

COMMONWEALTH OF VIRGINIA
CIRCUIT COURT OF FAIRFAX COUNTY
4110 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030
703-691-7320
(Press 3, Press 1)

Julia Kreyskop et al. vs. Town of Council of the Town of Vienna Virginia
CL-2019-0011361

TO: Town of Council of the Town of Vienna Virginia
Serve: Laurie A DiRocco, Mayor
127 Center Street S
Vienna VA 22180

SUMMONS – CIVIL ACTION

The party upon whom this summons and the attached complaint are served is hereby notified that unless within 21 days after such service, response is made by filing in the Clerk's office of this Court a pleading in writing, in proper legal form, the allegations and charges may be taken as admitted and the court may enter an order, judgment or decree against such party either by default or after hearing evidence.

APPEARANCE IN PERSON IS NOT REQUIRED BY THIS SUMMONS.

Done in the name of the Commonwealth of Virginia, on September 5, 2019.

JOHN T. FREY, CLERK

By: 
Deputy Clerk

Plaintiff's Attorney: Pro Se

received
9-11-19

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: JULY 17, 2019 DECISION OF THE
BOARD OF ZONING APPEALS OF THE
TOWN OF VIENNA, VIRGINIA

WRIT OF CERTIORARI

JULIA KREYSKOP

and

BRIAN JOSEPH BUYNISKI

Petitioners,

2019 11361

v.

TOWN COUNCIL OF THE TOWN OF
VIENNA, VIRGINIA,

Serve on: Laurie A. DiRocco, Mayor
127 Center Street S
Vienna, VA 22180

and

Steven D. Briglia, Town Attorney
127 Center Street S
Vienna, VA 22180,

Respondent.

THIS MATTER having been considered by the undersigned on Petitioners' Petition for Writ of Certiorari and for Judicial Review ("Petition") in accordance with Va. Code Ann. § 15.2-2314, the Court finds that Petitioners filed an Application for a Variance ("Application") from the rear setback requirements set forth in Sec. 18-33.E. of the Vienna Zoning Ordinance, that the Board of Zoning Appeals for the Town of Vienna, Virginia (the "Board of Zoning Appeals") denied the

cc to all parties - 9/15/19

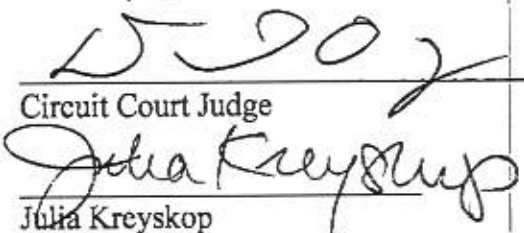
15/

Application after a quasi-judicial hearing, and that Petitioners are entitled to a review of the Board of Zoning Appeals' decision to deny the Application by a proceeding in the nature of certiorari.

NOW, THEREFORE, IT IS HEREBY ORDERED that the secretary of the Board of Zoning Appeals or, if no secretary exists, the chair of the Board of Zoning Appeals certify to this Court and serve upon Petitioners thirty (30) days after the entry of this Writ of Certiorari the complete record of the proceedings related to Petitioners' Application and the Board of Zoning Appeals' decision regarding the Application, including the Application with all attachments, all such documentary evidence and exhibits submitted, any minutes, audiotapes, videotapes, and transcripts of the Board of Zoning Appeals' hearings, including the testimony, deliberations, and decision related to Petitioners' Application.

IT IS FURTHER ORDERED that a copy of this executed Writ of Certiorari shall be filed with the Court, and that Petitioners shall serve a copy of the Petition and the executed Writ of Certiorari upon Respondent.

SO ORDERED this the 26th day of August, 2019.


Circuit Court Judge

Julia Kreyskop

Pro Se

Va. Bar No. 73118

206 Scott Cir SW

Vienna, VA 22180

(571) 643-3208

juliakreyskop@gmail.com


Brian Joseph Buyniski

206 Scott Cir SW

Vienna, VA 22180

(571) 643-3208

A COPY TESTE:

JOHN T. FREY, CLERK

BY: 

Deputy Clerk

Date: 9/5/19

Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: JULY 17, 2019 DECISION OF THE
BOARD OF ZONING APPEALS OF THE
TOWN OF VIENNA, VIRGINIA.

JULIA KREYSKOP

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Petitioners,

v.

TOWN COUNCIL OF THE TOWN OF
VIENNA, VIRGINIA,

Serve on: Laurie A. DiRocco, Mayor
127 Center Street S
Vienna, VA 22180

and

Steven D. Briglia, Town Attorney
127 Center Street S
Vienna, VA 22180,

Respondent.

PETITION FOR WRIT OF CERTIORARI
AND FOR JUDICIAL REVIEW

2019 11361

FILED
CIVIL INTAKE

2019 AUG 15 PM 4:02

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

Petitioners Julia Kreyskop and Brian Joseph Buyniski, hereby submit to the Court this
Petition for Writ of Certiorari and for Judicial Review, and, complaining of Respondent, Town
Council of The Town of Vienna, Virginia, in support of this Petition, alleges and says as follows:

Parties, Jurisdiction, Venue

1. Petitioners Julia Kreyskop and Brian Joseph Buyniski (each, a “Petitioner” and collectively, “Petitioners”) are individuals residing at 206 Scott Cir SW, Vienna, Virginia (the “Property”).

2. Respondent Town Council of the Town of Vienna, Virginia (the “Town”) is the local body authorized by the Charter of the Town of Vienna, Virginia, which Charter was granted by the General Assembly of the Commonwealth of Virginia.

3. The Board of Zoning Appeals of the Town of Vienna, Virginia (the “BZA”) is the decision-making body on behalf of the Town whose decision is being appealed.

4. The BZA’s decision that is being appealed was rendered by a vote taken by the BZA on July 17, 2019, with the official Order (“Order”) signed by the BZA on July 19, 2019. A true and accurate copy of the Order is attached hereto as Exhibit A¹.

5. This Court has jurisdiction over this action pursuant to Va. Code Ann. § 15.2-2314: “Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals...may file with the clerk of the circuit court for the county or city a petition...specifying the grounds on which aggrieved within 30 days after the final decision of the board... The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review....The Circuit Court may In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision.”

¹ The Order inaccurately states in several places that the variance sought was for lot coverage, although in the final paragraph it does correctly identify that the variance sought was from rear setback requirements.

6. Venue of this action is proper in Fairfax County, Virginia.

The Property and Improvements

7. The Property is a 10,897 square foot corner lot in the RS-10 single dwelling residential zoning district in the Town of Vienna. Petitioners reside at the Property in a 2,124 square foot house without a basement (the "House"). The House was originally constructed in 1959 and a second floor was added in 2010, prior to Petitioners' purchase of the House.

8. The Town of Vienna Code Chapter 18 (the "Vienna Zoning Ordinance") prescribes the following setbacks for the RS-10 zoning district and applicable to structures on the Property: 35' rear setback, 25' front setback, 25' setback for the **side of the lot facing a street** (the right side²), and a 12' side setback for the **side of the lot facing an adjoining property** (the left side). Vienna Zoning Ord. §§ 18-33, 18-15.F.

9. If the Property were an interior lot and not a corner lot, both sides of the Property would have 12' setbacks. Vienna Zoning Ord. § 18-33.D.

10. The House's placement on the Property is at an angle, but is within the setback requirements for the RS-10 zoning district. The **rear** corner of the House is 35.7' from the rear Property line (less than a foot within the setback); the **front** corner is 26' from the front Property line (1' within the setback); the **right** front corner is 30' from side Property line facing Cottage Street (5' within the setback); and the **left** rear corner is 29.3' from the side Property line abutting a neighbor's property (17.3' within the setback). A true and accurate copy of the plat of the Property submitted as part of Petitioners' application for a variance is attached hereto as Exhibit B-4, and visually depicts the foregoing measurements.

² Any references to left or right with respect to the Property and any of its improvements assume a view of the Property/improvements from Scott Circle.

11. The **left** side of the House contains the carport and utility room (with furnace, hot water heater, electrical panel, washer and dryer), and on its exterior are located all utility meters, utility easements for the underground gas line, electric line, cable and telephone lines, and the air conditioner (collectively, the “Utilities”).

12. The rear of the House contains a deck comprised of two parts (collectively, the “Deck”), constructed in the 1980’s without a permit by its then-owner. The Vienna Zoning Ordinance prescribes a 25’ rear setback for decks. §§ 18-33.E., 18-15.E. The left-hand portion of the Deck encroaches into the rear deck setback by 7.4 feet. Pursuant to Va. Code Ann. § 15.2-2307.D. the Deck is nonconforming but legal because taxes have been paid on it in excess of 15 years.³ Petitioners purchased the Property without knowledge that the Deck encroached into the rear deck setback.

13. Due to the modest size of the House⁴, Petitioners desire to construct a moderately sized 12.3’ by 14’ screened porch (the “Porch”) for use with family and friends. Petitioners propose to construct the Porch in place of the right hand portion of the Deck, while retaining the left hand portion of the Deck.

³ “Notwithstanding any local ordinance to the contrary, if...(ii) the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years, a zoning ordinance shall not provide that such building or structure is illegal and subject to removal solely due to such nonconformity. Such building or structure shall be nonconforming.” Va. Code Ann. § 15.2-2307.D.

⁴ Petitioners’ house is a total of 2,124 sq. ft. By comparison, a search of the website www.zillow.com on 8/14/19 for for-sale houses in the 22180 zip code (Petitioners’ zip code) constructed or to be constructed in 2019, returned 24 results ranging in size from just under 4,700 sq. ft. to 9,701 sq. ft.

14. Placement of the Porch in the rear, front, or right side of the House would require a variance, while placement of the Porch on the left side of the House is impracticable due to the existence of the Utilities.

Variance Application and Staff Report

15. On May 15, 2019, Petitioner Julia Kreyskop met with Frank Simcek and Sharmaine Abaid of the Town's Zoning Department ("Zoning Staff") to discuss Petitioners' proposed application for a variance to construct the Porch. At the meeting Zoning Staff notified Petitioner that construction of a Porch upon the right hand portion of the Deck would be considered an alteration of the Deck as a whole, and that the Town would require Petitioners to make the left hand portion of the Deck conforming in the event of such construction. Petitioner was advised that if she wished to retain the left hand portion of the Deck in its existing footprint after constructing the Porch, Petitioners would need to add a second request to the variance application: for BZA permission to retain the left hand portion of the Deck in a nonconforming footprint, but only in the event that the variance for the Porch were granted.

16. Petitioners submitted their Variance Application ("Application") for (a) a variance from the rear setback requirements set forth in Sec. 18-33.B. of the Vienna Zoning Ordinance in order to construct a Porch in the rear of Petitioners' Property (the "Porch Variance"), and (b) if the Porch Variance is granted, for permission to retain the left hand portion of a nonconforming Deck remaining after construction of the Screened Porch (the "Deck Variance"). A true and accurate copy of the Application is attached hereto as follows: Exhibit B-1: official application form and justification statement; Exhibit B-2: photo exhibits to justification statement; Exhibit B-3: statements of support from all affected neighbors; Exhibit B-4: plat; and Exhibit B-5: elevations.

17. Zoning Staff issued a Staff Report (the “Staff Report”) with respect to the Application. A true and accurate copy of the Staff Report is attached hereto as Exhibit C.

Hearing Before the BZA and the BZA’s Order

18. In addition to the substantiating information found within the Petitioners’ Application, Petitioner Julia Kreyskop provided sworn oral testimony in support of the Porch Variance and Deck Variance requests at the public hearing conducted on July 17, 2019 (the “Hearing”). (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:00:26.)

19. The BZA had an opportunity to question Petitioner under oath at the Hearing about all aspects of the Application, but the BZA questioned Petitioner solely about the Deck, and did not inquire about any aspect of the proposed Screened Porch, physical characteristics of the Property, Petitioners’ claims of hardship or unreasonable restriction, or the Porch Variance. (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:06:14.)

20. At the Hearing, the BZA voted to deny Petitioners’ Porch Variance request.

21. While members of the BZA discussed their concerns about the Deck Variance during their deliberations, the Porch Variance request having been denied, the Deck Variance request never came to an official vote. Accordingly, the Deck Variance is not a subject of this appeal.

22. The BZA’s written Order was signed on July 19, 2019 (the “Order”), setting forth “IT IS, THEREFORE, ORDERED, this 19th day of July, 2019 that the application requesting approval of variance from § 18-33.E of the Vienna Town Code in order to construct to construct [sic] a rear screened porch over apporportion [sic] of an existing unpermitted deck that encroaches into the rear-yard setback on the property located at 206 Scott Circle, SW, be denied.” (Exh. A at 2.)

Standard for Granting a Variance and the Court's Standard of Review

23. *Variance* means “ a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land, or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.” Va. Code Ann. § 15.2-2201; Vienna Zoning Ord. § 18-4.

24. The Vienna Zoning Ordinance and Virginia Code state that “a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (1) The property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (2) The granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (3) The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (4) The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (5) The relief or remedy sought by the variance application is not available through the conditional use permit process or, when permitted by this chapter, determination by the zoning

administrator. Va. Code Ann. §§ 18-233, 15.2-2309. Petitioners refer to these standards as the mandatory standards or mandatory requirements.

25. The Virginia Code was amended in 2015 with respect to the definition of a variance, what needed to be established by an applicant to receive a variance, and the circuit court's manner of review of a board of zoning appeals' decision with respect to a variance. (H. 1849, 2015 Gen. Assemb. Sess. (Va. 2015) accessed at <https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+CHAP0597>.) A true and accurate copy of House Bill 1849, in blacklined form, is attached hereto as Exhibit D.

26. In 2015 the Town of Vienna amended the Vienna Zoning Ordinance with respect to variances to match the revised terms of the Virginia Code.

27. It is acknowledged that the amended standard is "definitely a lesser standard" for an applicant to meet in order to obtain a variance. Brian Trompeter, *Council OKs Changes For Zoning Variances, Electronic Summonses*, InsideNOVA.com, (July 18, 2015), http://www.insidenova.com/news/fairfax/local/council-oks-changes-for-zoning-variances-electronic-summonses/article_9d01df20-2582-11e5-80f2-c7f26f3671b6.html (quoting Vienna Town Attorney Steven Briglia).

The Preponderance of the Evidence Shows That Petitioners Have Met the Mandatory Requirements of the Variance Statute

28. Petitioners presented competent, substantial, and material evidence, through its Application, sworn testimony, and exhibits, that they meet all of the mandatory requirements of the Virginia Code and Vienna Zoning Ordinance for the granting of a variance.

29. Petitioners meet the requirements of Va. Code Ann. §15.2-2201 and Vienna Zoning Ord. §18-4 for the definition of a variance: "a reasonable deviation from those provisions

regulating the shape, size, or area of a lot or parcel of land, or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.”

30. Unreasonable Restriction: Due to the shallowness and corner position of Petitioners’ Property, and the angled placement of their House, the front, rear, and street-side setback requirements of the Vienna Zoning Ordinance prohibit Petitioners from making any usable additions to their House on those three sides, thereby unreasonably restricting their utilization of the Property, which is already limited in use by a House that is modest in size and a back yard which is not usable during the summer months due to the high volume of mosquitoes (whose presence is likely exacerbated by a nearby stream). Additions to the left side of the house, while not prohibited by the Vienna Zoning Ordinance, are impracticable due to the presence of Utilities and would require the expensive relocation of underground and above ground utilities, utility meters, and air-conditioner, and the expensive reconfiguration of the utility room of the House on that side, since the relocation of the utilities and air conditioner on the exterior would entail reconfiguration of their interior connections to the furnace, hot water heater, electrical panel, ducting and other systems. With the left side of the House not being a viable option for any additions, the setback requirements unreasonably restrict the utilization of the Petitioners’ Property by prohibiting any usable additions to the remaining three sides of the House.

31. Need for Variance Not Generally Shared by Others: Most lots in the area surrounding the Property are not shallow and are not corner lots. The 35’ rear setback does not

pose problems for lots that are not shallow. Interior lots which are not corner lots must abide by a 12' setback on both sides (for the RS-10 zoning district), unlike Petitioners, who have to abide by a 25' setback on the side of the Property abutting a street. Even corner lots in the surrounding area tend to not be as shallow as Petitioners' lot. Attached hereto as Exhibit E is a printed depiction of the lots in the area surrounding the Property (the Property is marked with a black dot), obtained from the website of the Fairfax County GIS & Mapping Services, Aerial Photography website (<https://www.fairfaxcounty.gov/maps/aerial-photography>), visually illustrating the foregoing. (Accessed on 8/14/19 at https://utility.arcgisonline.com/arcgis/rest/directories/arcgisoutput/Utilities/PrintingTools_GPServ er/x_x6hpQQBSXF-KTiDcNDMjzkw..x_x_ags_ca300c98-bcd5-11e9-b9b5-22000a05be52.pdf.)

32. The Porch Variance is Not Contrary to the Purpose of the Ordinance: Sec. 18-3 of the Vienna Zoning Ordinance provides that the zoning regulations are made "to promote, in accordance with the present and future needs, the safety, morals, order, convenience, aesthetic appearance and welfare of the community. This chapter is intended, among other purposes, to provide for adequate light, safety and ample parking facilities, and to prevent undue concentration of population." The proposed Porch is in keeping with the character of the House and not unlike other screened porches throughout the neighborhood. It will not negatively impact the safety, morals, order, convenience, aesthetic appearance, welfare, or adequacy of light in the neighborhood, nor impact parking facilities or increase the concentration of the population.

33. The Porch is Not a Change in Use: Under the Virginia Code, a variance "shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional

zoning.” Va. Code Ann. § 15.2-2309. The construction of screened porches is permitted as part of residential dwellings and will not result in a change in use of the Property.

34. Petitioners’ also meet the requirements of Vienna Zoning Ord. §18-233 and Va. Code Ann. § 15.2-2309: “[A] a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (1) The property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (2) The granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (3) The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (4) The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (5) The relief or remedy sought by the variance application is not available through the conditional use permit process or, when permitted by this chapter, determination by the zoning administrator.”

35. Unreasonable Restriction: The Petitioners’ showing of an unreasonable restriction is discussed at length above.

36. Hardship: Petitioners have the option of also making a showing of a hardship, although the statute allows for a variance to be granted upon a showing of unreasonable restriction only. In this case, Petitioners have shown that the granting of the Porch Variance would alleviate a hardship – the inability of Petitioners to make useable additions to their House – due to the

following physical conditions relating to the Property and the improvements which were originally constructed in 1959, before the current recodification of the Town of Vienna Code in 2012: (1) The shallowness of the Property, (2) the fact that the Property is a corner lot, and (3) the angled setting of the House on the Property. The only remaining side of the House not requiring a variance to make a usable addition contains all of the Utilities and any construction of a simple addition on that side of the House would be economically prohibitive, as it would entail entirely reconfiguring underground and above-ground Utilities on both the exterior and interior of the House. See Brown v. Fairfax Cty. Board of Zoning Appeals, No. 188002, 2001 WL 543520, at *3 (Cir. Ct. Va. Feb. 14, 2001) (The “financial impact on the property owner is a factor that should be considered in determining undue hardship.”)

- *Shallowness and Size of Property:* Petitioner’s lot is wider than it is deep. Due to its overall small area, the Property is in the smallest Vienna single family residential zoning district, RS-10. While the front setbacks decrease in size from 35’ to 25’ from the largest RS-16 single family residential zoning district to the smallest RS-10 single family zoning district, the rear setbacks remain the same across all residential districts, which impacts smaller lots more, but is particularly problematic for shallow lots like Petitioners’. Vienna Zoning Ord. §§ 18-15.C., E., 18-33.C., E.
- *Corner lot:* Corner lots have a 25’ setback from the side of the house abutting the side street, instead of the 12’ setback for both sides on interior lots in the RS-10 zoning district. Vienna Zoning Ord. § 18-33.D. As a result, the Property has a setback that is twice as long on one side, as it is on the other side. This side setback

for corner lots applies regardless of the overall area of the lot, which impacts smaller lots, like Petitioners', more. *Id.* §§ 18-15.D, 18-33.D.

- *Angled placement of the House:* Such a placement results in the corners of the House being closer to all the setbacks than they would otherwise be, reducing the area within which Petitioners could potentially build without a variance.

37. The Property was Acquired in Good Faith and The Hardship was Not Created by Petitioners: Petitioners acquired the Property in August of 2010 and have not changed the footprint of the House, which was established in 1959. When they acquired the Property, they were not aware of the applicable setbacks and were not contemplating additions to the House at that time.⁵ Although Petitioners were aware of the modest size of the House when they purchased it, they viewed the large Deck as livable space, at least during the warm months, and looked forward to using it with family and friends. Petitioners heavily landscaped the back yard for such purpose. Unfortunately, they discovered that the Deck was effectively not usable during the summer months due to the presence of a high volume of mosquitos, which conventional remedies did not alleviate. A stream that runs through a park area in the vicinity of the Petitioners' Property exacerbates the mosquito problem. As a result, Petitioners learned after purchasing the Property that what they viewed as livable area, could not be used for the majority of the warm months, which resulted in Petitioners seeking to add enclosed livable common space to their modest-size home.

⁵ Although Petitioners were not aware at the time they purchased the House that a variance would be required in order to make any usable additions, the mere purchase of a property knowing that a variance would be required for construction is not a self-inflicted hardship. Spence v. Board of Zoning Appeals, 225 Va. 116, 120, 496 S.E.2d 61, 65 (1998).

38. Granting the Variance Will Not be of Substantial Detriment to Adjacent and Nearby Properties: The Porch will primarily be visible by Petitioners' neighbors in the rear, the side of whose house at 1108 Cottage Street SW faces Petitioners' back yard. Petitioners' Application included statements of unequivocal support from such rear neighbors, as well as, all other adjacent property owners and nearby properties. (See Exh. B-3.) No opposition was voiced against the Porch Variance by any adjacent or nearby properties at the Hearing or otherwise. The addition of the Porch will add value not only to the Property, but to surrounding properties. Since the Porch is proposed to be placed in the location of a portion of the existing Deck, it will not result in improvements where they do not already exist. Except for the rear neighbors, the Porch will otherwise be mostly hidden from view of other properties due to the heavy landscaping in and around the Petitioners' back yard. The Application exhibits contain photos showing the views of the back yard from various locations and underscore the private nature of the area.

39. The Condition of the Property is Not of So General or Recurring a Nature As To Make Reasonably Practicable the Formulation of a General Regulation: As described above, the shallowness of this Property lot is itself unusual, and combined with the lot being on a corner and having a house set at an angle, it is not generally recurring. The original placement of the Utilities on the side of the House where setbacks are not an issue, is also probably merely coincidental. It would not be appropriate to amend the zoning ordinance for circumstances this unusual.

40. The Granting of the Variance Does Not Result in an Unpermitted Use or a Change in Zoning Classification: Porches are typically part of single family homes and are permitted in the RS-10 zoning district. The construction of the Porch would not result in a change in zoning classification as the use will remain residential.

41. The Relief Sought by the Variance Application is Not Available Through the Conditional Use Permit Process or Determination by the Zoning Administrator: Conditional use permits are to be used for certain types of uses enumerated in Vienna Zoning Ordinance Sec. 18-210 and are not issued for the construction of screened porches to be used for residential purposes along with a residential dwelling. The Zoning Administrator is not permitted under the Vienna Zoning Ordinance to allow the construction of a screened porch in violation of the rear setback requirements. Accordingly, the relief sought by Petitioners is not available through a conditional use permit or through the Zoning Administrator.

Claims of Error

42. The BZA made various findings of fact and law in its Order and at the Hearing. The BZA made errors in many of such findings, sometimes ignoring the clear facts of the instant case, analogizing the facts to wholly dissimilar circumstances, making reference to facts which should have no bearing on a determination for the Porch Variance, applying standards to their variance analysis which are not in the statute, using standards which have since been revised by the legislature, failing to apply the current standards of the statute, and treating the Porch Variance request in a manner entirely inconsistent with prior decision-making.

1. BZA's Findings of Fact Are Erroneous

43. The Order sets forth the BZA's Findings of Fact. Finding of Fact C. states "The homeowner requests the variance based on claims that the existing house built in 1959 sits diagonally on a lot that is wider than it is deep. This configuration, according to the applicants, creates a hardship with respect to adding any living space *to the rear of the house*, and *trying to add living space to either side would be extremely challenging due to existing utilities.*" (Exh. A at 1.)

44. The foregoing findings of fact are incomplete and erroneous in four ways.

45. First, the BZA references “hardship” but fails to make any reference to Petitioners’ claim of “an unreasonable restriction on the utilization” of the Property, which is a showing upon which a variance shall be granted pursuant to Virginia Code Secs. 15.2-2201 and 15.2-2309 and Vienna Zoning Ordinance Secs. 18-4 and 18-233. In making reference only to hardship and not unreasonable restriction, the BZA appears to be operating under the pre-2015 standard for granting variances, which required a showing of “undue hardship relating to the property,” and “unnecessary or unreasonable hardship” and an “unnecessary hardship.” (See Exh. D at 2, 4.) The post-2015 standard not only deletes the requirement that the hardship be an “unreasonable or unnecessary” and “undue” hardship, but permits a variance without any showing of hardship at all: “a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property *or* that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.” Vienna Zoning Ord. §18-233; *see also* Va. Code Ann. § 15.2-2309 (emphasis added.) Petitioners referenced unreasonable restriction on utilization in their Application and in oral testimony at the Hearing, so ignoring such claims and acknowledging only the claim of “hardship” is clearly erroneous. (Exh. B at 3 and Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=11 at 1:02:30.)

46. Second, the BZA fails to list the fact of the Property being a corner lot as a characteristic of the Property which impacts its configuration and contributes to Petitioners’ claims. Being a corner lot, the right side of the Property has more than double the setback requirement of an interior lot. If the lot were not a corner lot, the setback on the right side of the Property would be 12’ instead of 25’ and a variance would not be required to make an addition on that side. Vienna Zoning Ord. § 18-33.D. Applicants expressly referenced these facts in their Application and oral

testimony at the Hearing and ignoring them is clearly erroneous. (Exh. B at 3 and Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=11 at 1:03:03.)

47. Third, the BZA erroneously states that Petitioners claim that the configuration of the Property creates a hardship with respect to adding any living area *only* to the rear of the House, while Petitioners claim that the configuration creates both hardship and unreasonable restriction with respect to adding living area on *three* sides of the house: the rear, front and right side, due to the House being close or at the setbacks in all of those locations. (Exh. B at 3 and Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=11 at 1:03:18.) That Petitioners are unable to make additions on three sides of their Property due to the zoning ordinance, rather than just one, is of fundamental importance to Petitioners' claims of unreasonable restriction and hardship and a failure to acknowledge this fact is clearly erroneous.

48. Fourth, the BZA erroneously claim that adding living space to two sides of the House would be extremely challenging due to existing utilities, in direct contradiction to Petitioners' Application and oral testimony at the Hearing. (Exh. B at 3 and Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=11 at 1:03:25.) Existing utilities make any addition on the *left* side of the House extremely challenging and impracticable, but adding living space on the right side of the House without a variance is not possible *not* due to the presence of any utilities, but because the corner of the house is within 5' of the side setback and usable living space would need to be deeper than 5'. This is a clear error on the part of the BZA.

II. The BZA's Findings of Law Are Erroneous

49. The BZA Order's "[a]rguments in favor of the motion to deny the variance request included: the property owners can continue [sic] have reasonable and enjoyable use of the property without the screened in addition; approval of the variance and non-conforming deck would be a

significant encroachment into the rear-yard setback; difficulty finding that there were two separate decks (per applicants argument of two separate decks).” (Exh. A at 2.) All of the aforementioned arguments are erroneous.

**A. “Reasonable and Enjoyable Use of Property” Is Not the Standard for
Variances in Virginia**

50. Not only has the BZA not provided any support for such a finding in the instant case, but whether “the property owners can continue [sic] have reasonable and enjoyable use of the property without the screened in addition” is not the statutory standard for variances in Virginia. Indeed, such a standard would effectively bar variances in any instances where a house already exists on a property.

51. The BZA statement that Petitioners can continue to have “reasonable and enjoyable use of the property without the screened in addition” is in direct contradiction to its Order’s Findings of Fact that the Petitioners claim “a high mosquito population also creates a hardship and that they are unable to use their back yard.” (Exh. A at 2.) The BZA made no findings that this claim by Petitioners is not truthful, nor did it challenge Petitioners’ claim at the Hearing.

52. Since it made no findings of fact to contradict Petitioners’ assertion that the high mosquito population results in the inability to use their back yard and yet discounts this as a limitation on the enjoyable use of the Property, the BZA apparently believes that the existence of a usable house *automatically* precludes a finding that an enjoyable use of a property is in any way impaired.

53. But if variances were not permitted for a property that could be reasonably and enjoyably used, and if every property were considered to be reasonably and enjoyably used so

long as it had a home, then variance requests to construct *any* additions or alterations to an existing house would be automatically prohibited. Yet neither the Virginia Code nor the Vienna Zoning Ordinance provide *any* support for an assertion that variances are inappropriate for a property otherwise improved with a house.

54. Indeed, the BZA's own decisions clearly do not ascribe to such a reading of the ordinance. A cursory review of the publicly available variance applications and applicable minutes which reflect variances granted by the BZA, clearly demonstrates that variances are primarily sought and granted not for the purpose of developing undeveloped land, but to construct or alter structures on properties that are already improved with homes, which will continue to be used by the applicants. (See BZA Minutes and Meeting Materials from hearings occurring between 7/18/2018 and 7/17/2019 at <https://vienna-va.legistar.com/Calendar.aspx>.)

55. The BZA appears to erroneously rely on the Staff Report in holding that a variance is inappropriate if applicants have the use of an existing house. The Staff Report asserts in its Findings of Fact that "If there is an existing reasonable use of the property, neither an unreasonable restriction nor a hardship exists and a variance may not be lawfully granted." (Exh. C at 5, item 6.) The Staff Report fails to cite to any statute or case in support of such an extraordinary assertion.

56. A variance is a deviation from the zoning ordinance "when the strict application of the ordinance would unreasonably restrict the utilization of the property". Va. Code Ann. § 15.2-2201 and Vienna Zoning Ord. § 18-4. Furthermore, "a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a

hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.” Vienna Zoning Ord. § 18-233; Va. Code Ann. § 15.2-2309.

57. The definition of a variance and the standard for granting a variance concern *unreasonable restrictions* on utilization, not whether the property may continue to be used *at all* without a variance. If the ability to live in an existing house is enough for a finding that there is no unreasonable restriction on utilization, as posited by the BZA and the Staff Report, then variances would only be permitted for undeveloped property. This is not the case now, nor was it even the case under the more stringent variance standards prior to 2015.

58. As a result, a finding that Petitioners “can continue [sic] have reasonable and enjoyable use of the property without the screened in addition” is not only erroneous because it conflicts with the BZA’s findings of fact, but also because it cannot form the basis for a denial of a variance and the BZA’s prior decisions make this abundantly clear.

**B. A Finding of Significant Encroachment is Insufficient To Deny A
Variance**

59. The BZA’s finding that “approval of the variance and non-conforming deck would be a significant encroachment into the rear-yard setback” is in itself insufficient for denying a variance.

60. The BZA had the ability to grant the Porch Variance but deny the Deck Variance. If the Porch Variance were granted but the Deck Variance were denied, Petitioners would have been able to construct the Porch only while reducing the size of the Deck so that it would not encroach into the rear deck setback. Accordingly, whether the *Deck* would significantly encroach after construction of the Porch was entirely within the control of the BZA and is completely irrelevant to the analysis of whether the Porch Variance should be granted.

61. A variance is “a reasonable deviation from” zoning requirements “when the strict application of the ordinance would unreasonably restrict the utilization of the property”. Va. Code Ann. § 15.2-2201 and Vienna Zoning Ord. § 18-4.

62. The proposed Porch would encroach 10.8’ feet into the rear setback at its furthest point. (Exh. C at 6.) In order to run parallel to the House, which sits angled on the Property, the porch would not run parallel to the rear property line, thus the amount of the encroachment would decrease along its length moving to the left. Whether an encroachment of 10.8’ is “significant” is debatable, but such an encroachment is reasonable.

63. The mere size of an encroachment is not itself indicative of whether the requested deviation from a zoning ordinance is reasonable. Indeed, it is entirely possible that a deviation which is small in size and not “significant” demonstrates that a variance is not actually appropriate, because a structure only slightly smaller than the one proposed for a variance, could be constructed without a variance, thereby implying that no unreasonable restriction on the utilization of the property exists.

64. In the instant case, the majority of the Petitioners’ proposed Porch would be encroaching precisely *because* Petitioners are unreasonably restricted in the utilization of their Property: the size of Petitioners’ lot, its corner position, and the angled orientation of Petitioners’ House result in there being only several feet of depth for Petitioners to make any additions without a variance on three sides of their House, while the fourth (left) side contains the Utilities and is impracticable to build on.

65. It is unclear what size encroachments the BZA considers to be significant versus insignificant, however, limiting variances to encroachments of only a certain distance, even though

the result would be to prohibit Petitioners from making *any* usable additions to their House, only underscores the unreasonable restriction faced by Petitioners.

66. Nothing in the Virginia Code or Vienna Zoning Ordinance states that an encroachment of a certain size automatically disqualifies an improvement for a variance, it only requires that the deviation be reasonable. Whether an encroachment is “reasonable” should be decided by evaluating the overall size of the proposed improvement as compared to the typical size of such proposed structures, the size necessary for the structure to be usable, the reason why the majority of the structure would be encroaching, and how such an encroachment impacts adjoining properties, an analysis that the BZA did not undertake in this case.

67. Since Petitioners need a variance to make any usable additions on three sides of their House, Petitioners have proposed a modest Porch that is 12.3’ in depth and 14’ in width, for a total area of 172.2 square feet. To provide context for the Porch’s relatively small size, one need only compare it to the sizes of proposed screened porches with respect to which the BZA issued variances in the past.⁶

68. The deviation requested by the Petitioners is reasonable because Petitioners have limited the size of their proposed Porch to a smaller size than what is typical or most convenient for such structures, the encroachment would not cause a detriment to adjoining properties, and is fully supported by their neighbors.

⁶16’x16’ screened porch variance granted for 1012 Frederick St SW on May 15, 2013 (Exh. F at 2); 14’x14’ screened porch variance granted for 429 Lewis St NW on December 21, 2011 (Exh. G at 1); 16’x21’ screened porch variance granted for 320 Westview Ct NE on December 21, 2011 (Exh. G at 3); 204 sq. ft. screened porch variance granted for 610 Kearney Ct SW on July 18, 2018. (Exh. H at 2.) Attached to this Petition as Exhibits E-P are the Minutes of BZA Hearings provided by the Town to Petitioners as part of a Freedom of Information Act request.

69. To provide further context on the relative *insignificance* of the encroachment of the proposed Porch relative to its proposed location in the rear yard, only 0.8' of the porch would be beyond the 25' rear *deck* setback requirement under the Vienna Zoning Ordinance. It would also be only 0.8' beyond Fairfax County's 25' rear setback limit. Fairfax Cty. Zoning Ordinance § 3-307.2.(A).(1)(c). And as a corner lot, it would be entirely *within* the rear setback limits in the City of Falls Church⁷ and Arlington County⁸. Falls Church City Code § 48-2 (Lot line, rear definition) and § 48-263(3)a.; Arlington Cty. Code § 3.2.6.A.(2).(b).

70. In short, a finding that an encroachment is significant in size is an insufficient basis upon which to deny a variance because the size of the encroachment may in fact be a reflection of the unreasonable restriction on utilization faced by an applicant, which is the standard upon which variances are supposed to be granted. The appropriate analysis under applicable statutes is whether the deviation being requested is "reasonable" and Petitioners' request for a modest-sized Porch is reasonable. Having denied the variance upon a finding which is not a part of the statutory standard for variances, the BZA erred.

**C. Any Findings of Law with Respect to the Deck Are Irrelevant for
Evaluation of the Porch Variance**

71. The BZA Order's findings of law set forth "Difficulty finding that there were two separate decks (per applicants argument of two separate decks)" as a rationale for denying the Porch Variance. (Exh. A at 2.)

⁷ The City of Falls Church considers corner lots as having two fronts and two sides (i.e., Petitioners' rear yard would be considered a side yard). The setback for side yards is ten feet. Falls Church City Code § 48-2 and § 48-263(3)a.

⁸ Rear setbacks in Arlington County are ten feet. Arlington Cty. Code § 3.2.6.A.(2).(b).

72. The BZA focused entirely on the Deck in its questioning of Petitioner during the Hearing⁹, demonstrating a troubling failure to consider the proposed Porch, the characteristics of the Petitioners' Property and House which result in a hardship and an unreasonable restriction on the utilization of Petitioners' Property, and virtually any other aspect of Petitioners' Porch Variance request. This failure was obvious in the factually inaccurate statement of facts within the BZA's Order and the BZA's unsupported statements of law.

73. The BZA's questions and comments about the Deck during the Hearing reflected a clear concern on the part of the BZA with respect to the Deck Variance, however, the Deck Variance being a separate request from the Porch Variance, the BZA's concerns about the Deck should not have informed its decision-making with respect to the Porch Variance at all.

74. To assuage its concerns about the Deck, the BZA had the ability to grant the Porch Variance but deny the Deck Variance. The fate of the Deck being entirely within its control, the BZA cannot use its concerns about the Deck as a basis for denying the Porch Variance, and its findings about the Deck are entirely irrelevant to the analysis of whether Petitioners have met the requirements of the Virginia Code and Vienna Zoning Ordinance to be granted the *Porch* Variance.

75. Accordingly, the BZA's use of the Deck within its analysis of the Porch Variance is clearly erroneous.

III. BZA's Oral Findings at the Hearing Are Clearly Erroneous

76. BZA members made several statements of fact and law during the deliberations portion of the Hearing which are oddly missing from the written Order, but demonstrate the BZA's erroneous, inconsistent and invalid reasoning and conclusions.

⁹ See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:06:14.

A. BZA Decision-Making Should Be Consistent

77. BZA Member Rak asserted at the Hearing that “this application seems very similar to numerous ones that we’ve seen for construction of screened porches and we fall [sic], we’ve consistently denied those and I just think for consistency of our um application of the ordinance that I would move that we deny the variance.” (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:30:11.)

78. BZA Vice Chair Creed immediately went on the record to voice his discomfort with this statement, asserting “I have a concern over that. We have never been consistent in in in in these particular lots that where you have corner lots, where the houses are are are kind of catty wampus to the front, there’s no real front, no rear set on there and we’ve often been very permissive of allowing these because of the size of the backyards and where the homes sit on these lots, and I have real heartburn over calling this consistent because it’s not and hasn’t been in the number of years that I have been sitting on this Board now since 2009.” (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:30:36.)

79. BZA Vice Chair Creed is correct. Petitioners’ review of the BZA minutes provided by Vienna as part of a Freedom of Information Act request shows:

- Ten variance requests for screened porches since October 2010 (excluding Petitioners’ request), and eight of such variances were granted. (Exh. F at 1-6, Items No. 1, 2; Exh. G at 1-6, Items No. 1, 2; Exh. H at 1-3, 5, Item No. 1; Exh. I at 2-3, 4, Item No. 1; Exh. J at 1-3, Item No. 1; Exh. K at 3-5, Item No. 2; Exh. L at 2-4, Item. No. 2; Exh. M at 4-5, 7-8, Item No. 3; Exh. N at 1-6)
- Eight variance requests involving corner lots with either angled houses, shallow lots, or both (excluding Petitioners’ request), and six of such variances were

granted. (Exh. F at 1-6, Items No. 1, 2; Exh. J at 1-3, Item No. 1; Exh. K at 1-5, Items No. 1, 2; Exh. M at 4-5, 7-8, Item No. 3; Exh. O at 1-3, Item No. 1; Exh. P at 3-4, 6, Item. No. 2.) Although such variance requests were not all limited to screened porches, in at least four instances, such variances were granted for the construction of a screened porch. (Exh. F at 1-6, Items No. 1, 2; Exh. K at 3-5, Item No. 2; Exh. M at 4-5, 7-8, Item No. 3.) This has been the case even under the more stringent pre-2015 variance standard!

80. After BZA Vice Chair Creed's correction of the record regarding the BZA's consistency in granting variances in these circumstances, BZA Member Rak stated that "On the issue of consistency, I definitely defer to Mr. Creed since he's he has the tenure on the Commission. I was just thinking of I guess one application we had a month or 2 ago that seemed *very similar*..." (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:34:24.) BZA Member Rak's reference to the prior application is instructive in demonstrating the erroneous findings of fact and law in this case.

81. The June and May 2019 BZA meetings did not consider any screened porch variance requests, however, the April 2019 BZA meeting did consider such a request. The BZA Minutes for the April 2019 request for a variance to construct a screened porch are attached hereto as Exhibit Q (the "April Application"). (The April Application and corresponding materials can be downloaded from [file:///C:/Users/j_kreyskop/Downloads/Agenda%20\(29\).pdf](file:///C:/Users/j_kreyskop/Downloads/Agenda%20(29).pdf).) Contrary to BZA Member Rak's assertion that the April Application and Petitioners' Applications are "very similar," even a cursory review of the April Application clearly shows that the only similarities between the April Application and the Petitioners' Porch Variance is that both requests are about screened porches.

82. The April Application requested a variance from total lot coverage, not rear setback requirements, as is the case for Petitioners' Porch Variance. (Exh. Q at 1.)

83. The property under the April Application is not a corner lot, it is not a shallow lot, and the house is not diagonally placed on the said lot. (Exh. Q at 4.) In other words, it shares no similarities with the Property characteristics which are relevant for the Petitioners' Porch Variance evaluation.

84. The applicants under the April Application claimed that the screened porch was necessary because (1) wasps are present on their property and they have a wasp allergy, and (2) [the existence of a storm drain on a neighboring property and the grading of their property resulted water pooling on their land, increasing the presence of mosquitoes and creating a hardship. (Exh. Q at 3; Exh. N at 2-4.) The Petitioners, on the other hand, claim that the specific characteristics of a shallow, corner lot, combined with a diagonally set House, create a hardship by effectively prohibiting Petitioners from making usable additions to a modest sized home. Neither the Petitioners' Application nor oral testimony at the Hearing asserted that the mosquitoes were the hardship, although mosquitos do make use of the Petitioners' Property nearly impossible during the summer months, depriving Petitioners of the use of their back yard and Deck and accounting for why Petitioners would like to add a screened porch to share with family and friends, since they can't use their deck in this fashion and are limited in their ability to use the house due to its size.

85. The BZA denied the April Application by a vote of 3-3. BZA Member Rak stated in the April Application hearing that "he struggled to see how the application fits within the requirements of a variance as a hardship doesn't seem to be related to the lot and the criteria of a hardship due to a physical condition relating to the property or improvements thereon. He continued stating he didn't see how it was distinguishable from other lots that have the same maximum lot

coverage percentage....he was sympathetic to the drainage problems, but that there was not a nexus to the drainage problems and the relief they are requesting. The lot coverage requirement they are requesting does not really affect the drainage as they are two different issues.” (Exh. N at 3-4.) Unlike the April Application, Petitioners’ Application clearly set forth that the physical characteristics of the Petitioners’ Property, combined with the setbacks, create the hardship for Petitioners because they’re unable to make any usable additions on 3 sides of their modest House without a variance, and so Petitioners are seeking a setback variance.

86. In summary, comparing the Petitioners’ Application to the April Application and concluding that they are “very similar” falls entirely outside of any reasonable evaluation of the two applications. Both applications request a variance to construct a screened porch, but that in and of itself is not sufficient to consider the applications similar, much less to conclude that one failed to meet the variance standards of the Virginia Code and Vienna Zoning Ordinance simply because the other one failed to do so. As a result, BZA Member Rak’s findings of fact and law are clearly erroneous.

87. Petitioners agree with BZA Member Rak that BZA decision-making should be consistent. In light of BZA’s prior grant of variances for screened porches in strikingly similar circumstances, and even while applying statutory standards which were more onerous for an applicant than those in place today, BZA’s denial of the Porch Variance in the instant case is entirely arbitrary and capricious and should be overturned.

**B. BZA Erred in Not Considering Whether Petitioners Faced An
Unreasonable Restriction**

76. At the Hearing, BZA Member Rak, in explaining his vote against granting the Porch Variance, stated, “...I think my, the reason I move to deny it really is just an inability to see the

hardship. That's that's kind of what it comes down to for me." (See Audio of Hearing, available at http://vienna-va.granicus.com/player/clip/393?view_id=1 at 1:34:36.) Putting aside BZA Member Rak's errors in evaluating the existence of the hardship in this case (detailed above), his statement underscores BZA's failure to recognize that the post-2015 standard for granting a variance does not require a showing of hardship at all.

77. As reflected on Exhibit D, the pre-2015 definition of a variance in the Virginia Code (and thus the Vienna Zoning Ordinance) required a showing of an unnecessary or unreasonable hardship. (See Exh. D at 2.) Likewise, "No such variance shall be authorized by the board unless it finds: a. That the strict application of the ordinance would produce undue hardship relating to the property". (See Exh. D at 4.) In other words, a showing of a hardship was a necessary prerequisite to obtaining a variance prior to the amendments adopted in mid-2015.

78. The 2015 amendments changed the definition of a variance, by deleting the reference to an unnecessary or unreasonable hardship, and replacing it with the concept of the zoning ordinance "unreasonably restrict[ing] the utilization of the property". (See Exh. D at 2.) An applicant must show that it meets the requirements of this definition. Va. Code Ann. §15.2-2309. In addition to meeting the requirements of the definition, an applicant must show that "the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property *or* that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance". Va. Code Ann. §15.2-2309 (emphasis added.) As a result, an applicant can show an unreasonable restriction on utilization and never show a hardship, and still be entitled to a variance.

79. Petitioners believe that they have shown by a preponderance of the evidence that they have met the hardship standard and that the findings of law by the BZA with respect to the

hardship were clearly erroneous and rested on erroneous findings of fact. But even if none of that is accurate, a Porch Variance should still be granted in this case because Petitioners have shown by a preponderance of the evidence that they are faced with an unreasonable restriction on the utilization of their property and have shown by a preponderance of the evidence that the BZA's scant findings of law with respect to that issue are erroneous.

PETITION FOR WRIT OF CERTIORARI AND FOR JUDICIAL REVIEW

80. Petitioners have presented sufficient evidence to meet all requirements of the Virginia Code and Vienna Zoning Ordinance for the issuance of the Porch Variance. They have shown by a preponderance of the evidence that the BZA clearly erred in its denial of the Porch Variance by making erroneous, inconsistent, and irrelevant findings of fact and law, and acting in a manner that was arbitrary and capricious.

81. This Petition for Writ of Certiorari is requested pursuant to Va. Code Ann. § 15.2-2314.

WHEREFORE, Petitioners respectfully pray:

1. That the Court issue a Writ of Certiorari directing the Town/secretary of the Board of Zoning Appeals or, if no secretary exists, the chair of the Board of Zoning Appeals to prepare and certify to the Court the record of the proceedings in this case;

2. That the Court reverse the decision of the BZA and remand this case with an order directing the BZA to issue the Porch Variance; and

3. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

This the 15th day of August, 2019.

Respectfully submitted,



Julia Kreyskop

Pro Se

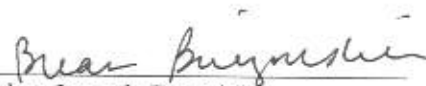
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Brian Joseph Buyniski

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Vienna, VA 22180

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EXHIBIT A

BOARD OF ZONING APPEALS, TOWN OF VIENNA, VIRGINIA

Request for approval of a variance from Section 18-33.F of the Vienna Town Code in order to construct a new screened in porch in excess of the maximum permitted lot coverage on the property located at 206 Scott Circle, SW in the RS-10, Single-Family Detached Residential zone. Application filed by Brian Buyniski & Julia Kreyskop, owners.

ORDER

THIS MATTER was considered by the Board of Zoning Appeals during a public hearing held on July 17, 2019 for a variance from Section 18-33.F of the Vienna Town Code. Based upon testimony offered by the applicant, exhibits offered into evidence, comments offered by members of the public and other interested parties, the Board has determined the following findings of fact:

- A. This RS-10 zoned property is located on a cul-de-sac on the southwesterly side of Scott Circle, SW; located between Yeonas Drive, SW and Walker Street, SW; in Section 12 of the Vienna Woods subdivision. The subject tract is a nearly rectangular corner lot that ranges in width from 113.75 to 78.86 feet, from 96.01 to 72.00 feet in depth and encloses a total lot area of 10,897 square feet. Existing improvements include the two-story dwelling, attached carport, concrete driveway, wooden shed and an unpermitted wooden deck. The dwelling was constructed in 1959, which includes a second story addition built in 2010, attached car port with a concrete driveway, and an open rear deck and rear wooden shed; as shown on the House Location Plat prepared by B.W. Smith and Associates, Inc., dated April 30, 2019; revised May 8, 2019 (see attached plat).
- B. The proposed screened porch will replace a portion of an existing open rear wooden deck with an enclosed 12.3' X 14' screened porch. According to the House Location Plat prepared by B.W. Smith and Associates, Inc., dated April 30, 2019; revised May 8, 2019, (see attached plat), the proposed screened porch will increase the lot coverage by 172.2 square feet, bringing the total lot coverage of the property to 1,918 square feet or 17.6% of the allowable 25% maximum.
- C. The homeowner requests the variance based on claims that the existing house built in 1959 sits diagonally on a lot that is wider than it is deep. This configuration, according to the applicants, creates a hardship with respect to adding any living space to the rear of the house, and trying to add living space to either side would be extremely challenging due to existing utilities. In addition, the applicants claim that a high mosquito population also creates a hardship and that they are unable to use their back yard.

Request for approval of a variance from Section 18-33.F of the Vienna Town Code in order to construct a new screened in porch in excess of the maximum permitted lot coverage on the property located at 206 Scott Circle, SW in the RS-10, Single-Family Detached Residential zone. Application filed by Brian Buyniski & Julia Kreyskop, owners.

AND FROM THE FINDINGS OF FACT AS DETERMINED ABOVE, the Board of Zoning Appeals makes the following conclusions of law:

A motion was made to deny the request for a variance from § 18-33.E, of the Vienna Town Code, to construct a rear screened porch over a portion of an existing unpermitted deck that encroaches into the rear-yard setback on the property located at 206 Scott Circle, SW. The motion passed with a 5-1 vote.

Arguments in favor of the motion to deny the variance request included: the property owners can continue have reasonable and enjoyable use of the property without the screened in addition; approval of the variance and non-conforming deck would be a significant encroachment into the rear-yard setback; difficulty finding that there were two separate decks (per applicants argument of two separate decks).

Arguments against the motion included: it appeared there were two separate decks based on the decking floorboards running parallel and perpendicular to the house.

IT IS, THEREFORE, ORDERED, this 19th day of July, 2019 that the application requesting approval of variance from § 18-33.E of the Vienna Town Code in order to construct to construct a rear screened porch over apportion of an existing unpermitted deck that encroaches into the rear-yard setback on the property located at 206 Scott Circle, SW, be denied.

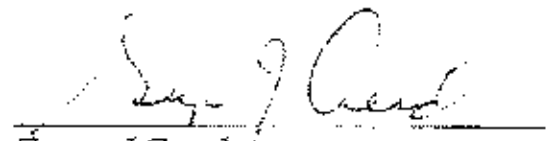

George J Creed
Board of Zoning Appeals, Vice-Chair
Town of Vienna

EXHIBIT B-1



Town of Vienna
Board of Zoning Appeals
Variance or Appeal Application

Application Number: 03-19 -BZA

(Office Use Only)

Address of Subject Property: 206 Scott Cir SW, Vienna, VA 22180

Legal Description: Single Family Home in Vienna Woods

Lot: 2112 Block: _____ Section: 12

Subdivision: _____

Square Footage: Land: 10,897

Present Use of Property: Single Family Home Zoning: RS-10

Reason for Requesting a Variance or Appeal (Provide additional pages as necessary):

Application for a variance to corner lot rear setback requirements under Section 18-33.E. of the Vienna Town Code. Applicant requests a variance to build a screened porch in the rear yard in place of a portion of an existing deck, which porch will be outside of the 35' rear yard setback requirement for RS-10. Applicant also requests approval to retain existing deck in current footprint after construction of screened porch, which current footprint is outside of the 25' rear deck setback requirement. The nonconforming deck would not be altered in the construction of the screened porch. The house (2,124 sq ft), the footprint of which was established when the house was first built in 1959, sits diagonally on a lot that is wider than it is deep. This unique configuration, together with the setbacks, creates a hardship with respect to adding any additional living space to the existing modest-size home. The corner of the house closest to the rear property line is 35.7' away from the property line, making it virtually impossible to add any living area to the rear of the house. Adding any usable living area to the other sides of the house would also either be prohibited by setback requirements, or would be extremely challenging due to existing gas, cable, power lines and various easements. Adjoining property owners have no objection to the porch construction and retention of the deck. Please see attached justification letter for further detailed information.

Signature (Owner or Agent): Julia Kreyskop Brian Buyniski

Name of Owner(s): Julia Kreyskop and Brian Buyniski

Address: 206 Scott Cir SW, Vienna, VA 22180 Phone: 571-643-3208

E-mail Address: juliakreyskop@gmail.com

Name of Agent(s): none

Address: _____ Phone: _____

E-mail Address (for "Contact Person"): juliakreyskop@gmail.com

The following is a list of information, or items, to be furnished along with the application for a variance or an appeal in conformance with Article 23 of Chapter 18 of the Code of the Town of Vienna, Virginia. Applications will not be considered complete and eligible for review, and placement upon an agenda, until the information listed below has been received at least twenty-one (21) days prior to the next available meeting of the Board of Zoning Appeals. All such requests shall be accompanied by the following information:

1. **Complete Application** with all requested information provided in this application.
2. **Nine (9) Copies** of a certificate of survey, or plat, showing the legal description, area, boundaries of the subject tract, abutting streets and alleys, and the **location of all proposed building and structures** for which the variance or appeal is requested (all materials larger than 8.5" x 11" must be folded).
3. **Nine (9) Copies** of any additional documentation, including the justification statement, prepared in support of the appeal or variance request.
4. **One (1) Copy** of a listing of the names and addresses of the owners of all properties adjoining and all lands lying on the opposite sides of all streets and alleys abutting the subject tract for which the variance or appeal is being requested. (This information may be easily obtained online at the following address: <http://icare.fairfaxcounty.gov/ffxcare/Main/Home.aspx>).
5. **Electronic Copy** of application and plans submitted via email or flash drive.

Note: Section 18-235 of the Town Code specifies that any variance authorized by the Board to permit the erection or alteration of a building or structure shall be valid only for six (6) months unless a building permit has been obtained.

THE TOWN OF VIENNA IS COMMITTED TO FULL COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT STANDARDS. TRANSLATION SERVICES, ASSISTANCE OR ACCOMMODATION REQUESTS FROM PERSONS WITH DISABILITIES ARE TO BE REQUESTED NOT LESS THAN 3 WORKING DAYS BEFORE THE DAY OF THE EVENT. PLEASE CALL (703) 255-6300 (Voice) OR TTY 711.

Owners and Applicants/Property Address:
Julia Kreyskop and Brian Buyniski
206 Scott Cir SW
Vienna, VA 22180
(571) 643-3208
juliakreyskop@gmail.com

Re: Statement of Justification

We would like to request a variance to the current setback requirements (1) in order to construct a screened porch at the rear of our house, and (2) to retain our existing deck (which would remain in place after construction of the screened porch) in its current footprint. Our house is located in the RS-10 zoning district. The property is a corner lot containing a total of 10,897 square feet of area, rectangular in shape (it is wider than it is deep), with a 2-story house set diagonally in the middle, originally built in 1959. We believe that the combination of these unique circumstances: a corner lot in the RS-10 zoning district, which is wider than it is deep, with a diagonally set house, is atypical and not of a recurring nature in the Town. The house complies with the setback requirements for this zoning district and was built before we acquired the property. Total lot coverage with a screened porch would be 17.6%, well below the 25% limit.

Unreasonable Restriction on the Utilization of the Property/Hardship

We purchased our house in 2010 in its current condition. Our house is 2 stories, does not have a basement, and is 2,124 square feet in area. We love living in the Town of Vienna and would like to be able to create more livable area in our home, to be shared with family and friends, but are unreasonably restricted from being able to do so by the unique combination of the setback requirements, the specific characteristics of the property, and the footprint of the house. Due to the shape of the lot (it being wider than it is deep) and the diagonal footprint of the house (with the closest corner being 35.7' away from the rear property line), we are effectively barred from making any enclosed additions to the rear of the house. We also cannot make any additions to the house at the front due to its closest corner being 26' from the front property line. Since ours is a corner lot, the setback requirement for the right side of the house (towards Cottage Street) is 25' rather than the 12' typical of non-corner lots. As a result, the setback on that side of the house would allow for only an unusable 5' expansion. While expansion on the left side of the house would be permitted from the standpoint of setback requirements, it is impracticable due to the presence on that side of the house of an underground gas line, cable lines, electric lines, and various meters, all of which would have to be rerouted and relocated, as well as, the presence of the air conditioner, which would also have to be relocated (to the opposite side of the house towards Cottage St, even though in its current location it directly connects to the house's utility room, containing the interior HVAC system, hot water heater and laundry area). *[Please see Exhibit A for depiction of this area]*. Further, since that left side of the house contains the carport and the aforementioned utility room, access to any such addition from that side of the house would require completely rearranging the entirety of the gas lines, ducting and water lines serving the home from that existing utility room, resulting in having to make material interior modifications to our home. Building a screened porch in the rear is the most practical way to increase our living space while minimizing the impact on the surrounding community, existing utilities, easements and our existing house, but it requires a variance.

While we have a deck in the rear of our house (constructed in the 1980s), use of the deck is severely limited by the high mosquito presence. We love our backyard and invested heavily in landscaping it when we first moved in, but have discovered in our almost 9 years in Vienna that usage of our yard in

the summer is virtually impossible due to the enormous number of mosquitos, a situation likely exacerbated by the stream that lies about 250' behind our property, in a park area. The addition of a screened porch would provide us with more livable area and allow us to enjoy our yard in the summer months without worrying about mosquitos and the diseases they carry.

Location of Screened Porch and Nonconformity of Existing Deck

Our yard contains a 474 square foot deck, which was in place prior to our purchase of the house in 2010. The deck is effectively divided into two parts—a portion extending toward the rear from our patio door ("long deck") and another portion extending to the right ("short deck"). We would like to place a screened porch in place of the short deck. *[Please see Exhibit B for a visual depiction of these two portions of the deck.]* Our neighbor at 200 Scott Cir SW recalls that the two portions of the deck were constructed independently, and indeed there are variations between the design and construction of these two portions of the deck. Although we cannot confirm the precise dates that these two portions were constructed, Fairfax County tax records indicate that all portions of the deck have been in place since at least the 1980s (the furthest back that the records go). The replacement of the short deck with a screened porch would not require any alterations to the long deck, as it is able to stay up independently of the short deck, and no portion of it is being converted to a screened porch. The long deck is surrounded by a decorative stone wall and various plantings, including trees *[please Exhibit B]*. As the survey shows, the long deck is 17.6' from our rear property line at its closest point, which does not conform to the 25' setback requirement for decks. When we purchased the house in 2010, we did not know that the deck was nonconforming. We understand that since the taxing authority in Fairfax has recognized the existence of the deck since at least the 1980's, it is nonconforming but not illegal pursuant to VA Code Sec. 15.2-2307D(ii) ("Notwithstanding any local ordinance to the contrary, if...(ii) the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years, a zoning ordinance shall not provide that such building or structure is illegal and subject to removal solely due to such nonconformity.") We also understand from Mr. Simeck, the Zoning Administrator, that altering the short deck (by way of demolition) requires us to seek the Board of Zoning Appeals' approval to leave the "long deck" in place as it is today. As mentioned, the construction of the screened porch in place of the short deck would not require any alteration to the long deck. If the long deck were to be reduced in size, this would also result in having to remove the decorative stone wall and the trees that surround it. Accordingly, if our request for a variance to build the screened porch is approved, we kindly request the BZA's approval to retain the "long deck" in its current footprint.

Neighbor Support

Our backyard is fenced in and due to the landscaping around the fence, views into the yard from both sides of the house are minimal. *[Please see Exhibit C.]* Neighbors to the rear of our property and to the left of our property -- the only two adjacent houses -- fully support the construction of the screened porch and their statements of support are included within this packet (as are statements of support from other property owners with lots on the other side of Cottage Street and Scott Cir). Our rear yard neighbors are also the only neighbors who have any views of the "long deck" and they are supportive of keeping it in place, as referenced in their statement of support.

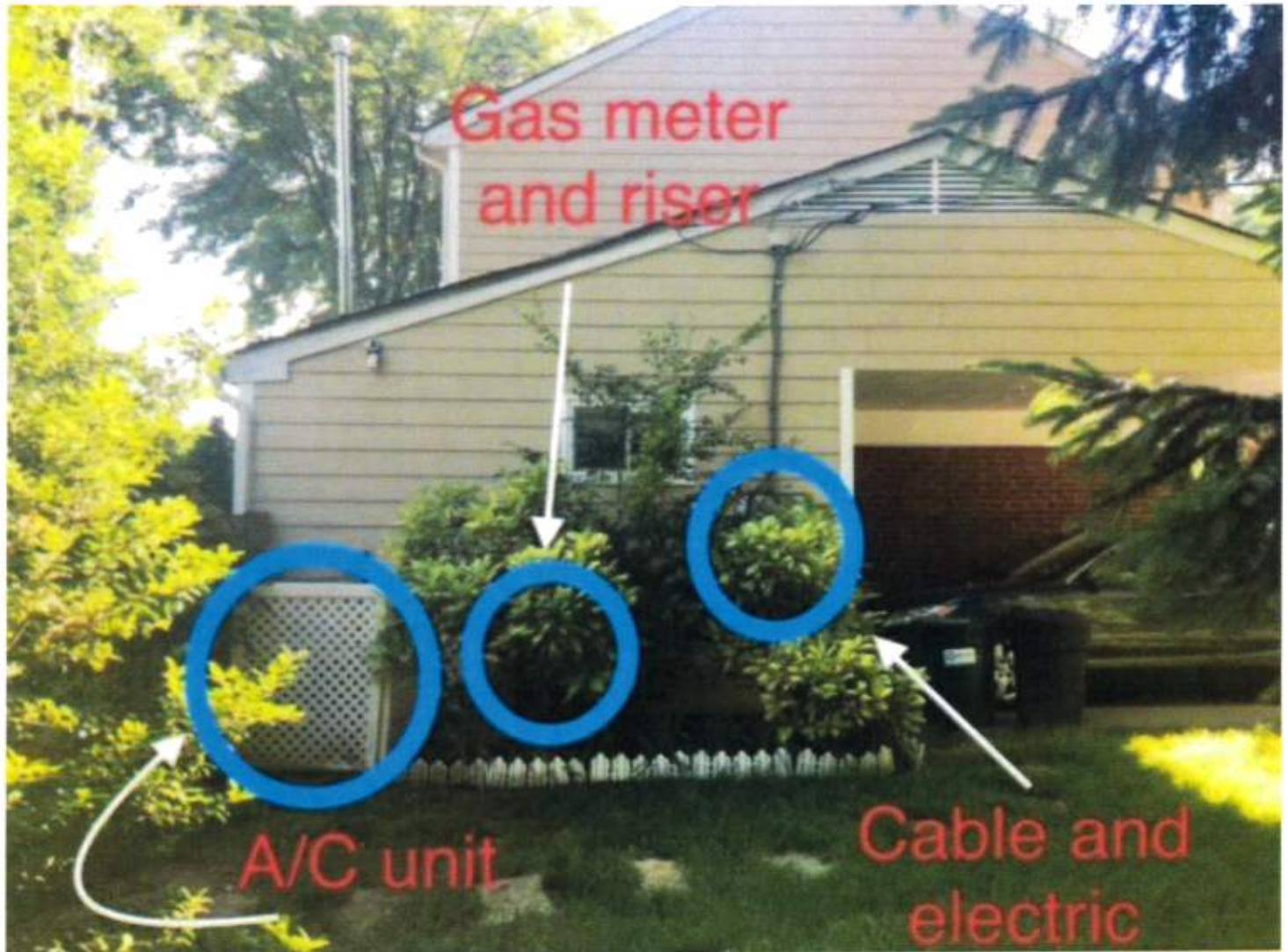
Thank you for your consideration of our requests,


Julia Greydrup
Brian Brummen

EXHIBIT B-2

Exhibit A

View of left side of house (facing side neighbors), specifically, utility room exterior and carport.



Closer view of various utilities and meters on this exterior of utility room.



Exhibit B

View of existing deck from 2nd floor of house.



Identification of decks for purposes of Justification Statement.



Views of decorative stone wall and landscaping around "long deck".



Exhibit C

View (standing on deck) facing left, toward 204 Scott Cir SW.



View (standing on deck) facing right, toward Cottage Street.



View of the side of our house facing Cottage Street, together with the trees/shrubs blocking our yard from view of Cottage Street. Photo taken from sidewalk.



Photos requested by Town of Vienna zoning staff.

The site plan for Lot 2112 shows a 2-story dwelling (#206) with the following setbacks and dimensions:

- Setbacks:** 25' SETBACK (FOR DECKS), 35' SETBACK, 12' SETBACK, 25' SETBACK, 25' SETBACK.
- Dimensions:** 96.01', 5' 6" 10' 00" W, 113.75', 72.00', 30.0', 78.86', 28.1', 26.0', 34.6', 35.7', 24.3' @APEX, 24.0' @APEX, 17.6', 17.3', 17.3', 8.2', 8.2', 7.4', 7.4', 29.3', 35.7'.
- Other Features:** LOT 2112, 10,897 SQ. FT., 0.2502 ACRE, C1, C2, C3.

COTTAGE STREET

SCOTT CIRCLE SOUTHWEST

Photo 1



Photo 2



Photo 3



Photo 4



Photo 5



Photo 6



Photo 7



EXHIBIT B-3

Adjoining Properties:

Jason and Amanda Tiede

1108 Cottage St SW – property immediately behind the subject property
(statement of support attached)

Alonso and Dina Medrano

204 Scott Cir SW – property immediately adjacent to side of the subject property
(statement of support attached)

Dean Cheng and Sharon Bee

205 Scott Cir SW – property across front of house, on Scott Cir
(statement of support attached)

Paul and Mary Anne Darling

1107 Cottage St SW – property to side of subject property, across Cottage St
(statement of support attached)

Keenan Lofton and Jennifer Leigh Phillips

203 Scott Cir SW – property across front of house, on Scott Cir
(statement of support attached)

William and Elizabeth Slaughter

1105 Cottage St SW – property across Cottage St
(owner does not live at property—being rented)

Feng Pan and Liming Liao

1109 Cottage St SW – property across Cottage St
(owner does not live at property – being rented)

Dated: 5/21/19

Jason and Amanda Tiede
1108 Cottage Street SW
Vienna, VA 22180

Re: Statement from Adjoining Property Owner with Respect to Variance

We reside at 1108 Cottage Street SW, Vienna, Virginia, with the side of our house facing the rear of the property at 206 Scott Cir SW, the residence of Julia Kreyskop and Brian Buyniski. We fully support Julia and Brian's desire to construct a screened porch on the rear of their house and have reviewed the proposed plans. We understand that such a porch would not be within the setback requirements of the zoning district for the property and that a variance is necessary in order to construct such a screened porch. We are also aware that the existing deck is nonconforming and that the deepest part of the deck would remain after the construction of the screened porch. We support keeping that part of the deck in place despite the nonconformity.

The trees immediately surrounding the deck provide extra privacy, which is beneficial to us, and which would have to be removed if the deck were reduced in size. In summary, we support the granting of any variances necessary for the construction of the porch and retention of the deck, and do not believe that any of this will be detrimental to our property.

X Amanda Tiede
Amanda Tiede

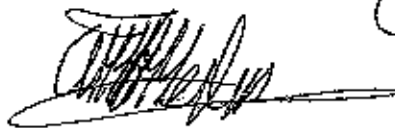
Jason Tiede
Jason Tiede

Date: 4/8/19

Alonso and Dina Medrano
204 Scott Cir SW
Vienna, VA 22180

Re: Statement from Adjoining Property Owner with Respect to Variance

Our property is adjacent to the property at 206 Scott Cir SW, owned by Julia Kreyskop and Brian Buyniski. We support the granting of a variance to construct a 12'x14' screened porch in the rear of Julia and Brian's house and have reviewed their proposed plans for such construction. We do not believe that the porch will be detrimental to our property. Thank you.




approximately

Dean Cheng and Sharon Bee
205 Scott Cir SW, Vienna, Virginia

To Town of Vienna Board of Zoning Appeals

We reside at 205 Scott Cir SW, Vienna, Virginia. The front of our house faces the front of the property at 206 Scott Cir SW, owned by Julia Kreyskop and Brian Buyniski. We have reviewed the proposal to construct a screened porch in the rear of Julia and Brian's house and support the granting of a variance to construct such a screened porch. We do not believe that the porch will be detrimental to our property. Thank you.

Sincerely,



Date: 4/6/2017

Date: 4/7/19

Name of Owner: Mary & Paul Darling

Address: 1107 Cottage St SW, Vienna, VA

To Town of Vienna Board of Zoning Appeals

I reside at the above address. My house is across Cottage Street from the side of the residence having an address of 206 Scott Cir SW Vienna, VA. That residence belongs to Julia Kreyskop and Brian Buyniski. I have reviewed the proposal to erect a screened porch within Julia and Brian's yard and have no objections to this project. I understand that a variance is required to construct this screened porch and support the granting of the variance.

Sincerely,

Mary J Darling

Date: May 12, 2019

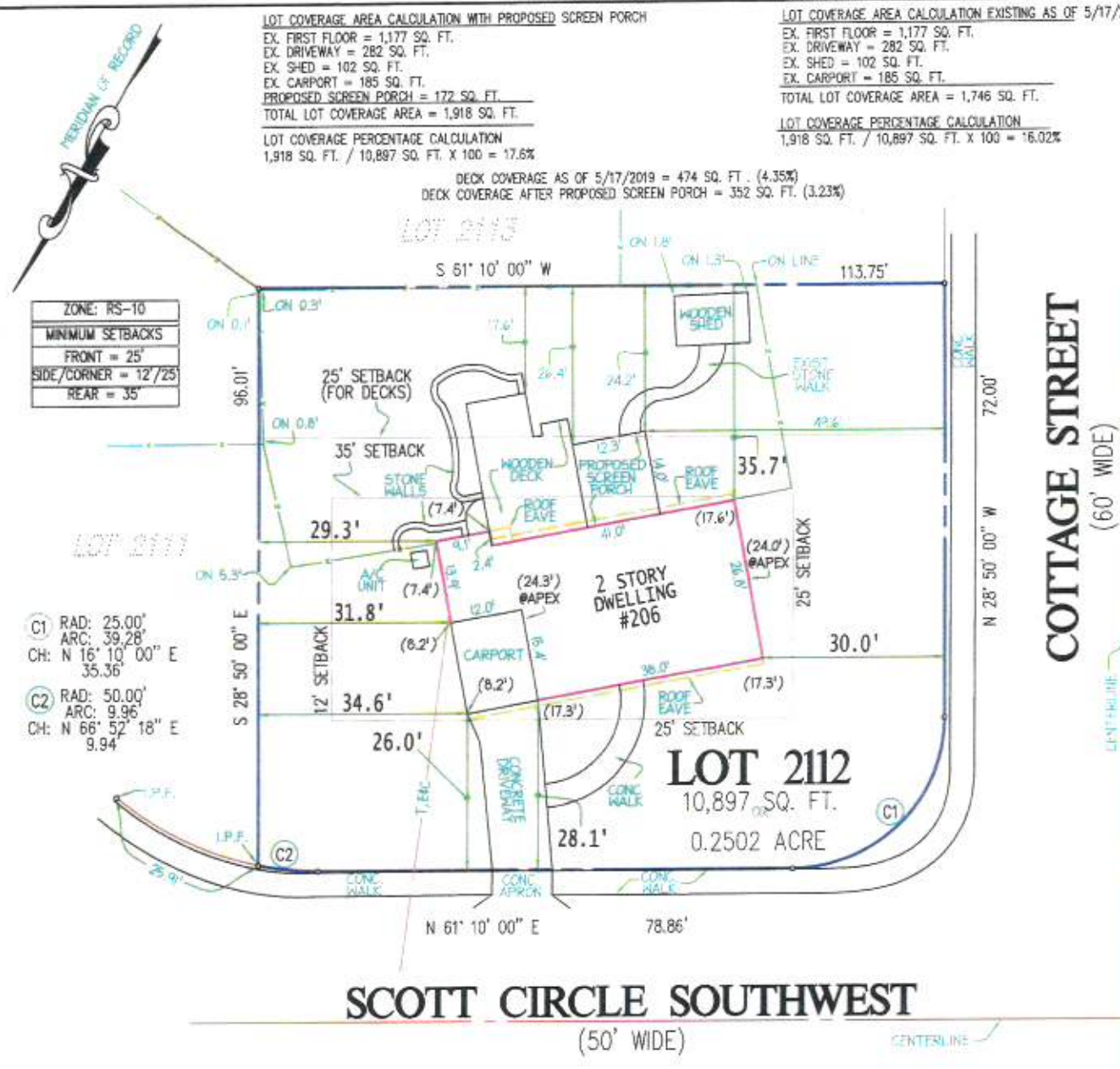
Keenan Lofton and Jennifer Leigh Phillips
203 Scott Cir SW, Vienna, VA 22180

To Town of Vienna Board of Zoning Appeals

We reside at the above address, across from 206 Scott Cir SW Vienna, VA, owned by Julia Kreyskop and Brian Buyniski. We have reviewed the proposal to erect a screened porch at the rear of Julia and Brian's house and have no objections to this project and the granting of a variance for such project.

Sincerely,

Jennifer Lofton



HOUSE LOCATION PLAT
LOT 2112
SECTION TWELVE
VIENNA WOODS
HUNTER MILL DISTRICT
TOWN OF VIENNA
FAIRFAX COUNTY, VIRGINIA



- NOTES:
- 1) THIS PLAT HAS BEEN PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT AND DOES NOT THEREFORE NECESSARILY INDICATE ALL ENCUMBRANCES ON THE PROPERTY.
 - 2) THE LOT SHOWN HEREON APPEARS TO PLOT IN FLOOD ZONE "X" AREA DETERMINED TO BE OUTSIDE THE 0.2% ANNUAL CHANCE FLOODPLAIN, AS SHOWN ON F.E.M.A. MAP # 51059C0145E EFFECTIVE DATE: SEPTEMBER 17, 2010
 - 3) THIS SURVEY WAS NOT PREPARED FOR CONSTRUCTION PURPOSES. (INCLUDING FENCES)
 - 4) LOCATION OF FENCES (IF ANY) ARE APPROXIMATE AND DO NOT CERTIFY TO OWNERSHIP.
 - 5) THE PROPERTY SHOWN ON THIS PLAT IS LOCATED ON TAX ASSESSMENT MAP # 0482 03 2112
 - 6) PROPERTY CORNERS NOT SET PER WAIVER REQUEST.
 - 7) EASEMENTS, B.R.L.'S & MERIDIAN, IF SHOWN HEREON, ARE AS DELINEATED ON PLAT RECORDED IN DEED BOOK 1787, PAGE 161 (UNLESS NOTED OTHERWISE).