In the
Supreme Court of Virginia

Record No. 250919

MARCIA L. NORDGREN, ET AL.,

Appellants,

v.

COUNTY BOARD OF ARLINGTON, VIRGINIA, ET AL.,

Appellees.

Opening Brief of Appellants

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INTRODUCTION

This appeal turns on threshold limits on appellate jurisdiction and permissive intervention. The trial court entered final judgment on October 25, 2024. The County Board of Arlington timely appealed. Wilsons Ventures, LLC, did not. Never a party below, Wilsons did not move to intervene until after 17 months of high-profile litigation, a five-day bench trial, and ruling on the merits. When its motion was denied, Wilsons filed its notice of appeal 49 days after final judgment.

The Court of Appeals nevertheless exercised jurisdiction over Wilsons's appeal. It did so by treating a later order modifying the conditions of a partial stay pending appeal as though that order modified the final judgment itself, restarting the 30-day notice-of-appeal deadline. That was error. A stay temporarily regulates the enforceability of a judgment. It does not reopen the final judgment, revive expired appellate deadlines, or give a nonparty a new right to appeal.

The Court of Appeals compounded that jurisdictional error with a mistake on the merits. Rule 3:14 permits intervention only to assert a claim or defense germane to the proceeding. This case is a facial

challenge to the validity of local legislation. Wilsons identified no claim or defense germane to the challenged ordinance's validity, and the timing of its motion to intervene alone provided a reasonable basis for denial.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that Wilsons Ventures timely filed a notice of appeal and that appellate jurisdiction exists in Court of Appeals' Record No. 2122-24. (Preserved at 1923-R.309-15, 403-05; 2122-R.21-31, 138-47, 205-11, 303-05.)[1]

2. The Court of Appeals erred in holding that the circuit court abused its discretion by denying Wilsons Ventures' motion to intervene under Rule 3:14 and as a necessary party when the motion failed to identify any claims or defenses and was filed post-trial and after the circuit court had orally announced its judgment. (Preserved at 1923-R.316-22, 405-09; 2122-R.159-62, 212-18, 305-09.)

3. The Court of Appeals erred in issuing relief in Court of Appeals' Record No. 1923-24 without explanation where the case is not consolidated with Court of Appeals' Record No. 2122-24 and Wilsons Ventures' second motion for leave to intervene on appeal in Court of Appeals' Record No. 1923-24 is barred by the law-of-the-case doctrine. (Preserved at 1923-R.74-87, 309, 400-09; 2122-R.205, 300-09.)

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[1] References to the record in Record No. 1923-24 are denoted "1923-R.____." References to the record in Record No. 2122-24 are denoted "2122-R.____."

STATEMENT OF THE CASE

1. The Neighbors bring a high-profile challenge to a major zoning ordinance amendment in Arlington County.

Appellants—collectively, the "Neighbors"—are residents of Arlington County who own their homes. R.7183.

On March 22, 2023, Appellee County Board of Arlington, Virginia adopted a major zoning ordinance amendment, the "EHO Amendment." R.6250, 6824. The EHO Amendment upended decades of land-use planning that had focused density along the metro corridor by changing the zoning for nearly every single-family zoned property in the County to allow for multi-family housing of up to six units. R.7181-82.

A month later, the Neighbors sued, challenging the Board's authority and process for enacting the EHO Amendment. R.7-70. This compressed timeframe was mandated by Code § 15.2-2285(F), which required them to file within 30 days. The case received local and national media attention. *See* R.7019, 10214. The *Washington Post*, for example, covered the case from the day it was filed. R.7019; *see, e.g.*, Teo Armus, *Arlington Residents Sue over Zoning Law,* Washington Post, April 22, 2023. The online version of the *Post*'s story even included a hyperlink to the Neighbors' complaint. R.7019 (citing

https://www.washingtonpost.com/dc-md-va/2023/04/21/arlington-missing-middle-lawsuit-zoning/).

Although the EHO Amendment was adopted in March, it did not take effect until July 1, 2023, more than three months later. That was the first day applications for EHO permits could be submitted to the County. R.12814. By that point, the Neighbors' suit challenging the EHO Amendment had been on file for more than two months.

Appellee Wilsons Ventures, LLC, has never been a party to this case. After the EHO Amendment was enacted and while this case was pending, Wilsons bought two properties in Arlington, 5041-43 25th Street South and 1225 North Quincy Street, with plans to develop them.[2] R.6985. Wilsons received EHO permits for those properties on August 16, 2023, and February 26, 2024. R.6992-93.

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[2] Wilsons acknowledged at oral argument in the Court of Appeals that it acquired its properties after the EHO Amendment was enacted. Tr. of Oral Arg. at 1:04:36-1:05:15, Record No. 2122-24 (July 7, 2025), https://vacourts.gov/coa/oralarguments/archive?field_release_date_value=07/07/2025&session_date=20250707&region=165. This Court is permitted to "take judicial notice of a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Va. Sup. Ct. R. 2:201;

2. After a five-day bench trial, the trial court rules in favor of the Neighbors.

After extensive motions practice and discovery, the trial court held a five-day bench trial in July 2024. *See generally* R.7798-9987. It requested post-trial briefing, then announced its judgment from the bench on September 27, 2024. R.10163-92. The court ruled in the Neighbors' favor on Counts I, III, IV, and VII, declaring the EHO Amendment void *ab initio*. R.10190-91. It found that:

> Count One: The Board failed to pass an initiating resolution or motion for the zoning amendment in accordance with Virginia law. …
>
> Count Three: The Board failed to reasonably consider several required factors in Virginia Code 15.2-2284.
>
> Count Four: The Board unlawfully delegated legislative authority granting a special exception for EHO development. …
>
> Count Seven: The landscaping provision of the zoning amendment contains provisions contrary to Virginia Code 15.2-961.

Williams v. Commonwealth, 289 Va. 326, 335 (2015) (appellate court has discretion to take judicial notice). County property records show that Wilsons acquired its properties after this case was filed: https://propertysearch.arlingtonva.us/Home/Sales?lrsn=26221&sequence=1; and https://propertysearch.arlingtonva.us/Home/Sales?lrsn=44942&sequence=1.

R.10190. The court announced its intention to reduce its oral decision to a written final order to be entered on October 25, 2024. R.10191.

3. Two weeks later, Wilsons Ventures moves to intervene.

Two weeks after the trial court pronounced its judgment, Wilsons sought leave to intervene in the case. R.6997-99. It noticed its motion for hearing on October 25, 2024—the same day the trial court had scheduled for entry of its final order. R.6997-98, 7001. In its motion to intervene, Wilsons asserted that it was "a necessary and indispensable party to this action and [stood] to be deprived of its property rights, without due process and to its great prejudice" as a result of the court's ruling. R.6997. Neither the motion nor Wilsons's memorandum in support identified a specific claim or defense that Wilsons would assert. *See generally* R.6985-98.

The Neighbors opposed intervention, pointing out that Wilsons was not in fact a necessary party, that it had not timely sought to intervene, and that it had not raised any claims or defenses that were germane to this case. R.7016-20. The Board took no position on the motion. R.6997, 10220.

4. The trial court denies intervention, finding that Wilsons's claims are not germane to the lawsuit and Wilsons had unduly delayed in moving to intervene.

The trial court addressed Wilsons's motion to intervene at the final-order hearing on October 25, 2024. R.10220-23. Wilsons presented no evidence. In a written order entered that day, the court denied Wilsons's motion on multiple independent grounds, finding the Neighbors' argument "persuasive and controlling." R.7178. The court ruled that Wilsons was not a necessary party, that the 30-day statute of limitations had run, and that Wilsons had unnecessarily delayed bringing its motion. R.7178.

5. The trial court enters final judgment.

In a separate written order that same day, the trial court entered its Final Order, holding:

> The EHO Zoning Amendment is void *ab initio*; and
>
> The County Board and the County of Arlington are hereby enjoined and prohibited from issuing permits for or approving applications of EHO Development pursuant to the void zoning amendment.

R.7177 (emphasis in original). The trial court never modified, vacated, or suspended the Final Order.

Twenty-one days later, Wilsons filed written objections to the order denying intervention. R.7265-66.[3]

6. Wilsons files its notice of appeal 49 days after entry of final judgment.

The Board filed its notice of appeal on November 22, 2024, within 30 days of the Final Order. R.7281-85. That initiated Record No. 1923-24 in the Court of Appeals.

Wilsons did not. Instead, it waited until December 13, 2024—49 days after entry of the Final Order—to file its notice of appeal. R.7286. That gave rise to Record No. 2122-24.

7. The trial court grants the Board's motion for a partial stay pending appeal.

After entering final judgment, the trial court granted the Board's motion for a partial stay of the Final Order pending appeal. R.7180. The Board argued, and the court agreed, that a partial stay would protect the interests of developers who had invested in properties for EHO

[3] Wilsons purported to file a second set of objections a week after that. Those second objections are irrelevant. The trial court lacked jurisdiction to rule on them because they were filed more than 21 days after the trial court had entered its final judgment. *See* Va. Sup. Ct. R. 1:1; R.7277-78.

development and who might wish to proceed with construction. R.7006-10. Thus, in a third, separate written order entered October 25 (the "Partial Stay"), the trial court ruled:

> 1. The Order of the Court of October 25, 2024 is hereby stayed pending appeal as to and exclusively to the forty-five EHO permits that have been issued prior to October 27, 2024.
>
> 2. This stay shall be subject [to] the following conditions:
>
> A. EHO permit holders that build a duplex, three-plex, four-plex, five-plex, or a six-plex housing unit shall provide a notice in the land records that a case is pending in the Court of Appeals with the following statement "To potential purchasers, please be advised that a lawsuit is on appeal to the Court of Appeals of Virginia that may void your zoning rights to this property and may result in your right to live in this property being eliminated."
>
> B. As a condition of this stay the county will ensure that this notice has been placed in the land records before additional permits on the property are issued.
>
> C. In the event an EHO permit holder elects to build a single-family home, this notice will not be necessary.
>
> D. Upon the Court of Appeals reaching a decision in this Matter, this notice may be removed.
>
> 3. The forty-five existing EHO permit holders shall be allowed to proceed to complete their projects provided they comply fully with the terms of this Order.

R.7180.

The Partial Stay was subject to various conditions, including that the County could not issue construction and related permits for existing EHO permit holders without ensuring that developers had placed language in the land records about the pending litigation. *Id.*; *accord* R.10398-99 ("[T]he County will ensure that this notice has been placed in the land records … ."). The court explained that this language was meant to notify potential purchasers that, if they bought an EHO dwelling, appellate decisions could result in their dwelling being in violation of Arlington's zoning laws. R.10400-01.

The Neighbors asked the trial court to modify the Partial Stay to ensure that its conditions applied to the Board (as opposed to nonparty EHO permit holders) and that they tracked the scope of the EHO Amendment itself. R.7222. The Board opposed the motion. R.7246-50.

After a hearing, the court modified the Partial Stay on November 13, 2024 (the "Amended Partial Stay"). R.7252-53. It explained that it was tweaking the stay to ensure that the description of EHO properties in the stay tracked the description of EHO properties in the EHO Amendment itself. R.10440-41. The court specified that its order would

"modify and replace the Order of Partial Stay dated October 25, 2024" with the following provisions:

> 1. The Final Order of the Court of October 25, 2024 is hereby stayed pending appeal as to and exclusively to the forty-five EHO permits that have been issued prior to October 27, 2024.
>
> 2. This Partial Stay shall be subject to the following conditions:
>
> A. EHO permit holders that build any structure allowed by EHO zoning that is the subject of this case, including but not limited to semidetached, townhouses, duplex, three-plex, four-plex, five-plex, or six-plex housing units, shall provide a notice in the land records that a case is pending in the Court of Appeals with the following statement "To potential purchasers, please be advised that a lawsuit is on appeal to the Court of Appeals of Virginia and then perhaps to the Supreme Court of Virginia that may void your zoning rights to this property and may result in your right to live in this property being eliminated."
>
> B. As a condition of this partial stay, the Defendant will ensure that this notice has been placed in the land records before additional permits on the property are issued.
>
> C. In the event an EHO permit holder elects to build a single-family home, then this notice will not be necessary.
>
> D. Upon the Court of Appeals reaching a decision and the Supreme Court of Virginia denying any Petition for Appeal in this matter, this notice may be removed. If the Supreme Court of Virginia grants a Petition for Appeal, this notice may not be removed until that appeal is finally resolved, including any reconsideration.

> E. The forty-five existing EHO permit holders shall be allowed to proceed to complete their projects provided they and the Defendant fully comply with the terms of this Order.
>
> F. The previous Order of Partial Stay dated October 25, 2024, is hereby replaced by this Order and is of no further force and effect.

R.7252-53. Neither the Partial Stay nor the Amended Partial Stay altered, changed, replaced, or otherwise addressed the final judgment in this case that the EHO Amendment is void *ab initio* and permanently enjoined.

Wilsons appears to have calculated its notice-of-appeal deadline from the date of the Amended Partial Stay, not the Final Order. *See* R.7286 (identifying November 13, 2024 as the date of the order appealed from).

8. The Court of Appeals holds that Wilsons timely appealed, and that the trial court abused its discretion in denying post-trial intervention.

The focus of litigation then shifted to the Court of Appeals. The Neighbors moved to dismiss Wilsons's appeal, Record No. 2122-24, for lack of jurisdiction because Wilsons's notice of appeal was untimely. 2122-R.16-32. Wilsons opposed the motion. 2122-R.37-49.

Wilsons then moved to intervene in the Board's timely appeal, Record No. 1923-24, or in the alternative, to consolidate the two appeals, or in the further alternative, to vacate the trial court's judgment and dismiss the appeal. 1923-R.44-61. The Neighbors opposed this motion, pointing out that the law-of-the-case doctrine barred Wilsons from intervening in the Board's appeal to challenge an unappealed ruling. 1923-R.66-89. The Board opposed the motion as "an improper collateral attack on the trial court's ruling." 1923-R.98-101.

A preliminary review panel of the Court of Appeals disagreed. It concluded it had jurisdiction over Wilsons's appeal, reversing the trial court's final judgment and injunction. But it did so on inconsistent and shifting grounds.

First, without allowing oral argument, and without consolidating the appeals, the panel issued an order in both appeals, reversing the trial court's judgment on the ground that Wilsons was a necessary party that must be joined. 1923-R.265-70; 2122-R.165-70.

The Neighbors then petitioned for panel or en banc rehearing. 1923-R.293-356; 2122-R.189-252. The Court of Appeals awarded panel

rehearing, withdrawing its order and allowing oral argument. 1923-R.389-90; 2122-R.289-90.

On rehearing, the Court of Appeals held that it had jurisdiction because Wilsons had timely appealed. The court reasoned that "the Partial Stay modified the Final Order's injunction against the Board by allowing the Board to issue additional permits to the 45 pre-existing EHO permit holders, and the Amended Partial Stay modified the Partial Stay's injunction by introducing more parties into the notice requirement." 1923-R.404.[4] On the Court of Appeals' reading, "the trial court did not merely stay the Final Order; it provided additional terms that changed the effect of the Final Order, modifying it for purposes of filing a notice of appeal." *Id.* The court further held that Wilsons was an "'aggrieved' party under Code § 17.1-405 'for purposes of' the stay orders." 1923-R.405.

The Court of Appeals then held that the trial court had abused its discretion in not allowing Wilsons to intervene. 1923-R.405-09. It

[4] Because the court issued the same opinion in both appeals, for readability this brief will cite only the opinion in Record No. 1923-24. The same opinion appears in Record No. 2122-24 at pages 300-10.

concluded that Wilsons had a "germane" claim or defense because factual allegations in the complaint (10 out of 342 paragraphs by the Court of Appeals' count) related to how developers would act under the EHO Amendment. *See id.* The Court of Appeals reasoned that only developers could properly respond to those allegations. 1923-R.408. The court ruled that "Wilsons Ventures sought a voice in a proceeding that could strongly impact property that they owned and had developed." 1923-R.408. Finally, the court ruled the trial court had erred by applying Code § 15.2-2285(F)'s 30-day time limit as a statute of limitations, because it was not a statute of limitations and it applied only to parties contesting a zoning decision. 1923-R.405-09.

The Court of Appeals did not identify a single claim or defense that Wilsons had raised. Nor did it address the fact that Wilsons only sought to intervene post-trial, and after the trial court had ruled. It also declined to discuss the trial court's decision to deny intervention due to Wilsons's unnecessary delay, which was an independent basis of its holding.

ARGUMENT

1. The Court of Appeals erred by finding that Wilsons filed a timely notice of appeal.

The Court of Appeals never had jurisdiction over Wilsons's appeal, Record No. 2122-24, because Wilsons's notice of appeal was untimely. In holding otherwise, the Court of Appeals misconstrued the Amended Partial Stay as modifying the Final Order, and as a result, held that the Amended Partial Stay was itself appealable. 2122-R.303-05.

A. Standard of Review

Whether a court has jurisdiction is a question of law reviewed de novo. *Johnson v. Johnson*, 72 Va. App. 771, 777 (2021). So is whether a particular order is a final judgment, *Zeng v. Wang*, 82 Va. App. 326, 341-42 (2024).

B. There is no appellate jurisdiction over Wilsons's appeal because Wilsons filed its notice of appeal 49 days after entry of the Final Order.

As a matter of black-letter law, "filing a timely notice of appeal is a mandatory prerequisite to an appellate court acquiring jurisdiction over a case." *Ghameshlouy v. Commonwealth*, 279 Va. 379 (2010); *Super Fresh Food Markets of Va., Inc. v. Ruffin*, 263 Va. 555, 563 (2002) ("Super Fresh's notices of appeal were filed well beyond that [30-day]

time frame and, thus, this Court lacks jurisdiction to consider any appeal from the judgment rendered in the August 23, 2000 order."); *Sch. Bd. of City of Lynchburg v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 556 (1989) (stating that the 30-day time period "is mandatory, not merely directory"). As the Court of Appeals recognized, the 30-day deadline for filing a notice of appeal is the same under this Court's Rules and the Court of Appeals' Rules. 2122-R.304; *see* Va. Sup. Ct. R. 5:9(a); Va. Sup. Ct. R. 5A:6(a).

Wilsons's appeal is untimely under a straightforward application of this Court's Rules and precedent. Rule 5A:3 explains that filing a motion for a new trial, a petition for rehearing, or a similar pleading will not extend the time for filing a notice of appeal "unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1, in which case the time for filing is computed from the date of the final judgment entered following such modification, vacation, or suspension."

Here, the Final Order was entered on October 25, 2024. R.7176-77. It granted complete relief, holding:

The EHO Zoning Amendment is void *ab initio*; and

> The County Board and the County of Arlington are hereby enjoined and prohibited from issuing permits for or approving applications of EHO Development pursuant to the void zoning amendment.

R.7177.

That conclusive, unequivocal judgment disposing of the entire case was the appealable final order in this case. A judgment is "final" when "it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment … ." Va. Sup. Ct. R. 1:1(b).

The trial court's judgment that the EHO Amendment is void *ab initio* has never been modified, suspended, or vacated. The Partial Stay and Amended Partial Stay simply preserved the status quo during appeal, subject to certain conditions. R.7180, 7252-53. Such limited, temporary relief pending appeal is the very definition of a nonappealable stay: "[A] stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *NAACP v. Commonwealth ex rel. Va. State Water Control Bd.*, 74 Va.

App. 702, 713 (2022). In other words, a stay suspends judicial alteration of the status quo. *Id.* That is exactly how the trial court used the stay below. R.7008 ("[A] limited stay of the Court's ruling pending appeal is the most appropriate way to preserve the status quo.").

It might be tempting to consider a stay pending appeal to be a suspension of the Final Order, resetting the appeal clock under Rule 5A:3. That reading would be mistaken. "A stay order merely postpones the date when a final judgment will be executed; it does not alter the substantive provisions of that final judgment." *Davidson v. Commonwealth*, 246 Va. 168, 171 (1993). It does not modify, suspend, or vacate the underlying judgment. *Id*. Thus, a stay order can be entered more than 21 days after entry of judgment. *Id.*; Va. Sup. Ct. R. 1:1B(3)(B). Suspension, by contrast, alters the final judgment itself, suspending its finality to allow for consideration of a motion to reconsider, a motion for a new trial, or a similar pleading. *See In re Commonwealth, Dep't of Corrs.*, 222 Va. 454, 463 (1981). A final judgment can be *suspended*, by contrast, only "for twenty-one days after the date of entry, and no longer." Va. Sup. Ct. R. 1:1(a).

So the November 13 Amended Partial Stay did not suspend the finality of the October 25 Final Order under Rule 1:1. Instead, it conditionally limited the enforceability of that judgment during the Board's appeal. The concept here is similar to a suspension bond under Code § 8.01-676.1, which suspends the execution of a judgment pending appeal. A suspension bond does not alter the underlying judgment, and it does not restart the deadlines for filing a notice of appeal.

That the Amended Partial Stay was entered within 21 days of the Final Order, while the trial court retained jurisdiction, changes nothing. The question under Rule 5A:3 is not whether the trial court could have suspended or modified the Final Order, but whether it actually did so. It did not. The Amended Partial Stay explicitly "modif[ied] and replace[d] the Order of Partial Stay dated October 25, 2024" — the Partial Stay, not the Final Order. R.7252. A court with plenary power that chooses to enter a stay has entered a stay; it has not modified its underlying judgment. Were the rule otherwise, every supersedeas bond, stay order, or adjustment thereto would silently reopen the underlying final judgment, reviving expired appeal deadlines. That would defeat the finality of judgments that Rule 1:1 is intended to secure.

Thus, Wilsons faced a 30-day deadline to file its notice of appeal under Rule 5A:6(a), which started running with entry of the Final Order on October 25, 2024. That deadline fell on Sunday, November 24, 2024, rolling over to Monday, November 25, 2024 under Code § 1-210. Yet Wilsons did not file its notice of appeal until December 13, 2024. R.7286. That notice of appeal was untimely, so the Court of Appeals lacked appellate jurisdiction over Record No. 2122-24. *E.g., Hutchins v. Talbert*, 278 Va. 650, 655 (2009).

C. The Court of Appeals misconstrued the Amended Partial Stay as silently modifying the Final Order and as otherwise constituting an appealable order.

The Court of Appeals concluded that it had appellate jurisdiction by holding that the Amended Partial Stay "superseded the Final Order's injunction," and that Wilsons thus was permitted to appeal from the it. 1923-R.405. That was wrong for three reasons.

First, the Amended Partial Stay is a temporary stay that did not modify any aspect of the Final Order. As noted above, the Final Order held that the EHO Amendment is void *ab initio*, permanently enjoining the issuance of permits and approval of applications under the ordinance. R.7177. The Amended Partial Stay said that "[t]he Final

Order of the Court of October 25, 2024 is hereby *stayed* pending appeal as to and exclusively to the forty-five EHO permits that have been issued prior to October 27, 2024." R.7252 (emphasis added). At no point did the trial court provide that the Amended Partial Stay modified, vacated, "superseded," or otherwise altered the Final Order to narrow the injunction's scope. *Contra* 1923-R.405; 2122-R.305. The Amended Partial Stay did not change who prevailed, what the court declared, or how its injunction operated.

Just the opposite, the trial court took pains to specify that the Partial Stay—not anything else—was the order that it was modifying: "[T]he Court shall modify and replace the Order of Partial Stay dated October 25, 2024. … The previous Order of Partial Stay dated October 25, 2024 is hereby replaced by this Order and is of no further force and effect." R.7252-53. It changed only the conditions of temporary relief from the enforceability of the Final Order pending appeal. The Court of Appeals was thus mistaken to conclude that the Amended Partial Stay "provided additional terms that changed the effect of the Final Order, modifying it for purposes of filing a notice of appeal." 1923-R.404.

Nor is the Amended Partial Stay itself an appealable final order under Code § 17.1-405. The Court of Appeals recently addressed this question in *Galiotos v. Galiotos*, 86 Va. App. 151 (2025). The court explained that when a party is aggrieved by a stay pending appeal, its recourse is to seek review in the then-pending appeal—not to file a new notice of appeal. *Id.* at 178. The Court of Appeals' jurisdiction is entirely statutory, and nothing in Code § 17.1-405 authorizes it to exercise appellate jurisdiction over an appeal from a stay. *Id.* What is more, "Rule 1:1B(a)(3) makes clear that the appellate court hearing the pending appeal is the one to review the trial court's rulings involving a stay pending appeal . . . ." *Id.* That is because once a notice of appeal is filed, the trial court and the appellate court have concurrent jurisdiction. *Id.* at 178-79. "Nothing in Rule 1:1B vests appellate jurisdiction in a different panel of the Court of Appeals from the one adjudicating the underlying appeal." *Id.* at 179.

On top of that, the *Galiotos* court explained, Code § 8.01-676.1(E)(1) explains that the trial court may modify security for suspension of execution of a judgment. *Id.* The statute says that any party aggrieved by the trial court's decision may request a review by the

appellate court before which the case is pending. *Id*. Finally, as a practical matter, commencing an entirely new appeal to challenge a trial court's stay ruling would take much longer than simply asking for review by the panel already hearing the pending appeal. *Id.*

*Galiotos'*s analysis is straightforward and compelling. It teaches that *if* Wilsons were a party, and *if* it were aggrieved by the Amended Partial Stay, its recourse would have been in the Board's pending appeal. As explained in the next two points, however, Wilsons was neither.

Second, the Court of Appeals erred by ruling that the Amended Partial Stay "directed the conduct of both the Board and Wilsons Ventures." 1923-R405. Wilsons has never been a party to this case. Contrary to the Court of Appeals' interpretation, the Amended Partial Stay directs the conduct of the Board, the relevant party to this litigation, which was responsible for issuing permits only as allowed by the Amended Partial Stay. R.7252. The trial court explained that the Amended Partial Stay would "help the [C]ounty to understand that the permit holder has to put this notice in. *And they have to have proof of*

that notice before they can issue any further permits. So it is instructive if nothing else." R.10442 (emphasis added).

Third, and relatedly, the Court of Appeals erred by holding that Wilsons was "aggrieved" by the Amended Partial Stay in the first place. 2122-R.305. No one disputes that Wilsons had the right to timely appeal the order denying intervention once the trial court entered the Final Order. *Bonanno v. Quinn*, 299 Va. 722, 732 (2021). But the Final Order was cemented and final as of October 25, 2024. If anything, Wilsons benefits from the Amended Partial Stay. It is an existing permit holder, and the Amended Partial Stay allows it to proceed with its projects. As a nonparty would-be intervenor, the only orders that Wilsons could be "aggrieved" by are the intervention order and the Final Order. It timely appealed neither.

2. The Court of Appeals erred by ruling that the trial court abused its discretion by denying Wilsons's motion to intervene.

Even if Wilsons had timely noticed its appeal, the trial court did not abuse its discretion in denying its post-trial motion to intervene. The Court of Appeals' decision to the contrary misread the law and

amounts to a de novo review, substituting the appellate court's judgment for the trial court's.

A. Standard of Review

Granting or denying a motion to intervene is within a trial court's discretion, but the intervenor must meet the requirements of Rule 3:14. *Hudson v. Jarrett*, 269 Va. 24, 33 (2005). This Court will also review a trial court's decision to proceed without a necessary party for an abuse of discretion, *Marble Techs. v. Mallon*, 290 Va. 27, 32 (2015), although whether a party is a necessary party in the first place is a question of law that it will review de novo, *Synchronized Const. Servs. v. Prav Lodging, L.L.C.*, 288 Va. 356, 363 (2014). When a decision is discretionary, the trial court enjoys a range of choices. Its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. *Galiotos v. Galiotos*, 300 Va. 1, 10 (2021). An abuse of discretion occurs only when reasonable jurists could not differ. *Id.* at 11.

B. The trial court correctly denied Wilsons's motion to intervene under Rule 3:14 because Wilsons has no germane claim or defense.

Intervention in the circuit court is governed by Rule 3:14, which says that "[a] new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding." A would-be intervenor must "intervene specifically as a plaintiff or as a defendant." *Hudson v. Jarrett*, 269 Va. 24, 32 (2005). And "for a stranger to become a party by intervention, he must 'assert some right involved in the suit.'" *Virginian-Pilot Media Cos. v. Dow Jones & Co. Inc.*, 280 Va. 464, 471 (2010). Rule 3:14's "history includes a strong adherence to limiting intervention to those parties who are legitimately plaintiffs or defendants . . . because the nature of their claim includes some right that is involved in the litigation." *Hudson*, 269 Va. at 34.

Wilsons did not specify whether it sought to intervene as a plaintiff or a defendant, and it did not identify a single claim or defense that it would assert. *See* R.6985-97. That threshold failure is dispositive. Rule 3:14 authorizes intervention only "to assert any claim or defense germane to the subject matter of the proceeding," and a

would-be intervenor who identifies none has not satisfied the Rule. The Court need go no further.

That Wilsons's interests may be affected by the outcome of this case does not equate to an actual claim or defense. It has no bearing on whether the Board passed an appropriate initiating resolution, reasonably considered the relevant factors under Code § 15.2-2284, legally delegated legislative authority, or complied with Code § 15.2-961. *Cf.* R.10190. The germane defenses to those claims are the defenses that the Board raised below, which were before the Court of Appeals in Record No. 1923-24. By the time Wilsons moved to intervene, they had been ably tried and ruled upon.

In denying intervention, the trial court independently based its decision on another glaring defect: Wilsons waited until after trial had concluded and after the trial court had announced its judgment before attempting to intervene. And even then, Wilsons waited another two weeks. R.6997-7000. This Court does not appear to have addressed the timeliness of post-trial and post-ruling interventions under Rule 3:14, although it has indicated that timeliness is committed to the trial court's discretion. *Comm. of Pet'rs for Referendum ex rel. Kerry v. City of*

Norfolk, 274 Va. 69, 73 (2007) (addressing timeliness of intervention and noting "[t]he circuit court's rationale reflects a reasoned evaluation of the circumstances").

Like the trial court in *Kerry*, the trial court below thoroughly considered the circumstances of Wilsons's motion, denying it because Wilsons moved to intervene far too late. Courts routinely deny motions to intervene in similar circumstances.[5]

[5] *See NAACP v. New York*, 413 U.S. 345, 365-69 (1973) (affirming denial of motion to intervene filed after defendant announced that it would not contest plaintiff's motion for summary judgment); *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) ("There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant.") (quoting 7C Wright & Miller, *Fed. Prac. & Proc.: Civil 2d* § 1916, at 444-45 (West 1986)); *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) ("The Union has offered no reason, and no reason is apparent from the record, why it could not have sought intervention prior to judgment. Accordingly, given the presumption that post-judgment motions to intervene will be denied, we affirm the District Court's denial of the Union's motion.").

C. The Court of Appeals misapplied Virginia law to hold that the trial court abused its discretion.

The Court of Appeals did not conduct any of the analysis above. Instead, it tried to rehabilitate Wilsons's faulty motion, ignoring the trial court's timeliness holding entirely. *See* 1923-R.406-09.

To start, the Court of Appeals incorrectly framed the Rule 3:14 inquiry. Rather than asking if Wilsons had articulated a germane claim or defense that it would assert, the Court of Appeals reframed the question as whether a germane claim or defense could possibly exist: "[W]hether Wilsons Ventures has 'any claim that [it] could assert as a plaintiff or defendant that is germane to the issues in the . . . case.'" 1923-R.407 (ellipses in original) (quoting *Hudson*, 269 Va. at 33). But that's not the test. *Hudson* teaches that the relevant inquiry is the one set out by Rule 3:14 (previously Rule 3:19): "A new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding." 269 Va. at 32. The Court of Appeals' quotation comes from *Hudson*'s case-specific conclusion emphasizing how badly the would-be intervenors had missed their marks: "The allegations of the intervenors

here fall far short of showing any claim that they could assert as a plaintiff or defendant that is germane to the issues in the tort case." *Id.* at 33.

Having misidentified the question presented, the Court of Appeals then scoured the record on its own to find a possible claim for Wilsons. It purportedly found one in the complaint, where the Neighbors "made allegations concerning the manner in which [Wilsons], as EHO permit holders, would develop land in Arlington County." 1923-R.408. By the court's lights, only developers could properly respond to those allegations. 1923-R.408. The court reasoned that the Neighbors' suit "could strongly impact property that [Wilsons] owned and had developed." *Id.* It even mused that "Appellee's suit, if successful, would destroy the value of the property that Wilsons's Ventures had acquired and built on under the challenged ordinance."[6] *Id.*

[6] The Court of Appeals did not explain how it was able to make this factual finding on appeal, especially given that Wilsons presented no evidence and the trial court did not hold an evidentiary hearing on the motion to intervene. To claim that the Final Order would "destroy the value" of Wilsons's property on this record is a serious overstatement. That single-family residences in Arlington are quite valuable is not just generally accepted; it was one of the driving factors behind the EHO Amendment.

Although the Court of Appeals concluded that "Wilsons Ventures' claim was germane," it never identified what that claim was. Instead, the court asserted that such a claim exists without defining it. *Id*. at 10.

This whole approach was misguided. Neither *Hudson* nor any other case decided by this Court invites appellate courts to comb through the record looking for a potential, conceivable claim or defense that a would-be intervenor could have raised had they thought of it. *E.g., Daily Press, LLC v. Commonwealth*, 301 Va. 384, 406 (2022) (intervenor had identified a "very narrow, specific purpose" for intervention); *Eads v. Clark*, 272 Va. 192, 196 (2006) (intervenor had identified only an unrelated claim for fees); *Hudson*, 269 Va. at 33 (explaining the would-be intervenors' proffered claims); *Layton v. Seawall Enters., Inc.*, 231 Va. 402, 406 (1986) ("We hold that the claim asserted by the interveners was not 'germane' to the subject matter of the … suit … .").

Just the opposite, this Court recently made clear that it is not "a Court's 'function to comb through the record … to ferret-out for ourselves the validity of [appellant's] claims.'" *Cappe v. Commonwealth*, 304 Va. 86, 91 (2025). Courts are passive arms of government. *United*

States v. Sineng-Smith, 590 U.S. 371, 376 (2020). "They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* (cleaned up). Under Virginia law, the burden falls on the would-be intervenor to identify and support the claims or defenses it would raise if permitted to intervene under Rule 3:14.

The Court of Appeals then concluded that Wilsons had a germane claim or defense because 10 paragraphs in the Neighbors' complaint related to developers. 1923-R.407-08. That is a non sequitur. The Neighbors stated no claim for relief against Wilsons or any other developer. They included contextual allegations concerning development to support the plausibility of their counts challenging the Board's failure to consider certain factors under Code § 15.2-2284. That would make those developers—at most—potential fact witnesses, not defendants. And the allegations in the complaint were superseded by evidence at trial. They do not provide a reasonable basis for identifying germane claims or defenses for a post-trial motion to intervene.

To put things in perspective, the trial court found in favor of the Neighbors on four counts. None of those counts have anything to do with developers' conduct. Whether the Board passed a proper initiating resolution (Count I), whether it reasonably considered certain statutory factors (Count III), whether it unlawfully delegated legislative authority (Count IV), and whether the EHO Amendment complied with Code § 15.2-961 (Count VII) are all questions about the Board's process and the EHO Amendment's text. Wilsons's testimony would have added nothing.

Even if Wilsons had identified a germane claim or defense, the trial court retained discretion to deny intervention as untimely. Wilsons waited through 17 months of well-publicized litigation, a five-day bench trial, post-trial briefing, and an oral ruling on the merits before seeking to enter the case. The trial court expressly relied on that delay. R.7178. The Court of Appeals did not hold that this independent discretionary ground was an abuse of discretion.[7]

[7] The Court of Appeals did fault the trial court for treating Code Section 15.2-2285(F)'s 30-day deadline as a statute of limitations, noting that it applied only to challengers. 1923-R.408. Even accepting

Rather than addressing the timeliness point, the Court of Appeals appears to have held that because Wilsons's unstated claim was germane, the trial court erred as a matter of law in denying intervention. 1923-R.405-10. But that is not how permissive intervention works. As *Hudson* established, stating a germane claim or defense is necessary, but not sufficient, for permissive intervention. *Hudson*, 269 Va. at 33 ("While intervention under [Rule 3:14] is within the discretion of the trial court, the intervention must meet the requirements of the Rule."). Trial courts retain the discretion to deny an untimely motion that otherwise satisfies the requirements of Rule 3:14. *See Kerry*, 274 Va. at 73. The Court of Appeals erred by treating the existence of a germane claim or defense as legally dispositive.

D. Wilsons is not a necessary party.

While the Court of Appeals explicitly declined to find that Wilsons was a necessary party, 1923-R.409-10, its reasoning nonetheless folded necessary-party considerations into the Rule 3:14 analysis, 1923-R.408.

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that, the Court of Appeals never addressed the trial court's independent ruling about undue delay.

Yet Wilsons is not a necessary party, and even if it were, the trial court would have been within its right to proceed in its absence.

A "necessary party" is a person interested in the subject matter of an action, who will be affected by its result. *Marble Techs. v. Mallon*, 290 Va. 27, 32 (2015). This case is a facial challenge to local legislation. When a party files such a suit, the necessary parties are the challenger and the local governing body. *See Friends of Clark Mt. Found., Inc. v. Bd. of Supervisors*, 242 Va. 16, 20-22 (1991) (addressing predecessor to Code § 15.2-2285(F)). If the absence of a necessary party is noted after the suit begins, the trial court generally should not adjudicate the controversy until the necessary party has intervened or been joined. *See id.* at 20-22. That said, whether to allow intervention and whether to proceed in the absence of necessary parties are both decisions committed to the trial court's discretion. *Hudson v. Jarrett*, 269 Va. 24, 33 (2005) (intervention); *Marble Techs. v. Mallon*, 290 Va. 27, 32 (2015) (necessary parties).

Wilsons has not cited any case from this Court or the Court of Appeals holding that a developer is a necessary party in a challenge under Code § 15.2-2285(F), where the subject matter of the suit is the

authority of the governing body to enact the relevant amendment. Wilsons just argues that its property rights were affected by the final decision in the proceeding. BIO 14-17; R.6985-97, 7265-66, 10197-209, 10215-19.

Yet by that measure, Wilsons is situated no differently from any other homeowner in the County. No developer, including Wilsons, had obtained an EHO permit before the 30-day deadline for filing suit under Code § 15.2-2285(F) expired. Wilsons did not even acquire its properties until after this lawsuit was pending.

For that reason, *Friends of Clark Mountain* cuts against Wilsons on both ends. It establishes that any additional necessary party should be joined before adjudication. Wilsons let that window close by waiting until after a five-day trial and a ruling on the merits—putting the timeliness of its request at issue, and giving the trial court an unassailable reason to deny its motion to intervene.

And on its facts, *Friends* does not suggest that a developer in Wilsons's position is a necessary party. *Friends* involved a challenge to the rezoning of a specific parcel and the granting of a special use permit. 242 Va. at 18. The Court assumed without deciding that the

owners of the tract and the company holding an option to buy it—the applicants for the challenged rezoning—were necessary parties. *Id.* at 19. This case is different. The Neighbors challenge a countywide legislative amendment, not a site-specific approval granted to a known applicant. When they filed their suit, no EHO permit holder existed and Wilsons had not yet acquired its properties. Treating Wilsons as indispensable would require challengers to join not just known applicants, as in *Friends,* but every homeowner, future purchaser, and potential EHO permit holder whose interests might be affected by a countywide zoning amendment. Nothing in *Friends* mandates that impossible result.

Even if Wilsons were a necessary party, that would not justify the Court of Appeals' decision. While a court should generally decide a case only when all necessary parties are before it, it has the discretion to proceed without a necessary party if (1) it is "practically impossible" to join a necessary party and the missing party is represented by other parties who have the same interests; (2) the missing party's interests are separable from those of the present parties, so the court can rule without prejudicing the missing party; or (3) a necessary party cannot

be made a party, but the court determines that the party is not indispensable. *Marble Techs.*, 290 Va. at 32.

Here, it would be practically impossible for the Neighbors to join every party who might potentially become a homeowner or EHO permit holder in Arlington County during the pendency of the case. In *Howell v. McAuliffe*, for example, this Court concluded that it would have been practically impossible to join the 206,000 convicted felons whose political disabilities were restored by the Governor's Executive Orders. 292 Va. 320, 337 (2016). But at least in *Howell*, the alleged necessary parties, though numerous, were identifiable. Here, when the Neighbors filed suit, there was no way for them to determine that Wilsons (or any other developer) might purchase property in the County, let alone that it might pursue an EHO permit.

And to whatever extent that Wilsons has interests in the EHO Amendment's validity, those interests are represented by the Board. "[W]hen a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013). The Board has ably defended the EHO Amendment at every stage of this proceeding. There was no need

to undo years of work to let Wilsons belatedly rehash arguments that the Board had already made.

* * *

The Court of Appeals was obviously troubled by Wilsons's situation, and it strained to reach what it considered a fair result. But in the context of a discretionary ruling, those fairness concerns are committed to the trial court. The trial court explicitly weighed them below. R.10220-21. It then fashioned a solution within the range of its available choices—not by reopening the judgment and throwing away 17 months of work, but by entering a stay that allowed EHO permit holders like Wilsons to continue their projects. That the Court of Appeals might have reached a different result were it the decisionmaker in the first instance does not mean that the trial court abused its discretion.

3. The law-of-the-case doctrine bars relief in Record No. 1923-24.

A. Standard of Review

This Court will review de novo whether the Court of Appeals was bound by the law-of-the-case doctrine. *Cole v. Commonwealth*, 294 Va. 342, 353 (2017).

B. Discussion

The Court of Appeals entered its final order in both Court of Appeals Record No. 2122-24 (Wilsons's appeal) and Court of Appeals Record No. 1923-24 (the Board's appeal). It cited no legal basis for awarding relief in Record No. 1923-24. The cases were not consolidated, and because Wilsons's notice of appeal was untimely, the law-of-the-case doctrine bars it from seeking recourse in the County's standalone appeal.

An unappealed legal decision becomes the law of the case, governing all subsequent proceedings. *Kondaurov v. Kerdasha,* 271 Va. 646, 658 (2006). Thus, "when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived her right to challenge that decision during later stages of the same litigation." *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 26

(2008) (cleaned up). Wilsons's right to appellate relief from the denial of its motion to intervene depended on Wilsons preserving and perfecting its own appeal. Because Wilsons's notice of appeal was untimely, no one appealed the denial of intervention. That ruling became the law of the case.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals in Record No. 2122-24 and dismiss Wilsons's appeal for lack of jurisdiction. The Court should also vacate the Court of Appeals' disposition of Record No. 1923-24 and remand for consideration of the Board's appeal on the merits.

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I certify that

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3. This brief complies with the word and page limits in Rule 5:26. It is 43 pages long and contains 8,210 words (excluding the cover page, table of contents, table of authorities, signature blocks, and certificate).

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