already found that:

i. the business at 1200 Duke Street will continue to operate as a heating and fuel distributor to consumers offering air conditioning and heating retail sales and repairs.

and

ii. the reintroduction of on-site fuel storage and vehicle repair will not intensify the operation that is grandfathered for the site.

*Id.*, pp. 4-5. These findings were in no way contingent upon the submission of a landscaping plan. They were, rather, based on Fannon’s representations about the uses he planned on site, including hours of operation, number of employees and trucks, number of fuel deliveries, number of delivery vehicles and the number of parking spaces. *Id.* The Director’s reference to

the landscaping plan was only that it would “*further* ameliorate any impacts from the use.” *Id.* (emphasis added).

Even if submission of a landscaping plan could fairly be said to be a condition for the Director’s findings, the Zoning Determination did not specify when the plan had to be submitted or what details it should contain. As set forth above, the Zoning Determination stated only that the landscaping plan should be submitted for the Director’s approval “prior to installation” of the landscaping. *Id.* Therefore, the Zoning Determination was not conditioned on a landscaping plan of a certain type by a certain date, and Fannon is entitled to vested rights protection under Va. Code Ann. § 15.2-2307.

**D. The City’s Argument that the Zoning Determination did not “Remain in Effect” Pursuant to Va. Code § 15.2-2307(i) is Factually Incorrect, Circular and Conclusory of the Ultimate Issue.**

Next, the City argues that Fannon is not entitled to vesting under Va. Code § 15.2-2307(i) because the Zoning Determination was not in effect at the time it was revoked. This argument is factually incorrect. As of an instant before the Revocation, the Zoning Determination was in effect. It had *not* been revoked. Therefore, the Zoning Determination was a significant affirmative governmental act that “remained in effect” as of the August 8, 2008 Revocation, entitling Fannon to vested rights protection against the Revocation. *See* Va. Code § 15.2-2307(i).

The City also argues that the Zoning Determination did not “remain in effect” because it was legally terminated by the Revocation. This argument is circular and conclusory of the ultimate issue in this case. The fundamental issue in this appeal is whether the Revocation was lawful. *See* Summary, p. 1. The City, then, cannot premise its argument against vested rights upon the legal conclusion that the Revocation was lawful. As set forth herein, Fannon contends

that the Revocation was unlawful for many reasons, including that it violated Fannon's vested rights under Va. Code § 15.2-2307 and that Zoning Ordinance § 11-205(A) did not justify the Revocation.

**E. Fannon's Development of 1200 Duke Street was Consistent with the Zoning Determination and the Other Determinations by Mr. Josephson**

The City next argues that Fannon is not entitled to vested rights under Va. Code § 15.2-2307(ii) in that it:

failed to rely in good faith on the November 3, 2003 determination letter because it failed to comply with the terms of that letter. Fannon & Sons sought to use one underground storage tank for gasoline, rather than heating fuel, which exceeded the scope of the determination letter, and it failed to submit an adequate landscaping plan as expressly required.

Summary at p. 9. The City's assertion is factually incorrect. As set forth a p. 6, *supra.*, installation of an 8,000 gallon tank and fuel dispensing machine were found by the Acting Planning Director to be within the scope of the Zoning Determination. Therefore, Mr. Josephson's December 28, 2006 determination and sign off on the site plan for installation of the three tanks and the fuel dispensing unit (**Exhibit 1**) constituted significant affirmative governmental acts upon which Fannon was justified in relying, even without taking into consideration Fannon's separate justifiable reliance upon the Zoning Determination.

While not necessary to support his claim for vested rights protection, Fannon was also justified in relying upon the Zoning Determination in installing the 8,000 gallon tank and fuel dispensing unit. In the Zoning Determination, the Director did *not* limit her determination of lawful uses to heating fuel oil uses. *See* Summary, Exhibit 2, p. 4. On the contrary, she expressly found that the reintroduction of "on-site fuel storage" (*without limitation as to type*) was allowable. *Id.* Further, the Director expressly recognized that 1200 Duke Street "has always included a fleet of vehicles that at times requires mechanical attention." *Id.* Fueling vehicles

used in the business is part of servicing them. It is also accessory to the grandfathered service businesses on site to be able to fuel vehicles used in those businesses. The historical use of the property supported on-road fueling as part of vehicle services, as confirmed by the presence of an on-road fuel tank at 1200 Duke Street (**Exhibit 4**). Therefore, the City is incorrect when it asserts that installation of the 8,000 gallon fueling tank exceeded the scope of the Zoning Determination, or the other determinations by Acting Director Josephson.

**F. Fannon Diligently Pursued Approval of a Plan Based on the Zoning Determination and the Other Determinations by Mr. Josephson**

The City argues that Fannon is not entitled to vested rights because it “did not engage in ‘diligent pursuit’ of the project under the circumstances as required by Va. Code § 15.2-2307 (iii).” This is not true. As set forth above, pp. 4-7, *supra.*, Fannon secured approval of a site plan (**Exhibit 1**) and a mechanical permit (**Exhibit 2**) based not only on the Zoning Determination, but also the determinations by Acting Director Josephson, specifically permitting the project. Prior even to these approvals, Fannon incurred extensive obligations and expenses in diligent pursuit of the project and in reliance on the Zoning Determination. *See* pp. 4-6, *supra.* Fannon undertook approval of his October 27, 2007 site plan (**Exhibit 7**) and the landscaping plan (**Exhibit 9**) even under circumstances where the City had issued the March 2, 2007 Stop Work Order that prevented him from finishing work on site that previously had been authorized by the December 28, 2006 site plan and mechanical permit. Fannon’s expenses included incurring professional fees to respond to fifty-one (51) comments to the site plan submission. (**Exhibit 10**) Therefore, Fannon complied with the diligent pursuit requirements of Va. Code § 15.2-2307(iii) “under the circumstances” and is entitled to vesting protection against the Revocation.

**G. Fannon was Entitled to Vesting Protection Against the Revocation because the Revocation Would Constitute Amendment to the Zoning Ordinance Applicable to 1200 Duke Street**

Last, the City argues that Fannon is not entitled to vested rights protection on the grounds that the Revocation was not a “subsequent amendment to a zoning ordinance” as that term is used by Va. Code § 15.2-2307. Summary at 9. This argument is specious because the Zoning Determination and Mr. Josephson’s determinations were part of the Zoning Ordinance applicable to 1200 Duke Street. Therefore, if effective, the Revocation of the Zoning Determination would amend the Zoning Ordinance applicable to 1200 Duke Street.<sup>8</sup>

The City cites the recent case of *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008) in support of its position that the Revocation was not an amendment to the zoning of 1200 Duke Street. *Goyonaga*, however, is inapposite and the City mischaracterizes its holding. In *Goyonaga*, the Supreme Court made no finding about whether a zoning administrator’s sign-off on a building permit allowing demolition of a structure was a “subsequent amendment to a zoning ordinance,” as asserted by the City in its Summary. The Supreme Court’s holding, rather, was that the zoning administrator’s sign-off was not a lawful government act upon which the landowner was entitled to rely for its vested rights under the statute.

In *Goyonaga*, the landowner argued that its reliance upon the Falls Church zoning administrator’s sign-off on a building permit allowing destruction of a residence in violation of the zoning ordinance entitled the landowner to vested rights under the statute. The Supreme Court rejected this argument holding that the zoning administrator did not have authority to permit the landowner to violate the zoning ordinance. 275 Va. at 243-44, 657 S.E.2d at 159-60.

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<sup>8</sup> The City would have no need to revoke the Zoning Determination if it were not part of the Zoning Ordinance applicable to 1200 Duke Street.

Therefore, the zoning administrator's sign-off on a building permit allowing such violation was not a lawful governmental act upon which the landowner was entitled to rely for vested rights protection under the statute. *See id.* In contrast to the facts at issue in *Goyonaga*, there is no dispute in the instant case that the Zoning Determination or the determinations by Mr. Josephson were anything other than lawful acts. Therefore, Fannon was entitled to rely on those acts for vested rights protection under Va. Code Ann. § 15.2-2307.

**V. ZONING ORDINANCE SECTION 11-205(A) DID NOT JUSTIFY THE REVOCATION**

The City attempts to build its case for upholding the Revocation upon Zoning Ordinance Section 11-205(A). *See* Summary at p. 5. Section 11-205(A), however, does not provide legal support for the Revocation because the Zoning Determination was not a “development approval” as that term is used in the Zoning Ordinance. Further, even if the Zoning Determination were a development approval, Fannon did not fail to comply with any condition upon which it was issued. Therefore the Revocation was not justified by Section 11-205(A).

**A. The Zoning Approval was not a Development Approval**

Section 11-205 provides as follows:

**11-205 Suspension or revocation of development approval.** In addition to any other remedy provided in this section 11-200, development approval may be suspended or revoked as follows:

(A). In the event any person . . . materially fails to comply with any statute, code, ordinance or regulation pertaining to the use or development of any land for which an approval has been granted under the provisions of this ordinance, or materially fails to comply with any condition proffered or required by the approving agency as part of such approval, the director may suspend or revoke such approval in whole or in part and on such terms and conditions as he deems necessary to effect the cure of such failure to comply.

Section 11-205 is part of Article XI, Division A of the Zoning Ordinance entitled “Administration and Enforcement of Ordinance and Notice of Public Hearings.” As such,

Section 11-205 governs how and under what circumstances development approvals, as contemplated elsewhere in the Zoning Ordinance, can be suspended or revoked. “Development Approvals” are set forth elsewhere in the ordinance in the very next division of Article XI. In particular, they are specified in “Division B, Development Approvals.”

In Sections 11-400 through 11-420, the Zoning Ordinance addresses “Site Plan” development approvals. In Sections 11-500 through 11-512, the Zoning Ordinance addresses “Special Use Permit” development approvals. In Sections 11-600 through 11-609, the Zoning Ordinance addresses development approvals in the form of “Special Use Permits for Cluster Residential Development.” In Sections 11-700 through 11-710 the Zoning Ordinance addresses “Transportation Management Special Use Permit” development approvals. In Sections 11-800 through 11-809 the Zoning Ordinance addresses development approvals in the form of “Zoning Amendments.” Finally, in Sections 11-900 through 11-905 of Article XI, Division B, the Zoning Ordinance addresses development approvals in the form of “Master Plan Amendments.” The Zoning Determination is neither a “Site Plan” nor a “Special Use Permit” nor a “Special Use Permit for Cluster Development” nor a “Transportation Management Use Permit” nor a Zoning Amendment nor a “Master Plan Amendment.” Therefore, the “Zoning Determination” is not a “Development Approval” as that term is used in the Zoning Ordinance, and Section 11-205(A) does not justify the City’s revocation of the Zoning Determination.

**B. Under the Plain Language Rule, the Zoning Determination was not a Development Approval**

The term “Development Approval” is not defined by the Zoning Ordinance. *See* Zoning Ordinance § 2-100 *et seq.* The Supreme Court of Virginia has long held, however, that “when construing a zoning ordinance and its undefined terms, we give such terms their plain and natural meaning.” *Adams Outdoor Advertising*, 274 Va. at 196, 645 S.E.2d at 275 (citing *Capelle v.*

*Orange County*, 269 Va. at 60, 65, 607 S.E.2d 103, 105 (2005). See also *Donovan v. Board of Zoning Appeals*, 251 Va. 271, 274, 467 S.E.2d 808, 810 (1996); *McClung v. County of Henrico*, 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959). In its Summary, the City does not offer any other instances where it has regarded a zoning determination to be a Development Approval. It is well established, however, that even such a consistent administrative interpretation must be reversed where it is at odds with the plain language used in the ordinance as a whole. *Cook v. BZA of Falls Church*, 244 Va. 107, 110-111, 418 S.E.2d 879, 881 (1992).

The plain and natural meaning of the term “development,” means “a developed tract of land.” *Merriam Webster Online Dictionary*, <http://www.merriam-webster.com>. The term “approval” means “an act or instance of approving.” *Id.* The word “approving,” in turn, means “to give formal or official sanction to.” *Id.* Therefore, the plain meaning of the term “development approval” is an act or instance of approving a particular development for the tract of land at 1200 Duke Street. The Zoning Determination determined whether certain “proposed changes are within the grandfathered rights at 1200 Duke Street.” Summary at Exhibit 2, p. 3. It did not approve a particular development for 1200 Duke Street. Indeed, it could not have approved a particular development at 1200 Duke Street because the Zoning Ordinance requires a site plan to be approved before any permit is issued “to erect or alter any building or structure or alter the grade of any land” Zoning Ordinance Section 11-403. Based on its arguments in the Summary, the City must concede that the Zoning Determination was not a site plan.

**C. Even if the Zoning Determination were a Development Approval, Fannon Complied with Any Conditions**

Assuming, for the purposes of argument, that the Zoning Determination was a “Development Approval,” Fannon has complied with any conditions. The findings set forth in the Zoning Determination about consistency with the 1981 grandfathering ordinance were not



conditioned upon the commitment by Fannon to submit a landscaping plan. To the extent they were, Fannon complied with the commitment to submit a landscaping plan for approval prior to installation of the plantings. *See p. 5, supra.* Further, Fannon's installation of an 8,000 gallon fuel tank and dispensing unit were specifically found by Acting Director Josephson to be consistent with the Zoning Determination (and the 1981 grandfathering ordinance). Therefore, Fannon did not exceed the uses permitted by the Zoning Determination by installing the 8,000 gallon on-road fuel tank and dispensing unit.

### CONCLUSION

The Revocation was unlawful and of no effect. It was unlawful and of no effect because Fannon was entitled to protection against reversal of the Zoning Determination and Acting Director Josephson's determinations by virtue of Va. Code § 15.2-2311(C). It was also unlawful and of no effect because Fannon was entitled to vested rights pursuant to Va. Code § 15.2-2307. Finally, the Revocation was not lawful under Zoning Ordinance § 11-205(A) because the Zoning Determination was not a "Development Approval" and because Fannon complied with any conditions.

Respectfully submitted,  
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By:

  
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Gifford R. Hampshire

**BOARD OF ZONING APPEALS  
FOR THE CITY OF ALEXANDRIA**

**BZA CASE # 2008-0034**

**CITY OF ALEXANDRIA'S RESPONSE TO THOMAS J. FANNON'S REPLY  
TO THE CITY'S SUMMARY OF CASE ON APPEAL**

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The City of Alexandria ("City") submits this response to Thomas J. Fannon's Reply to the City's Summary of Case on Appeal ("Reply"). Mr. Fannon challenges an August 8, 2008 decision by the City's Director of the Department of Planning and Zoning ("Director") revoking a November 3, 2003 Zoning Determination ("Zoning Determination") approving Thomas J. Fannon & Sons, Inc.'s ("Fannon & Sons") request to transfer heating fuel storage and vehicle repair uses from 1300 Duke Street to its property at 1200 Duke Street. In its Summary of Case on Appeal ("Case Summary"), submitted before the Board's December 11, 2008 scheduled hearing in this matter, the City described why the Director's decision should be upheld. None of the arguments Mr. Fannon raises in his Reply is convincing. The appeal should be denied.

The City hereby addresses Mr. Fannon's three main arguments:

1. Mr. Fannon argues that the Director did not have authority to revoke the Zoning Determination under Section 11-205(A) of the City's Zoning Ordinance because the Zoning Determination was not a "development approval" to which that Section applies. "Development approval" is not defined in the Zoning Ordinance. Under the plain and natural meaning of that term, however, the Zoning Determination qualifies as a development approval because it granted Fannon & Sons approval to proceed with proposed development at 1200 Duke Street. The Director also correctly relied on Section 11-205(A) because she reasonably determined that

Fannon & Sons materially failed to comply with a condition of the Zoning Determination by failing to submit an adequate landscaping plan nearly five years after the Zoning Determination was issued.

2. Mr. Fannon also argues that the Director's August 8, 2008 revocation decision ("Revocation") should be overturned under Virginia Code Section 15.2-2311(C), which prohibits the Director from reversing a prior zoning decision after 60 days where the person aggrieved has materially changed his position in good faith reliance on the prior decision. This argument fails because the Zoning Determination was conditioned on Fannon & Sons submitting an adequate landscaping plan as part of a finding that the new uses at 1200 Duke Street would not intensify zoning impacts. The Director reasonably determined that Fannon & Sons had materially failed to comply with the condition to submit an adequate and complete landscaping plan under the Zoning Determination, and accordingly, that Fannon & Sons had failed to act in good faith reliance on the Zoning Determination. Fannon & Sons did not submit an initial landscaping proposal until April 2007; that proposal was woefully inadequate. A plan Fannon & Sons submitted in October 2007 suffered from numerous deficiencies that the City promptly requested be addressed. In the approximately eight months after receiving the City's comments and before the August 8, 2008 Revocation, Fannon & Sons failed to submit a revised plan. Complaints about the appearance of 1200 Duke Street persisted throughout this time. Fannon & Sons' lack of diligence in complying with a condition of the Zoning Determination demonstrates a lack of good faith, rendering Virginia Code Section 15.2-2311(C) inapplicable.

3. Similarly, Mr. Fannon argues that the Revocation should be overturned under Virginia Code Section 15.2-2307, which grants a landowner a vested right when he is the beneficiary of a significant affirmative government act on which he relies in good faith and for

which he incurs extensive obligations or substantial expenses in diligent pursuit thereof. Mr. Fannon argues that Fannon & Sons obtained a vested right to develop the 1200 Duke Street site for the uses approved under the Zoning Determination because the company took various steps in reliance thereon, such as installing underground storage tanks. However, similar to the argument under Virginia Code Section 15.2-2311(C), Fannon & Sons' failure to diligently pursue and submit a complete and adequate landscaping plan demonstrates a lack of good faith, thereby rendering the vested rights provision under Virginia Code Section 15.2-2307 inapplicable. Moreover, Section 15.2-2307 only applies when a previous right is affected by a subsequent amendment to a zoning ordinance. Because the Revocation did not amend the City's Zoning Ordinance, Mr. Fannon's reliance on Section 15.2-2307 is misplaced.

For all of these reasons, as more fully discussed below, Mr. Fannon's arguments should be rejected and his appeal should be denied.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

There are no Virginia Code or Zoning Ordinance provisions that describe the precise standard of review the BZA should follow in hearing an appeal from a decision of the Director. Mr. Fannon claims that the BZA must follow the same standard of review that a circuit court would use in reviewing an appeal from a decision of the BZA, but he cites no case law to support that claim. *See Reply at 2.*

The primary issue before the Board is its evaluation of the Director's decision to revoke the Zoning Determination under Section 11-205(A). That Section allows the Director to revoke a development approval if the beneficiary of the approval materially fails to comply with a condition of the approval. The Director must interpret this provision against a given set of facts

and make a judgment call about whether Fannon materially failed to comply with a condition of the Zoning Determination. The City maintains, as it did in its Case Summary, that the Director's interpretation is entitled to deference and should be upheld if it was reasonable. *See, e.g., Trs. of the Christ & St. Luke's Episcopal Church v. Bd. of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 381-82 (2007) (*quoting Lamar Co. v. Bd. of Zoning Appeals*, 270 Va. 540, 547 (2005)) (finding that, with regard to interpretation and application of zoning ordinances, "[t]hat decision, or 'judgment call,' is 'best accomplished by those charged with enforcing' the [local] Zoning Ordinance, *i.e.*, the zoning administrator . . . ."); *see also* Zoning Ordinance § 11-102(F) (setting forth Director's duty and authority to interpret provisions of the ordinance to ensure its intent is carried out). Indeed, the Director was best situated to make the revocation decision at issue in this case because she was involved with the issues on a day-to-day basis through most of its history. In addition, the Director must have the authority to make similar determinations, based on given circumstances, to preserve the orderly administration of the Zoning Ordinance and use of property in Alexandria.

Mr. Fannon claims this deferential standard should not apply because the cases cited by the City were decided before a change in the circuit court review standard took effect. However, Mr. Fannon cites no case law that overturns the statements made by the Virginia Supreme Court in the cases cited above. Therefore, that standard should apply here.

The City agrees that pure legal questions that the Director did not have the opportunity to address in the first instance should be reviewed under a *de novo* standard. But questions in which the Director applied the law to a set of facts should be granted deference under the authority cited above. For instance, Mr. Fannon's claim that the Zoning Determination was not a "development approval" under Section 11-205(A) and that submission of a landscaping plan was

not a condition of the Zoning Determination for the purposes of Section 11-205(A) are purely legal and should be heard *de novo*. By contrast, the Director's determination that Fannon & Sons did not act in good faith reliance on the Zoning Determination by failing to submit a complete and adequate landscaping plan should be granted deference because it is the equivalent of the Director's finding that Fannon & Sons materially failed to comply with the landscaping plan condition. These standards should guide the Board in hearing this appeal.

The Revocation also should be upheld in all respects if the BZA concludes that it should apply the *de novo* standard of review to all issues. The Director was correct in her determination that Fannon & Sons materially failed to comply with the landscape plan condition of the Zoning Determination, and it is correct as a matter of law that neither the 60-day rule of Virginia Code Section 15.2-2311(C) nor the vested rights provision of Virginia Code Section 15.2-2307 prohibits the Director's decision.

## **II. THE DIRECTOR PROPERLY RELIED ON SECTION 11-205(A) OF THE CITY'S ZONING ORDINANCE TO REVOKE THE ZONING DETERMINATION**

Mr. Fannon raises three primary arguments challenging the Director's revocation decision. The City recommends considering his third argument first because it is a threshold issue that must be decided before his other arguments are even relevant: Does the Zoning Determination qualify as a "development approval" under Section 11-205(A) of the Zoning Ordinance and was submission of a landscaping plan a condition of the Zoning Determination under Section 11-205(A)? The BZA must determine whether Section 11-205(A) applies before it can determine Mr. Fannon's arguments with respect to material reliance and vested rights.

### **A. The Zoning Determination Was A Development Approval**

In revoking the Zoning Determination, the Director expressly relied on the authority granted her under Section 11-205(A) of the City's Zoning Ordinance. That section provides:

**“11-205 Suspension or revocation of development approval.** In addition to any other remedy provided in this section 11-200, development approval may be suspended or revoked as follows:

(A) In the event any person, whether owner, lessee, principal, agent, employee, or otherwise, materially fails to comply with any statute, code, ordinance or regulation pertaining to the use or development of any land for which an approval has been granted under the provisions of this ordinance, or materially fails to comply with any condition proffered or required by the approving agency as part of such approval, the director may suspend or revoke such approval in whole or in part and on such terms and conditions as he deems necessary to effect the cure of such failure to comply.

Zoning Ordinance, § 11-205(A).

Mr. Fannon argues that the Zoning Determination should not be considered a “development approval” because it is not encompassed within Division B of Article XI of the Zoning Ordinance, which is entitled “Development Approvals.” *See* Reply at 18-19. This argument fails for several reasons. First, no provision in Division B or in any other section of the Zoning Ordinance limits the term “development approval” to the items set forth in Division B. Second, Zoning Ordinance Section 1-400(A)(13), regarding interpretation of the Zoning Ordinance, expressly states that the headings and titles of sections in the Zoning Ordinance, such as the heading of Division B, “are intended as mere catchwords to indicate the contents of the section and shall not be deemed or taken to be titles of such sections, nor as any part of the section . . . .” Thus, no weight should be attached to the use of “Development Approvals” as the title of Division B. Third, the text of Section 11-205(A), under which the Director revoked the Zoning Determination, does not limit the scope of the term “development approval” to those items set forth in Division B of Article XI of the Zoning Ordinance. If the City Council, in adopting the Zoning Ordinance, had intended Section 11-205(A) to apply only to “development approvals” identified under Division B, it could have included a statement to that effect in

Section 11-205(A), but it did not. For all these reasons, Mr. Fannon's argument that the title heading of Division B controls the interpretation of "development approval" is wrong.

Because the term "development approval" is not defined in the Zoning Ordinance, it must be given its plain and natural meaning. *See, e.g., Adams Outdoor Adver. v. Bd. of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 196 (2007). Although Mr. Fannon recognizes that the term must be given its plain and natural meaning, he instead offers an illogical interpretation. *See Reply at 20.* He first selects a definition of "development" from the Merriam Webster Online Dictionary: "a developed tract of land." *See id.* Next, he selects a definition of "approval" from the same dictionary: "an act or instance of approving." *See id.* "Approving" is defined as "to give formal or official sanction to," so the definition of "approval" becomes "an act or instance of giving formal or official sanction to." *See Merriam Webster Online Dictionary, www.merriam-webster.com.* Putting these terms together, leads to a definition of "development approval" meaning "an act or instance of giving formal or official sanction to a developed tract of land." Clearly, this is illogical as applied to the Director of Planning and Zoning's duties under the Zoning Ordinance. The Director must approve a development proposal *before* it is actually implemented, rather than approving a "developed tract of land" after the fact.

Moreover, Mr. Fannon fails to mention in his Reply that the first and primary definition of "development" listed in the Merriam Webster Online Dictionary is "the act, process, or result of developing." Merriam Webster Online Dictionary, [www.merriam-webster.com](http://www.merriam-webster.com). In addition, the definition of "develop" that best fits the purpose of the Zoning Ordinance is "to make suitable for commercial or residential purposes." *Id.* "Development" thus becomes "the act, process, or result of making suitable for commercial or residential purposes." This is the



definition that provides the plain and natural meaning of the term “development” in the context of Section 11-205(A). Pairing this definition with the definition of “approval,” from above, the plain and natural meaning of “development approval” becomes “an act or instance of approving the act, process or result of making suitable for commercial or residential purposes.”

Under this definition, the Zoning Determination is clearly a “development approval” because it provided Mr. Fannon with the formal approval to commence the “act” and “process” of developing the property at 1200 Duke Street in accord with the proposed changes contained in the Zoning Determination itself. The Zoning Determination expressly outlines Mr. Fannon’s plans for developing 1200 Duke Street, stating that “[t]wo underground storage tanks for petroleum are proposed to be installed,” and that the “vehicle repair function will be relocated from the 1300 Duke Street property” to 1200 Duke Street, requiring an existing building at 1200 Duke Street “to be retrofitted.” Zoning Determination at 1-2 (Case Summary, Exhibit 2). As Mr. Fannon himself notes, the Zoning Determination letter determined “whether the proposed changes at the site are within the grandfathered rights at 1200 Duke Street.” Reply at 20, *citing* Zoning Determination at 3. In deciding this question in the affirmative, the City approved Fannon & Sons’ plans to develop 1200 Duke Street under the conditions stated in the Zoning Determination. In other words, but for the approval granted in the Zoning Determination, Fannon & Sons could not have proceeded with its development plans.

In sum, under the plain meaning rule the Zoning Determination letter qualifies as a “development approval” for the purposes of the Director exercising her authority to revoke that development approval under Section 11-205(A) of the Zoning Ordinance. Mr. Fannon’s argument to the contrary should be rejected.

**B. The Requirement That Fannon & Sons Submit An Adequate Landscaping Plan For 1200 Duke Street Was An Express Condition Of The Zoning Determination**

Section 11-205(A) gives the Director authority to revoke a previously granted development approval if the person who received the approval “materially fails to comply with any condition proffered or required by the approving agency as part of such approval . . . .” City’s Zoning Ordinance § 11-205(A). The Director relied on this provision to revoke the Zoning Determination on grounds that Fannon & Sons materially failed to comply with the condition of that development approval requiring Fannon & Sons to submit an adequate landscaping plan for 1200 Duke Street. Mr. Fannon argues that the Director acted improperly because submission of an adequate landscaping plan was not a condition of the Zoning Determination letter. Mr. Fannon is incorrect.

The Zoning Determination consists of five pages of factual and legal analysis to determine whether Fannon & Sons’ proposal to install two underground storage tanks for petroleum and to modify a building to allow for vehicle repair services was within the grandfathered rights at 1200 Duke Street. *See* Zoning Determination (Case Summary, Exhibit 2). The Planning and Zoning staff evaluated two primary questions: (1) “Will the business continue to operate as a heating and fuel distributor to consumers offering air conditioning and heating retail sales and repairs?”; and (2) “Does reintroducing on-site fuel storage and vehicle repair intensify the operation that is grandfathered at the site?” *Id.* at 4. In evaluating this second question, the Planning and Zoning staff considered “whether there are any changes proposed which create additional zoning impacts; such impacts – often characterized as intensification – would amount to an expansion of the use in a zoning sense, and go beyond the use limitations that have been grandfathered.” *Id.* The staff then evaluated whether the proposed fuel storage and deliveries as well as the changes to the building for repair services would

intensify impacts. *See id.* at 4-5. Before reaching a final conclusion, and as part of the evaluation process regarding potential intensification of impacts, the Director states that Fannon & Sons must submit a proposed landscaping plan for her approval:

Finally, we have received a commitment from T.J. Fannon and Sons to install landscaping along Duke Street at 1200 in order to screen the parking and activities that are proposed to occur there. A plan of the proposed landscaping will be submitted for my approval prior to installation. That buffering will further ameliorate any impacts from the use.

*Id.* at 5. Only after this statement does the Zoning Determination conclude that “[t]herefore, the additional features do not change or intensify the grandfathered use, but are aspects of the same business that has operated on the site for over 50 years.” *Id.* It is plain on the face of the letter that the landscaping plan was an essential element of the staff’s conclusion that the proposed changes at 1200 Duke Street would not intensify the zoning impacts of the grandfathered use, and, thus, that submission of an adequate plan was a condition of the Zoning Determination.

Trying to avoid the consequences of this conclusion, Mr. Fannon argues in the alternative that even if the landscaping requirement was a condition of the Zoning Determination, the Zoning Determination did not provide a date by which a landscaping plan had to be provided and did not “state the specifics of what the landscaping plan should contain.” Reply at 9. This is essentially an argument that the condition to submit a landscaping plan could be met at whatever time or in whatever manner Fannon & Sons chose. Such a “condition” is no condition at all. Fannon & Sons delayed for years submitting a landscaping plan and failed to submit a revised plan in eight months following receipt of the City’s comments on its inadequate October 2007 plan. The Director acted reasonably and correctly in light of this delay in issuing the Revocation. As stated above, the Director must have the ability to determine when a delayed compliance has

become material noncompliance. Otherwise, all ability to enforce conditions for which a specific date was not issued would be eliminated.

In sum, it is clear that Fannon & Sons' submission of a landscaping plan for approval by the Director was an express condition of the Zoning Determination. Indeed, if the submission of a landscaping plan were not a condition of the Zoning Determination, it is hard to see why it would have been mentioned at all.

**C. Fannon & Sons Materially Failed To Comply With The Condition By Failing To Submit An Adequate Landscaping Plan**

Mr. Fannon also argues that the Director improperly revoked the Zoning Determination because Fannon & Sons submitted a landscaping plan to Planning and Zoning. *See Reply* at 21. Mr. Fannon presumably refers to two items: (1) a landscaping sketch submitted to the City on April 27, 2007 (*Reply*, Exhibit 9); and (2) a site plan submitted on October 27, 2007 (*Reply*, Exhibit 7). Neither one of these submissions, however, complied with the condition in the Zoning Determination because both were inadequate and could not be approved by the Director.

The April 27, 2007 submission was a sketch drafted by a local nursery that even a cursory review reveals did not come close to complying with the City's Landscape Guidelines. *See City of Alexandria Landscape Guidelines*, April 2007, at 2-4 (outlining landscape plan standards and requirements) (attached hereto as City Exhibit 14). The October 2007 submission also was inadequate, as described in the City's detailed response dated December 3, 2007. The City explained that it "found major omissions and additional information needed to bring the plan into compliance with the Department of Planning's requirements as well as verbal commitments made between Fannon Oil and the City and in discussions with the community." Staff Recommendations, Case Summary, Exhibit 8. Among the over 50 deficiencies, the City stated the following:

28. Landscaping plan submitted is not adequate. Provide a separate landscape plan to scale that shows all existing and proposed conditions including structures, infrastructure, etcetera that must be considered in placement and selection of proposed plantings. (P&Z)

29. Submit information in one complete plan set package that includes all landscape plan sheets, with all landscape plan details in accordance with the City's Landscape Guidelines (April 2007) (P&Z)

30. Show existing conditions on plan including location, size and type of trees to be removed, existing trees along Duke Street frontage and existing and proposed locations of transformers proposed to be relocated. . . .

...

34. Show preservation of existing trees and installation of new bushes, trees and landscaping along the Duke Street frontage. Indicate type of specimens selected, size and number of each specimen, and total crown coverage proposed and in accord with the City's Landscape Design Guidelines. (P&Z)

*Id.* at 4-5. Because of the numerous deficiencies related to Fannon & Sons' landscaping plans, the Director could not approve the plan, and it, thus, failed to meet the condition in the Zoning Determination requiring the submission of a landscaping plan "for [the Director's] approval prior to installation." Zoning Determination, at 5 (Case Summary, Exhibit 2). Mr. Fannon failed to submit another revised plan to the City in the eight months following receipt of the City's comments, and the Director reasonably issued the Revocation in August 2008.

### **III. VIRGINIA CODE § 15.2-2311(C) DOES NOT PROHIBIT THE 2008 REVOCATION**

#### **A. Fannon & Sons Did Not Rely In Good Faith Upon The 2003 Zoning Determination**

In his Reply, Mr. Fannon argues that the Director's August 8, 2008 decision to revoke the Zoning Determination was unlawful because it violated Virginia Code Section 15.2-2311(C) ("60-day rule"), which prohibits a zoning officer from modifying or reversing a determination after 60 days where a person aggrieved "has materially changed his position in good faith reliance on" the determination. *See* Reply at 3-11. Mr. Fannon's argument is erroneous because

the Director reasonably determined that Fannon & Sons failed to rely in good faith on the Zoning Determination.

Mr. Fannon identifies a number of actions and investments that Fannon & Sons made in reliance on the Zoning Determination to demonstrate that it materially changed its position. *See* Reply at 4-5. Although the City cannot necessarily confirm all the actions Mr. Fannon identifies, for the purposes of this case the City does not dispute that Fannon & Sons materially changed its position in reliance on the Zoning Determination. However, the 60-day rule requires such a change in position to have been based on *good faith* reliance. As discussed further below, the Director reasonably determined that Fannon & Sons materially failed to comply with the condition in the Zoning Determination to submit a complete and adequate landscaping plan. Fannon & Sons' material failure to comply with this condition represents a failure to rely in good faith on the Zoning Determination, nullifying the applicability of the 60-day rule. *See, e.g., Gittins v. Bd. of Zoning Appeals*, 55 Va. Cir. 495, 497 (2000) (finding that a variance seeker's merely "casual" efforts to inquire about pertinent zoning law did not rise to the level of good faith).

As discussed above, *supra* at Part II.B., the Director required Fannon & Sons to submit a landscaping plan as a condition of the Zoning Determination in order to ensure that the proposed changes at 1200 Duke Street would not intensify zoning impacts at the site. The landscaping plan would ensure that the residential neighbors, and other members of the public, would be shielded from the industrial business activities at the site.

Although the landscaping plan was a condition of the Zoning Determination, Fannon & Sons took numerous steps toward developing 1200 Duke Street without submitting a landscaping plan. For instance, in 2005, as Mr. Fannon notes, Fannon & Sons secured a permit and a

Certificate of Appropriateness to demolish a wall and part of the existing garage at 1200 Duke Street, but it did not submit a landscaping plan. *See* Reply at 4 (Exhibit 3 to the Reply).

Similarly, in 2006, Fannon & Sons received a building permit for the renovation of the garage, and it applied for and received approval of a mechanical permit to install three underground storage tanks at 1200 Duke Street. *See* Reply at 5 and Exhibit 5 and 1. In taking several steps for its own benefit under the Zoning Determination while failing to submit a complete landscaping plan, Fannon & Sons was neglecting its obligation to the City and the public.

By letter dated February 26, 2007, the Acting Director reminded Fannon & Sons of its obligation to submit a landscaping proposal. *See* Case Summary, Exhibit 6. Another two months after receiving this reminder, Fannon & Sons submitted the grossly inadequate April 2007 landscaping proposal described above. *See* discussion *supra* at Part II.C. In the time period leading up to the submission of the April 2007 landscaping proposal, the City began to receive several complaints from neighbors of 1200 Duke Street about the appearance of the property. *See, e.g.*, February 28, 2007, Comments to City Council from R. Larrimore (attached hereto as City Exhibit 15) (“Fannon’s . . . new plans further threaten the beauty of the area and our neighborhood in particular. . . . Fannon must take steps to . . . provide landscaping and beautification to maintain or enhance the beauty of this community.”); February 28, 2007, Comments to City Council from J. Evans (attached hereto as City Exhibit 16) (“Rusty oil tanks are piled up behind the building and the lot is littered with stones, trash, broken bricks, asphalt, open trash dumpsters, and weeds.”). These complaints highlight the significance of the landscaping required at 1200 Duke Street and the problems caused by Fannon & Sons’ delay in submitting an adequate plan.

Complaints about the appearance of 1200 Duke Street continued for another six months following the submission of the April 2007 proposal. *See, e.g.*, May 15, 2007, Email from H. Alan Young to P. Leiberger, et al. (attached hereto as City Exhibit 17) (“As I look out my third floor office window I still see the same debris at 1200 Duke St on the Duke street side that has been there for many weeks if not months.”); August 21, 2007 Email from F. Hamer to T. Fannon (attached as City Exhibit 18) (referring to complaints from neighbors in June and July 2007 regarding the appearance of 1200 Duke Street). In October 2007, Fannon & Sons submitted a site plan for 1200 Duke Street, *see* Reply (Exhibit 7), but, again, the landscaping component failed to comply with the City’s Landscaping Guidelines and was otherwise incomplete and inadequate, as the City described in its December 3, 2007 comments. *See* discussion, *supra* at Part II.C; *see also* Case Summary, Exhibit 8 (outlining deficiencies of landscape plan at comments 28-30, 34).

After providing its comments, the City continued to communicate with Mr. Fannon into 2008, regarding the landscaping plan. *See, e.g.*, January 3, 2008, Email from F. Hamer to T. Fannon (attached hereto as City Exhibit 18) (noting Fannon’s failure to pursue project in a timely manner). Nonetheless, Fannon & Sons failed to submit a revised plan in the eight months following receipt of the City’s comments. Mr. Fannon claims that he incurred costs to develop a site plan in response to the City’s December 2007 comments, attaching a site plan dated January 11, 2008 as Exhibit 11 to his Reply. *See* Reply at 6. This is misleading because Fannon & Sons never submitted this plan to the Planning and Zoning Department. Similarly, Mr. Fannon claims that he submitted a site plan dated September 3, 2008 to comply with the landscaping proposal requirement. *See* Reply, Exhibit 12. This, too, is misleading because Mr. Fannon did not formally submit the September 2008 plan to Planning and Zoning for its consideration, but rather



attached the plan to this appeal. Moreover, because the September 2008 plan was submitted nearly one month after the Director's August 8, 2008 Revocation, the September 2008 plan is irrelevant to these proceedings.

When August 2008 arrived, Fannon & Sons still had failed to submit a complete and adequate landscaping plan. At this point, it was reasonable for the Director to determine that, given the long history of Fannon & Sons' delay and inaction amidst ongoing complaints by neighbors about the unsightly appearance of 1200 Duke Street, Fannon & Sons had materially failed to comply with the condition to submit such a plan under the Zoning Determination. Fannon & Sons' material failure to comply with this condition constitutes a lack of good faith on its part. It failed to live up to its obligations under the Zoning Determination. Because Fannon & Sons failed to act in good faith in reliance on the Zoning Determination, the Director reasonably concluded that the terms the 60-day rule of Virginia Code Section 15.2-2311(C) did not apply.

**B. The Director Did Not Improperly Legislate With Respect To The Interpretation And Application of Virginia Code Section 15.2-2311(C)**

Mr. Fannon argues in his Reply that the Director somehow improperly legislated under Virginia Code Section 15.2-2311(C) by determining that Fannon & Sons did not act in good faith reliance on the Zoning Determination. Mr. Fannon's argument is misplaced.

The Director revoked the Zoning Determination under authority granted her by Section 11-205(A) of the City's Zoning Ordinance. As discussed above, she reasonably determined under this Section that Fannon & Sons materially failed to comply with the condition of the Zoning Determination to submit an adequate landscaping plan for her approval. Both the Virginia Code and the Zoning Ordinance grant the Director the authority to make this determination. *See* Va. Code § 15.2-2286(A)(4) ("The zoning administrator shall have all

necessary authority on behalf of the governing body to administer and enforce the zoning ordinance.”); Zoning Ordinance § 11-102(F) (“In the administration of this ordinance the director’s duties and authority shall include, without limitation: Interpreting the provisions of this ordinance to ensure that its intent is carried out.”).

Thus, there is no doubt that the Director had the authority to determine that Fannon & Sons materially failed to comply with a condition of the Zoning Determination. Indeed, the Director *must* have and exercise this authority to preserve the orderly administration of property use in Alexandria. The primary purpose and intent of the Zoning Ordinance is to promote the health, safety and welfare of the residents of Alexandria. *See* Zoning Ordinance § 1-102. Providing the Director the authority to interpret and enforce the Zoning Ordinance promotes these goals. Without this authority, Fannon & Sons could have continued to drag its feet for months and months, as it had already done, to the detriment of the public. At some point, enough is enough, and the Director acted reasonably in deciding to take enforcement action under Section 11-205(A) of the Zoning Ordinance. Her decision under that Section that Fannon & Sons materially failed to comply with the landscaping condition of the Zoning Determination also constitutes a reasonable determination that Fannon & Sons failed to rely in good faith on the Zoning Determination for purposes of the 60-day rule. Contrary to Mr. Fannon’s position, this is not an arbitrary or post-facto legislative action by the Director, but a reasonable interpretation of law. Appellate review of her decision exists before this Board, and, if necessary, before the Circuit Court. Because her application of the 60-day rule was reasonable, the Director’s decision should be upheld.

**C. The December 28, 2006 Memorandum From The Acting Director Does Not Provide A Separate Or Valid Ground For Application Of The 60-Day Rule**

Mr. Fannon also argues that Fannon & Sons “materially changed its position with respect to the installation of the three tanks in reliance upon a determination dated December 28, 2006 by [the] Acting Director of Planning & Zoning.” However, this argument has no bearing on this appeal because the Director has not reversed the December 28, 2006 determination or the mechanical permit that the City issued on the basis of that determination.

**IV. FANNON & SONS HAS NO VESTED RIGHTS TO THE EXPANDED USES THAT WERE CONDITIONALLY APPROVED BY THE 2003 ZONING DETERMINATION**

Mr. Fannon argues that the Revocation was improper because he had obtained a vested right in the Zoning Determination, as well as the Acting Director’s approval of his site plan to install three underground storage tanks and dispensing facilities. *See* Reply at 11-12.<sup>1</sup> Mr. Fannon’s argument is incorrect because he fails to meet several conditions of the vested rights statute.

Under Virginia Code Section 15.2-2307:

... a landowner’s rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance upon the significant affirmative governmental act.

Va. Code § 15.2-2307. If any of these statutory conditions is not met, the landowner does not obtain a vested right. In this case, Fannon & Sons have failed to meet the conditions of good

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<sup>1</sup> Mr. Fannon’s vested rights argument with respect to the approval of the site plan for the underground storage tanks and dispensing facilities, or the permit for the underground storage tanks, is irrelevant because those approvals have not been revoked.

faith reliance and diligent pursuit, and his alleged rights were not affected by a subsequent amendment to a zoning ordinance. For these reasons, Fannon & Sons has no vested rights under the Zoning Determination.

**A. Fannon & Sons Did Not Rely In Good Faith On The Zoning Determination**

For the same reasons as discussed above with respect to the 60-day rule, *supra* Part III.A., the Director reasonably determined that Fannon & Sons did not rely in good faith on the Zoning Determination for purposes of the vested rights statute, Virginia Code Section 15.2-2307.

**B. Fannon & Sons Did Not Diligently Pursue The Project Approved Under The Zoning Determination**

For the same reasons that the Director determined Fannon & Sons failed to rely in good faith on the Zoning Determination, the Director was reasonable to conclude that Fannon & Sons did not diligently pursue the project approved under the Zoning Determination. *See* discussion *supra* Part III.A. This is true even taking into consideration Fannon & Sons' application for and approval of a site plan and mechanical permit for the installation of underground storage tanks in 2006 and early 2007. More than one and a half years after he secured the mechanical permit, Mr. Fannon had still failed to submit an adequate landscaping plan under the Zoning Determination. Mr. Fannon's lack of diligence and lack of good faith are both independent grounds for rejecting his vested rights argument.

**C. The Revocation Was Not A Subsequent Amendment To A Zoning Ordinance**

As stated above, the vested rights statute only serves to protect a land use right from being affected by a "subsequent amendment to a zoning ordinance." Va. Code § 15.2-2307. In his Reply, Mr. Fannon argues that the Zoning Determination (as well as the Acting Director's December 28, 2006 memorandum) should be considered part of the City's Zoning Ordinance

applicable to 1200 Duke Street, such that the Revocation of the Zoning Determination amounts to a subsequent amendment to a zoning ordinance. Mr. Fannon is incorrect.

Few Virginia cases analyze to any degree what constitutes a “subsequent amendment to a zoning ordinance” under Va. Code § 15.2-2307, but the phrase has never been held to include more than a formal amendment to a zoning ordinance<sup>2</sup> by the local governing body, which in Alexandria is the City Council. *See, e.g., Bd. of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 282-83 (2006) (amendment to zoning classification); *City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for the City of Suffolk*, 266 Va. 137, 141-42 (2003) (same). *See also McGhee v. Bd. of Zoning Appeals of Roanoke*, 57 Va. Cir. 47, 71 (2001) (emphasizing that as it dealt with a mere stop-work order and associated determinations, “[t]his is not a case in which the landowner claims that his vested rights have been impaired by ‘subsequent amendment to a zoning ordinance.’”). In fact, the Zoning Ordinance is clear that only the City Council has the authority to amend the Zoning Ordinance. *See* Zoning Ordinance § 11-801 (setting forth City Council authority to adopt text amendments and map amendments to the Zoning Ordinance). The Zoning Ordinance provides no such authority to the Director and she took no such action here.

As a result, the Zoning Determination, although applicable to 1200 Duke Street through the Director’s interpretation of the Zoning Ordinance’s grandfathering provisions, was not itself a “part of the Zoning Ordinance applicable to 1200 Duke Street,” as Mr. Fannon argues. *See* Reply at 17. Similarly, the Revocation, which was also based on the Director’s interpretation of the Zoning Ordinance, cannot be considered an amendment to the Zoning Ordinance itself. If

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<sup>2</sup> This includes a zoning map. Alexandria’s Official Zoning Map is incorporated by reference into the ordinance by Ordinance §§ 1-101 and 1-300(a).

the contrary were true, the Director would be intruding on the province of the City Council simply by performing her everyday duties interpreting the Zoning Ordinance.

Fannon & Sons states no authority for its claim that the Zoning Determination and the 2006 Acting Director's memorandum "were part of the Zoning Ordinance applicable to Duke Street," except the odd assertion that "[t]he City would have no need to revoke the Zoning Determination if it were not part of the Zoning Ordinance applicable to 1200 Duke Street." This makes little sense. The Director decided to revoke the Zoning Determination because Mr. Fannon had flouted his obligation under the Zoning Determination to submit a complete and adequate landscaping plan for far too long. Although the Director may place conditions on a property through her interpretation of the Zoning Ordinance, such as her interpretation of the grandfathering provisions in this case, such conditions do not become amendments to the Zoning Ordinance unless formally adopted by the City Council.

### CONCLUSION

For all of the reasons discussed above, and in the City's Case Summary, Mr. Fannon's arguments should be rejected and his appeal denied.

Respectfully submitted,



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Dated: February 3, 2009

**IN THE BOARD OF ZONING APPEALS  
OF THE CITY OF ALEXANDRIA**

**BZA CASE NO. 2008-0034**

**STIPULATED FINDINGS OF FACT**

COME NOW the parties, by counsel, and stipulate to the following facts and pray that the BZA make these findings of fact in connection with its review of this case.

1. Thomas J. Fannon & Sons, Inc. ("Fannon & Sons") has operated an air conditioning, heating systems, and heating fuel distribution business at 1200 Duke Street since the 1940's. The property consists of an office building, a garage, and a parking lot, on a triangle-shaped lot which is bordered by Duke and South Payne Streets on two sides, and upscale townhomes on the third. A representative map of the property and neighboring lots is set forth at Page 2 of the City's Summary of Case on Appeal (City's Summary).

2. Fannon & Sons stored heating oil at 1200 Duke Street in seven (7) above-ground storage tanks beginning in 1940.

3. In 1962, Fannon Petroleum Services, Inc. ("Fannon Petroleum") was incorporated and obtained a special use permit to construct and operate a fuel distribution facility at 1300 Duke Street, on the other side of South Payne Street across from Fannon & Sons' operations. Fannon Petroleum maintained twenty-six (26) underground fuel storage tanks and also housed a vehicle repair facility for both its trucks and Fannon & Sons' distribution vehicles.

4. In 1981, the City passed Zoning Amendments that eliminated petroleum storage as a permitted or special permit use, but the 1981 Amendments grandfathered all lawfully existing uses, allowing Fannon & Sons to maintain its operations at 1200 Duke Street as they existed at that time.

5. In 1992, seven (7) above-ground storage tanks were removed from 1200 Duke Street as part of an environmental remediation at the site. Fannon & Sons maintained its heating fuels operation, however, by receiving heating fuel directly from Fannon Petroleum at 1300 Duke Street.

6. Also, in 1992, the property at 1200 Duke Street was rezoned from I-2 Industrial to Office Commercial (OC), but Fannon & Sons' operations continued to be permitted under the grandfathering provisions passed in 1981.

7. A portion of the outbuilding located at 1200 Duke Street was historically used for vehicle repair until the requirements for truck maintenance of the Fannon family businesses required a larger facility. As of November 2003, the outbuilding at 1200 Duke Street was used for storage related to the business.

8. In or before 2001, Fannon Petroleum decided to realign its business and relocate primary operations from 1300 Duke Street to Gainesville, Virginia. Because Fannon & Sons desired to maintain a limited fuel oil retail operation after the departure of Fannon Petroleum from 1300 Duke Street, it requested a determination from the City as to whether it could transfer certain uses from 1300 Duke Street to 1200 Duke Street, including installation of two 20,000 gallon tanks for storage of heating fuel and the retrofitting of one outbuilding to allow repair service for Fannon & Sons' distribution trucks.

9. On November 3, 2003, Eileen Fogarty, Director of the City Department of Planning and Zoning, issued a letter to Duncan Blair, Esquire, counsel for Fannon & Sons, regarding Fannon & Sons' request to transfer uses from 1300 Duke Street to 1200 Duke Street. A copy of the letter is attached to the City's Summary as Exhibit 2.



10. Subsequent to the November 3, 2003 letter, the owners of 1300 Duke Street sold 1300 Duke Street to Van Metre Companies for residential development.

11. On June 1, 2005, Fannon & Sons obtained a Board of Architectural Review (“BAR”) permit to demolish the old wall and part of the existing 1-story garage at 1200 Duke Street.

12. On June 1, 2005, Fannon & Sons obtained a Certificate of Appropriateness from the BAR for alterations and additions to the garage at 1200 Duke Street.

13. On January 12, 2006, Fannon & Sons obtained a building permit for a 1-story addition and renovation of the garage at 1200 Duke Street. A copy of this permit is attached to Fannon’s reply to the City’s Summary (“Fannon’s Reply”) at Exhibit 5.

14. On December 28, 2006, Rich Josephson, Acting Director of Planning and Zoning, issued a memorandum concerning “grandfathered use at Fannon property (1200 Duke Street)-MEC2006-04202.” A copy of that memorandum is attached to the City’s Summary at Exhibit 4.

15. On December 28, 2006, the City approved a site plan for the installation of three tanks for fuel storage and a fuel dispenser. The fuel tanks were to consist of two 20,000 gallon tanks for storage of heating fuel oil and one 8,000 gallon tank. The site plan bore the approval of the Department of Planning and Zoning and the Board of Architectural Review. A copy of the site plan is attached to Fannon’s Reply at Exhibit 1.

16. On January 9, 2007, the City issued a mechanical permit for the installation of the three underground fuel storage tanks referenced above. A copy of this mechanical permit is attached to Fannon’s Reply at Exhibit 2. A copy of the application for the mechanical permit is attached to the City’s Summary at Exhibit 5.

17. Subsequent to the issuance of the site plan approved by the City on December 28, 2006, and the issuance of the mechanical permit on January 9, 2007, Fannon & Sons installed two 20,000 gallon tanks and one 8,000 gallon tank at 1200 Duke Street. The two 20,000 gallon tanks were for the storage of heating fuel. The 8,000 gallon tank was split into two compartments. One compartment was for the storage of 4,000 gallons of gasoline for on-road use. The other compartment was for the storage of 4,000 gallons of diesel fuel for on-road use.

18. On February 26, 2007, Rich Josephson, Acting Director of the Department of Planning and Zoning, wrote a letter to Thomas J. Fannon concerning the underground storage tanks and site improvements at 1200 Duke Street. A copy of this letter is attached to the City's Summary at Exhibit 6.

19. On March 2, 2007, the City issued a Stop Work Order to Fannon & Sons for work under the January 9, 2007 permit.

20. On March 5, 2007, City Staff met with Thomas J. Fannon and advised Fannon that no additional work and no dispensing of fuel (either fuel oil or gasoline) would be permitted until all uses related to the storage and dispensing of fuel were adequately addressed, including the submission of plans to rebuild an existing brick wall that previously screened the surface parking lot at the 1200 Duke Street site which faces South Payne Street, submission of plans to screen any dispensing equipment when viewed from the neighboring residences, and the provision of additional landscaping/screening along Duke Street and along the south property line between Old Town Village and the 1200 Duke Street lot.

21. On April 27, 2007, Fannon & Sons submitted to the Director of Planning and Zoning a landscaping proposal entitled "Property Screen" prepared by Hybla Valley Nursery, Inc., dated April, 2007. A copy of the Property Screen is attached to Fannon's Reply at Exhibit

9. Upon review, the City informed Fannon & Sons that the landscaping proposal was inadequate.

22. On April 30, 2007, James K. Hartmann, City Manager for the City of Alexandria, wrote to the Old Town Village Owners Association, to the attention of Cosondra Johnson, Community Manager, and transmitted a copy of this letter to a number of persons, including Fannon & Sons. A copy of Mr. Hartmann's April 30, 2007 letter is attached to the City's Summary at Exhibit 7.

23. On October 27, 2007, Fannon & Sons submitted a site plan to the City. A copy of the site plan is attached to Fannon's Reply at Exhibit 7.

24. On December 3, 2007, the City issued to Fannon and Sons 51 comments and 1 Code requirement in response to the October 27, 2007 site plan submission. A copy of those comments is attached to the City's Summary at Exhibit 8 and to Fannon's Reply at Exhibit 10.

25. In the spring of 2008, Thomas J. Fannon met with City Staff and proposed the withdrawal of the two 20,000 gallon heating oil storage tanks in return for the approval of only the 8,000 gallon on-road fuel tank and dispensers.

26. Through August 8, 2008, Fannon & Sons did not submit to the City a revised site plan or landscaping plan in response to the City's December 3, 2007 comments.

27. On August 8, 2008, Faroll Hamer, the Director of the Department of Planning and Zoning, wrote to Thomas J. Fannon revoking the November 3, 2003 letter referred to hereinabove. A copy of the August 8, 2008 letter is attached to the City's Summary at Exhibit 9.

Respectfully submitted,

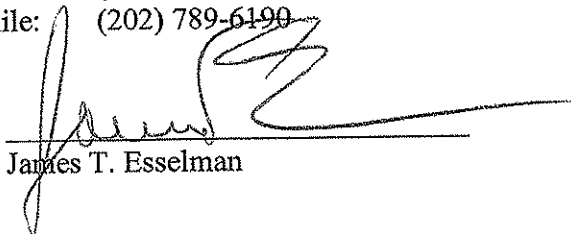
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