Clarke County Board of Zoning Appeals

MEETING AGENDA
Monday, February 27, 2023 (10:00AM)
Berryville/Clarke County Government Center
101 Chalmers Court, Berryville, VA
Main Meeting Room (second floor)

1) **Approval of Agenda**

2) **Organizational Meeting – Election of Officers (Chair & Vice Chair)**

3) **Organizational Meeting – 2023 Meeting Dates**

4) **Approval of Minutes – February 28, 2022**

5) **Other Business**

    a. **Reading Material**

    b. **Board Member Reports**

6) **Adjourn**

2023 APPLICATION CUT-OFF DATES BZA MEETINGS

MEETING DATE	APPLICATION CUT-OFF DATE
January 23rd	January 2nd
February 27th	February 6th
March 27th	March 6th
April 24th	April 3rd
May 22nd	May 1st
June 26th	June 5th
July 24th	June 27th
August 28th	August 7th
September 25th	September 4th
October 23rd	October 2nd
November 27th	November 6th
December 18th	November 27th
January 22nd 2024	*January 1st 2024*
February 26th 2024	*February 5th 2024*

Clarke County Board of Zoning Appeals

Meeting Minutes - DRAFT
Monday, February 28, 2022 – 9:00 AM
Berryville/Clarke County Government Center – Main Meeting Room

ATTENDANCE:			
Anne Caldwell (Chair)	✓	Alain Borel	✓
Howard Means (Vice Chair)	✓	Clay Brumback	X
Laurie Volk	X		

STAFF PRESENT: Jeremy Camp (Senior Planner / Zoning Administrator) and Kristina Maddox (Office Manager / Zoning Officer)

OTHERS: Alvin B. Poe, Jr and Kim Poe (applicants)

CALL TO ORDER: This being the first Board of Zoning Appeals (BZA) meeting of the year, Mr. Camp opened the Organizational Meeting at 9:07AM.

1. Organizational Meeting - Election of 2022 Officers – Chair and Vice-Chair

Mr. Camp asked for nominations for Chair for 2022. Mr. Means nominated Anne Caldwell. With no further nominations, the BZA voted 3-0-2 to elect Ms. Caldwell as Chair for 2022.

Motion to Approve the election of Anne Caldwell as Chair of the Board of Zoning Appeals for 2022:			
Caldwell	**AYE**	Borel	**ABSENT**
Means	**AYE (moved)**	Brumback	**AYE (seconded)**
Volk	**ABSENT**		

Chair Caldwell asked for nominations for Vice Chair for 2022 and nominated Howard Means for the position. With no further nominations, the BZA voted 3-0-2 to elect Mr. Means as Vice-Chair for 2022.

Motion to Approve the election of Howard Means as Vice Chair of the Board of Zoning Appeals for 2022:			
Caldwell	**AYE (moved)**	Borel	**ABSENT**
Means	**AYE**	Brumback	**AYE (seconded)**
Volk	**ABSENT**		

2. Approval of Minutes – April 19, 2021 Meeting Minutes

Chair Caldwell and Vice Chair Means noted several corrections as follows.

- Under page 2 of the meeting minutes and the second action item, add the word “is” to read “The property is located…”
- Remove the word “for” in the last sentence of the fourth action item.
- Change the period to a colon in the fifth action item on page 2 after the word “construction.”

- Remove one set of the words “per day” in the sixth action item.
- Better define the appeal in the seventh action item to read “appeal of the Zoning Officer’s decision found in the staff report.”
- Under Mr. Johnson on page 4 of the meeting minutes add “It was noted” under the first action item.
- Change “rebuilt” to “rebuild” under the third action item.
- Add a period after the word “issue,” remove the repeated word “that,” and remove the “s” in the word “obtains.”
- In the sixth action item, add the word “neighboring” after “numerous.”
- Add a period after the word “issue,” remove the word “when” and replace it with “following” to start a new sentence, change “was it” to “it was,” and remove “than” and replace it with “and that.”
- Under the first header on page 5, remove the word “from” the first bulleted item.
- Add the word “include” to replace the words “there are” within the third item under Mr. Mitchell.
- Remove the word “criteria” and the comma in the fourth item under Mr. Mitchell.
- Add a colon after the word “practice” in the first sentence of the first bulleted item on page 7.
- Start the second sentence of that bulleted item with the word “he” so that it reads “he is not aware” on page 7.
- In the very last sentence of the meeting minutes, change “non-profits” to “non-profit.”

The BZA voted 3-0-2 to approve the April 19, 2021 Board of Zoning Appeals meeting minutes with corrections as stated.

Motion to approve the April 19, 2021 Board of Zoning Appeals meeting minutes were approved with corrections as stated:			
Caldwell	**AYE**	Borel	**ABSENT**
Means	**AYE (moved)**	Brumback	**AYE (seconded)**
Volk	**ABSENT**		

3. BZA-22-01a, Alvin B. Poe, Jr.

Chair Caldwell introduced the appeal to the Board of Zoning Appeals (BZA) and stated that Mr. Poe is requesting a variance for construction work on a non-conforming building at 214 White Post Road (Tax Map 28-A-61) in the White Post district with a zoning classification of Neighborhood Commercial. She stated the property is non-conforming due to its setbacks and that the applicant requests a variance to the setback requirements of the neighborhood zoning district for a front porch and rear stoop roofs.

Mr. Camp added that the applicant would like to construct a 6’x24’ front porch attached to the front facade of the building. He said that it is a historic, non-conforming building and that any expansion of such a building requires a variance. Specifically he said it is non-conforming due to the site’s setback requirements in the neighborhood commercial district and stated there is a 25-foot for side property lines that adjoin residential zoned properties. He noted the Historic Preservation Committee reviewed and approved the case contingent upon the BZA variance.

Mr. Camp explained a checklist that was established by the BZA regarding tier-based criteria that has to be considered on an application. He said following the first tier, in which a case needs to meet one of three criteria, it has to meet all of the criteria on the second tier. He said Staff has commented regarding each of those discussion points and that he could elaborate on them if there were any questions. He said Staff concluded that the criteria was met and recommend approval of the application.

Having heard the summary of the application, Chair Caldwell opened the public hearing at 9:23AM.

Alvin B. Poe, Jr (applicant) said he bought the property and fixed the interior as the floor had collapsed. He said he added a porch to keep it from deteriorating further but was then notified by a nearby Historic Preservation Committee member that he might need approval. He stopped the work and contacted Mr. Camp.

There being no further comments or questions from the Board or audience, Chair Caldwell closed the meeting and entertained a motion.

The BZA voted 3-0-2 to approve the Zoning Administrator's determination for **BZA-22-01a**, Alvin B. Poe, Jr.

Motion to approve the Zoning Administrator's determination for BZA-22-01a, Alvin B. Poe, Jr:			
Caldwell	**AYE**	Borel	**ABSENT**
Means	**AYE (moved)**	Brumback	**AYE (seconded)**
Volk	**ABSENT**		

4. Other Business

None.

Adjournment

Motion to adjourn the BZA meeting at 9:35AM was approved by consensus.

Motion to adjourn the February 28, 2022 Board of Zoning Appeals meeting:			
Caldwell	**AYE**	Borel	**ABSENT**
Means	**AYE (seconded)**	Brumback	**AYE (moved)**
Volk	**ABSENT**		

Howard Means, Vice Chair

Kristina Maddox, Clerk

Chapter 13

Variances

13-100 Introduction

A variance is a "reasonable deviation from" certain provisions of a locality's zoning ordinance. *Virginia Code § 15.2-2201*; *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). Specifically, a *variance* is defined as:

> [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.

Virginia Code § 15.2-2201. The 2015 amendments to the definition replaced the phrase "unnecessary or unreasonable hardship to the property owner" with "unreasonably restrict the utilization of the property." The extent to which this amended definition, as well as the changes to the criteria for granting a variance (discussed in section 13-600), have changed the law of variances is still unfolding. However, the concepts of regulations *unreasonably restricting* utilization of the property or causing *hardship* remain and these are still high bars to satisfy.

A variance "allows a property owner to do what is otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). Stated a different way, variances allow someone to do something "in violation of the ordinance." *Bell, supra*. By comparison, special use permits (which include special exceptions and conditional use permits) do not allow a landowner to do something in violation of the zoning regulations but, instead, allow the property to be developed in a way consistent with those regulations, but only with approval of the governing body following a case-specific review. Therefore, a governing body desiring to retain legislative control of its zoning ordinance should consider incorporating flexibility into zoning regulations and expanding the availability of special use permits.

13-200 The nature of variances

Historically, variances provided an administrative remedy in those rare circumstances when a facially valid zoning ordinance may prove to be unconstitutional (*e.g.*, a regulatory taking of the property without just compensation) in its application to a particular property, and to do so without destroying the viability of the locality's zoning ordinance. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance process furnished "elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner." *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976). Under the standards and criteria in effect today, variances are available even when the restrictions on the use of property are not such that they have constitutional implications. Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994). A variance ensures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57, 278 S.E.2d 814 (1981).

A variance cannot confer on a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra*. A variance also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008). In addition, a variance may not allow a change in use, which only may be accomplished "by a rezoning or by a conditional zoning." *Virginia Code § 15.2-2201; Tolman v. Richmond*

Board of Zoning Appeals, 46 Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district. The courts may revise some of these longstanding principles as the case law applying the current variance laws develops.

Five Things to Know About Variances
• Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance. • Variances should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications. • Variances run with the land, and the consequences of a board of zoning appeals' ("BZA") decision to grant a variance may last for years. • Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a variance from the same restriction in the same neighborhood if there are factual differences. • If there is an existing reasonable use of the property, neither an unreasonable restriction on the property's use nor a hardship exists and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are addressed in section 13-800.

13-300 The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. *Virginia Code § 15.2-2309(2).*

When considering an application for a variance, a BZA is acting in an administrative capacity and, under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

13-400 The application

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. *Virginia Code § 15.2-2310.* Applications are made to the zoning administrator. *Virginia Code § 15.2-2310.* Before a variance application is considered by the BZA, the application and accompanying maps, plans, or other information must be transmitted to the secretary of the BZA, who must place the matter on the docket. *Virginia Code § 15.2-2310.*

13-500 Procedural requirements prior to and during a hearing on a variance application

Several procedural rules apply to the conduct of a hearing on a variance application:

- Scheduling the hearing on the variance application: The BZA must "fix a reasonable time for the hearing" on a variance. *Virginia Code § 15.2-2312.*

- Notice of the hearing: The BZA must "give public notice thereof as well as due notice to the parties in interest."

Virginia Code § 15.2-2312. Notice of the hearing must be provided as required in Virginia Code § 15.2-2204. *Virginia Code § 15.2-2310*.

- Before the hearing; contact by parties with BZA members: The *non-legal staff* of the governing body, as well as the applicant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA before the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions before a public meeting to which the applicant, landowner, or their agent or attorney are all invited. The *non-legal staff of the governing body* is "any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542]." *Virginia Code § 15.2-2308.1(A) and (C)*. The legal staff of a governing body is not similarly prohibited from having *ex parte* communications with BZA members.

- Before the hearing; sharing of locality-produced information: Any materials relating to a variance, including a staff recommendation or report furnished to a BZA member, must be available without cost to the applicant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the applicant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code § 2.2-3700, et seq.*). *Virginia Code § 15.2-2308.1(B)*.

- At the hearing; the right to equal time for a party to present its side of the case: The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code § 15.2-2308(C)*.

- At the hearing; the burden of proof is on the applicant: The applicant has the burden of proof to prove by a preponderance of the evidence that their application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria in Virginia Code § 15.2-2309(2). *Virginia Code § 15.2-2309(2)*.

- Decision: The BZA *must grant* a variance if the evidence shows that the strict application of the terms of the zoning ordinance would "*unreasonably restrict* the utilization of the property or that 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 "(i) 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; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) 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; (iv) 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 (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application." *Virginia Code § 15.2-2309(2)*. *See section 13-600 for further discussion.*

- Time for the decision: The decision must be made within 90 days. *Virginia Code § 15.2-2312*. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the 90-day period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

- Required vote: The concurring vote of a majority of the BZA's membership is necessary to grant a variance. *Virginia Code § 15.2-2312*. This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

- Explaining the basis for the decision: A BZA may grant a variance only if the evidence *shows* that all of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion so that the circuit court can properly adjudicate the issues if there is an appeal.

13-600 Criteria to establish a right to a variance

The criteria that the BZA must consider when reviewing an application for a variance are referenced in section 13-500 (under "*Decision*"). The reader should anticipate that most variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists and, unless BZAs and the courts give very relaxed readings of those criteria, there should be few variance applications that actually satisfy the criteria to establish the right to a variance.

13-610 The strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that 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 or alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.

The evidence must show "that the strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that 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." *Virginia Code § 15.2-2309(2)(¶2)*. If a variance is necessary to accommodate a person with a disability, the evidence must show that the granting of a variance is necessary to alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability. *Virginia Code § 15.2-2309(2)(¶2). For a discussion of the hardship arising for persons with disabilities, see section 13-820.*

13-611 Unreasonable restriction on the utilization of the property or a hardship due to a physical condition relating to the property or improvements

The key criteria that must be satisfied for a variance to be granted is whether there is an *unreasonable restriction* on the utilization of the property or a *hardship* due to a physical condition relating to the property or improvements. Of those two criteria, the *hardship* that may arise if a variance is not granted has been by far the more commonly analyzed criterion. That may change under the current variance laws because of a peculiarity in the required showing for a hardship. Under either the *unreasonable restriction* or *hardship* criterion, the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the "standard" that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, an applicant seeking a variance under the *hardship* criterion must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be high standard to satisfy).

There are few, if any, cases where the *unreasonable restriction* criterion has been analyzed or formed the basis for granting a variance. The word *unreasonable* cannot be overlooked during the analysis. Something is *reasonable* when it is "[f]air, proper, or moderate under the circumstances; sensible." *BASF and James City County v. State Corporation Commission*, 289 Va. 375, 770 S.E.2d 458 770 S.E.2d 458 (2015). Something is *unreasonable* if it, in the context here, is "absurd, inappropriate," "exceeding the bounds of reason or moderation," or "unconscionable." *Webster's Third New International Dictionary (2002)*. If an application for a variance is based on the criterion that a restriction is *unreasonable*, the locality should consider whether the restriction – the regulation – should be amended or repealed because unreasonableness raises an issue of whether the regulation is constitutional or facially valid.

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA incorrectly decided that a 35-foot rear-yard setback was not an unreasonable restriction where the setback prevented the petitioners from adding a screen porch that would extend into the setback. The 2,124 square-foot house was built in 1959 on a corner lot and the house had a diagonal footprint on the lot. There

also were utilities and other setbacks that limited extension into other areas on the lot. Although the rear-yard setback was a restriction, the court engaged in no meaningful analysis as to why the 35-foot rear yard setback was *unreasonable* beyond the fact that the setback did not allow the petitioners to do what they wanted to do.

The *hardship* criterion has experienced a profound evolution since 2009. Before 2009, the criterion called for an *undue hardship approaching confiscation* – language that is tantamount to circumstances approaching a regulatory taking of private property for a public use requiring compensation. In 2009, the criterion was amended to require the applicant to merely show an *undue hardship*, though the BZA still had to find an undue hardship approaching confiscation. Beginning in 2015, Virginia Code § 15.2-2309(2) merely requires a *hardship* due to a physical condition relating to the property or improvements. In *In re December 12, 2019 Decision of Board of Zoning Appeals of City of Chesapeake*, 105 Va. Cir. 54 (2020), the trial court affirmed the decision of the BZA granting a variance, concluding that the record supported the BZA's finding of a hardship. In rejecting the petitioner neighbor's arguments based on pre-2015 variance law that imposed a higher *hardship* threshold, the court said the following: "This Court must give effect to the removal of the language [that had been in the prior variance law]; the Court 'will not construe legislative action in a manner that would ascribe to the General Assembly a futile gesture. Legislative amendments are presumed as intended to effect a change in the law. . . We will not read into the statute language which the legislature purposefully deleted.'" *Shaw v. Commonwealth,* 9 Va. App. 331, 334 (1990)."

13-612 The physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The attributes composing the *physical condition of the property* are not described in either the definition of *variance* in Virginia Code § 15.2-2201 or in the variance elements in Virginia Code § 15.2-2309(2). However, the reader should consider the property's narrowness, shallowness, size, shape, exceptional topographic conditions, or any other similar physical conditions. These conditions, in effect, define the *hardship* the BZA must find in order to grant a variance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The attributes of any *improvements* on the property existing on the effective date of the zoning ordinance may also be considered, an element that was added in the 2015 amendments. The effect of this change is seen in *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), where the presence of and limitations caused by utilities on the lot affected the trial court's decision to hold that the BZA erred when it did not grant a variance to the petitioners.

13-620 The property for which the variance is being requested was acquired in good faith

The evidence must show that "the property for which the variance is being requested was acquired in good faith." *Virginia Code § 15.2-2309(2)(¶2(i)).*

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner's knowledge that the previous owner of the property had been denied a variance does not affect "good faith" status. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. *Spence, supra.*

13-630 Any hardship was not created by the applicant for the variance

The evidence must show that "any hardship was not created by the applicant for the variance." *Virginia Code § 15.2-2309(2)(¶2(i)).* This appears to be similar to the prior standard that prohibited *self-inflicted* hardships, and the cases below were evaluated under that standard.

The situation where the applicant has created a hardship would arise when an owner violates a provision of the

zoning ordinance and then seeks a variance to provide relief from the unlawful act. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). Following are some examples where the court considered whether a hardship was self-inflicted:

- To correct zoning violation; reliance on erroneous boundary markers: Hardship was self-inflicted where the owners constructed a house in violation of side yard setback requirements, although done inadvertently in reliance on misplaced property line markers. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (reliance on statement by homeowners' association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line).

- To correct zoning violation: Hardship was self-inflicted where the owner continued construction of an apartment over an existing garage in violation of the zoning ordinance after knowledge and warning of the likely consequences of her unlawful conduct. *Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959).

- Knowing need for variance: Hardship was not self-inflicted where the owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The standard must be satisfied regardless of whether the hardship was created intentionally or inadvertently. It is an open question as to whether the acts of a contractor or some other third party will be attributed to the *applicant*.

13-640 Granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area

The evidence must show that "granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area." *Virginia Code § 15.2-2309(2)(¶2(ii)).*

The BZA must consider the effect that granting the variance may have on nearby properties. See *Board of Zoning Appeals of City of Chesapeake v. Glasser Bros. Corp.*, 242 Va. 197, 408 S.E.2d 895 (1991). For example, in *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993), granting a variance would have required three adjacent lots to provide an additional 25 feet of front yard where they abutted a pipestem lot line or driveway pavement. The court concluded that the BZA failed to consider the potentially detrimental impact the granting of the variance would have on the future development of the three lots.

The prior version of Virginia Code § 15.2-2309(2) also required consideration of whether the "character of the district" would be changed. The elimination of that broader consideration may open the door for variances that might change the character of the district by, for example, allowing a tall building or the encroachment of a building into a front yard. Perhaps the theory of the new law is that a single variance cannot change the character of a district, and a series of variances is needed to change the character of a district. The issue of a series of variances is addressed in the criterion in section 13-650.

13-650 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

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." *Virginia Code § 15.2-2309(2)(¶2(iii)).*

An owner's showing that the special condition of the property and the resulting hardship are non-recurring is of considerable importance in determining the propriety of the variance. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (in determining that a variance from setbacks was improperly granted, the Court rejected the

argument that the historic overlay district regulations were intended to apply only to old buildings and granting a setback variance for the proposed new building would render the zoning ordinance meaningless; rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of the lots in the area were even more shallow yet they complied with the zoning ordinance and the piecemeal granting of variances would nullify the zoning regulations; and, there was "no factual support" for the claim that the condition was unique since all lots in the area must comply with the base and overlay district regulations and the issue must be addressed legislatively).

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA erred when it denied the petitioners' variance that would have provided relief from a 35-foot rear yard setback that prevented the petitioners from adding a screened porch that would extend into the setback. The BZA's conclusion that the setback issue was recurring and could be addressed through a zoning text amendment was based on the 35-foot rear yard setback and its effect on the residents of the zoning district being restricted from having screened porches, which had a greater setback than open decks. The court rejected that reasoning because the BZA failed to base its decision on whether the *condition or the situation of the property* was of so general or recurring that it could be resolved by amending the zoning ordinance. The court said that this issue had to be understood in the context of the petitioners' lot being a corner lot that was wider than deep, with a house having a diagonal footprint, and with expansion to allow a screened porch into other areas on the lot constrained by utilities and other setbacks. Given the apparently unique condition or situation of the property at issue, the court concluded that the condition or situation was not general or recurring, and therefore a legislative solution was not reasonably practicable.

Why are variances for general or recurring problems prohibited? A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. If there is a problem with the zoning ordinance, that problem needs to be addressed legislatively. *Martin, supra.* As the Virginia Supreme Court has said, variances are an "administrative infringement upon the legislative prerogatives of the local governing body." *Packer v. Hornsby*, 221 Va. 117, 123, 267 S.E.2d 140, 143 (1980). Thus, a legislative solution is always preferred over the piecemeal granting of variances. In *Hendrix v. Board of Zoning Appeals of the City of Virginia Beach*, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981), the Virginia Supreme Court said that "[t]he power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body." The Court added that using variances to resolve these problems when a legislative solution is reasonably practicable is prohibited "because the piecemeal granting of variances could 'ultimately nullify a zoning restriction throughout [a] zoning district' (internal citation omitted)."

13-660 Granting the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property

Granting a variance may not "result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property." *Virginia Code § 15.2-2309(2)(¶2(iv)).* This element overlaps the definition of *variance*, which provides that a *variance* does "not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning." *Virginia Code § 15.2-2201.* Use variances have been prohibited in Virginia since 1988. This element is also directly related to the scope of the regulations which may be varied, which are limited to those pertaining to 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." *Virginia Code § 15.2-2201.*

13-670 The relief or remedy sought by the variance application is not available through a special exception or a zoning modification at the time of the filing of the variance application

The "relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to [Virginia Code § 15.2-2309(6)] or the process for modification of a zoning ordinance pursuant to subdivision [Virginia Code § 15.2-2286(A)(4)] at the time of the filing of the variance application." *Virginia Code § 15.2-2309(2)(¶2(v)).*

This provision is consistent with those cases explaining that a variance "allows a property owner to do what is

otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance is only a remedy of last resort.

13-680 The variance is not contrary to the purpose of the ordinance

Virginia Code § 15.2-2309(2) requires that the evidence show not only the elements discussed in sections 13-610 through 13-670, but also that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201. The definition of *variance* provides that it shall not be "contrary to the purpose of the ordinance." *Virginia Code § 15.2-2201*.

For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed. As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

13-690 The variance application must meet the standard for a variance as defined in Virginia Code § 15.2-2201

Virginia Code § 15.2-2309(2) requires that the evidence show that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201.

Whether the applicant is seeking a variance under either the *unreasonable restriction* or *hardship* criterion in Virginia Code § 15.2-2309(2), the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the "standard" that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, an applicant seeking a variance under the *hardship* criterion in Virginia Code § 15.2-2309(2) must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be a high standard to satisfy). This issue is also discussed in section 13-611 as part of the discussion of the *unreasonable restriction* and *hardship* criteria.

13-700 Consideration of a variance application; matters the BZA may and may not decide

A BZA acts in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004).

13-710 The BZA acts with discretion, to a point

Within the context of the applicant's burden of proof to show by a preponderance of the evidence that it has satisfied the criteria for granting a variance, the BZA must exercise its discretion with regard to the particular facts of the application, including the precise extent of the relief sought. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). In the performance of this duty, the BZA is "clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily." *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960); *see also Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959). "Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals." *Martin v. City of Alexandria*, 286 Va. 61, 69, 743 S.E.2d 139, 143 (2013).

However, if the standards and criteria for granting a variance are satisfied, Virginia Code § 15.2-2309(2) states that the BZA *must* grant the variance.

13-720 The BZA should explain its decision

Under the prior law, the Virginia Supreme Court said repeatedly that, if the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980); *see also Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005). A BZA is no longer required to state *findings*; however, a BZA may grant a variance only if the evidence *shows* that all the standards and criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

13-730 Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied

Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk, or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance.

In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court's opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. An attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court's opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

13-740 The BZA may impose conditions

In granting a variance, a BZA may impose conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2).* Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2).* Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance is required. *Virginia Code § 15.2-2309(2). See section 13-820 for authority to condition variances to accommodate persons with disabilities for as long as the need for the variance exists.*

13-800 Special situations: condominium conversions, the Americans with Disabilities Act, the Fair Housing Act, the National Flood Insurance Program

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least three special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

13-810 Condominium conversions

Virginia Code § 55.1-1905(E) provides in part that localities may provide by ordinance that a proposed conversion condominium that does not conform to the zoning, land use, and site plan regulations obtain a variance

before the property becoming a conversion condominium. The BZA must grant the variance "if the applicant can demonstrate to the reasonable satisfaction of the [BZA] that the nonconformities are not likely to be adversely affected by the proposed conversion." *Virginia Code § 55.1-1905(E).*

13-820 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (*e.g.*, its zoning regulations and the criteria for granting a variance in Virginia Code § 15.2-2309(2)) so as not to discriminate against disabled persons.

Virginia Code § 15.2-2309(2) expressly recognizes modifying zoning regulations to accommodate persons with disabilities by allowing variances to "alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability." Virginia Code § 15.2-2309(2) continues: "Any variance granted to provide a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability may expire when the person benefited by it is no longer in need of the modification to such property or improvements provided by the variance, subject to the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq.*), as applicable. If a request for a reasonable modification is made to a locality and is appropriate under the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq.*), as applicable, such request shall be granted by the locality unless a variance from the board of zoning appeals under this section is required in order for such request to be granted."

13-830 National Flood Insurance Program

Localities participating in the National Flood Insurance Program are required to adopt floodplain management regulations required by federal law either as part of its zoning ordinance or otherwise. *44 CFR § 59.1 et seq.*

A locality's floodplain management regulations must include a provision that provides a procedure and standards for variances for development in the floodplain. A landowner may be eligible for a variance under the floodplain management regulations in two circumstances: (1) for new construction or substantial improvements where nearby structures were constructed below the base flood elevation, generally for parcels less than ½ acre in size; and (2) for new construction, substantial improvement, or development that is required for water-dependent facilities. *44 CFR § 60.6*. Encroachment standards and construction standards specific to the floodplain are among the standards that may be varied. *44 CFR § 60.6*. The findings required to be made by the BZA include a finding substantially similar to the hardship standard applicable to variances considered under Virginia Code § 15.2-2309(2), as well as a finding that the variance will not result in unacceptable or prohibited increases in flood heights. *44 CFR § 60.6*. The BZA is also required to consider a number of factors related to the impact of the variance, if granted. *44 CFR § 60.6*.

13-900 Modifications

Virginia Code § 15.2-2286(A)(4) enables localities to authorize zoning administrators to review and approve *modifications* from zoning regulations. A *modification* is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements.

13-1000 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314.* Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court's decision in *Friends of the Rappahannock v. Caroline County*, 286 Va.

38, 743 S.E.2d 142 (2013).

13-1010 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314*. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the "official filing date," which was a date specified in the BZA clerk's letter that was eight days after the BZA voted on the appeal).

The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

13-1020 Nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 "has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance." *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after being served with the writ of certiorari. *Virginia Code § 15.2-2314*. The necessary parties in a case challenging a BZA decision are the governing body, the landowner, and the applicant before the BZA (assuming the latter is different from the landowner). *Virginia Code § 15.2-2314*. The governing body must be named in the petition within the 30-day appeal period. *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017). In *Boasso*, the petitioner appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, the petition did not name the city as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city had to be named in the petition within the 30-day period, or whether the petitioner could add the city as a necessary party by amending the petition after the 30-day period had run. The trial court granted the city's motion to dismiss the petition because the city had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality's governing body that "is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition." In *In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 88 Va. Cir. 114 (2014), the trial court concluded that the failure to serve the governing body with the petition may implicate the provisions of Virginia Code §§ 8.01-275.1 and 8.01-277, but would not constitute grounds for dismissing the case under a motion to dismiss for failing to name a necessary party because the county was included in the style of the case). The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*.

The court's role is to determine whether the BZA's *decision* was correct. This limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity or constitutionality of the ordinance or statute underlying the BZA's decision. *City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. *See Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra.*

13-1030 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions on variance applications, the decision of the BZA is presumed to be correct. *Virginia Code § 15.2-2314*. The petitioner may rebut that presumption by proving by a preponderance of the evidence, including the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA's decision. *Virginia Code § 15.2-2314*. If the BZA's decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code § 15.2-2314*. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code § 15.2-2314*. Any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.

Chapter 15

Appeals of Decisions by Zoning Officials to the Board of Zoning Appeals

15-100 Introduction

A board of zoning appeals ("BZA") has the power and duty to consider a variety of matters. Some of those matters originate with the BZA, such as applications for special use permits (see Chapter 12) and variances (see Chapter 13). The procedures and standards applicable to those matters are covered in those respective chapters. Other matters originate with either the zoning administrator or other administrative officers (collectively, the *zoning administrator*), and they come to the BZA in the nature of an appeal from that zoning official's decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*). *Virginia Code § 15.2-2309*. This chapter focuses on appeals of those decisions to the BZA.

The range of issues that the zoning administrator may be asked to resolve in a decision, and which may be appealed to the BZA, include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with lot size, setback, height, bulk, or other requirements.
- Whether a use or structure complies with the zoning ordinance or is nonconforming.
- Whether an owner has vested rights.

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a *thing decided. (see Chapter 14 for further discussion of the thing decided rule).*

15-200 Standing to appeal

Any person aggrieved, and any officer, department, board, or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision, or determination (to repeat, collectively, a *decision*) made by any other administrative officer in the administration or enforcement of the state zoning laws, the locality's zoning ordinance, or any modification of zoning requirements pursuant to Virginia Code § 15.2-2286, may appeal the decision to the BZA. *Virginia Code § 15.2-2311(A).*

To have a right to appeal a decision, a person who is not affiliated with the locality must be a *person aggrieved* by the decision. *Virginia Code § 15.2-2311(A)*. The meaning of *aggrieved* is settled under Virginia case law:

> . . . [I]n order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest" . . . The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Virginia Marine Resources Commission v. Clark, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011), quoting *Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach*, 231 Va. 415, 419-420, 344 S.E.2d 899, 902-903 (1986); *see Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994); *Mann v. Loudoun County Board of Supervisors*, 75 Va. Cir. 24 (2008). Organizations that neither own nor occupy any real

property, nor hold any right that would be affected by a decision, are not persons aggrieved. *Pearsall v. Virginia Racing Commission*, 26 Va. App. 376 (1998).

Mere proximity to the parcel that is the subject of the appeal alone is insufficient to establish standing; a *particularized harm* must exist. *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013) (to allege standing, proximity to the subject property, alone, is insufficient; instead, a plaintiff must allege sufficient facts showing harm to some personal right or property right different than that suffered by the public generally). This standard applies to appeals of zoning decisions to the BZA. *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County,* 89 Va. Cir. 345 (2014). The alleged harm also cannot be speculative. In *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County,* the zoning administrator determined that a proposed warehouse was part of a "public benefit use" that could be allowed by special use permit, and not a prohibited "storage" use. The trial court concluded that the neighbor's alleged harm that the decision changed the nature of their residential neighborhood with resulting visual impacts, increased traffic flow, and noise from truck deliveries, and the need for increased vigilance, was "speculative" and insufficient to establish standing. The court noted that the proposed warehouse still required a special use permit from the board of supervisors, and until that board approved the special use permit, it was "impossible to know what harms, if any, might result."

15-300 Notice of the decision and perfecting an appeal

An appeal must be filed within 30 days after the decision is made. *Virginia Code§ 15.2-2311(A); see Voorhees v. County of Fairfax Board of Zoning Appeals*, 2009 Va. Cir. LEXIS 84, 2009 WL 1269384 (2009) (BZA did not err in denying appeal as untimely where zoning approval of grading plans was made on April 20, and the petitioner's appeal was not filed until May 23; failure of petitioners to receive notice of zoning approval does not trigger any due process rights where notice of the decision was not required by state law or county ordinance).

Written notice of a zoning violation or a written order of the zoning administrator must include a statement informing recipients that they may have a right to appeal the decision within 30 days in accordance with Virginia Code § 15.2-2311, and that the decision will be final and unappealable if it is not appealed within 30 days. *Virginia Code§ 15.2-2311(A).* The notice of the zoning violation or written order must state that the applicable appeal fee and explain where additional information may be obtained regarding the filing of an appeal. *Virginia Code§ 15.2-2311(A).* The appeal period does not begin until the statement is given and the zoning administrator's written order is sent by registered or certified mail to, or posted at, the last known address or usual place of abode of the property owner or its registered agent, if any. *Virginia Code§ 15.2-2311(A).*

A locality's zoning ordinance may provide for an appeal period of less than 30 days, but not less than 10 days, for short-term recurring violations pertaining to temporary or seasonal commercial uses, parking commercial trucks in residential zoning districts, or maximum occupancy limitations on residential dwelling units. *Virginia Code§ 15.2-2286(A)(4).*

The failure to file a timely appeal results in the official determination becoming final and binding – a *thing decided*, at least in a subsequent civil court proceeding.

At least one trial court has concluded that an appeal to the BZA pursuant to Virginia Code § 15.2-2311(A) may not be circumvented by filing a court action under Virginia Code § 15.2-2313. Virginia Code § 15.2-2313 provides:

> Where a building permit has been issued and the construction of the building for which the permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of the zoning ordinance, by suit filed within fifteen days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals.

In *Campbell v. Davidson*, 96 Va. Cir. 55 (2017), the city had issued building permits for the construction of a 301-unit multifamily apartment complex on April 11, 2017. On April 25, 2017, the plaintiffs, who were landowners in

the vicinity of the apartment complex, filed a lawsuit against the city and the zoning administrator pursuant to Virginia Code § 15.2-2313. The plaintiffs alleged that the building permits had been issued in violation of the zoning ordinance. The plaintiffs never filed an appeal to the board of zoning appeals under Virginia Code § 15.2-2311.

The issue in *Campbell* was whether Virginia Code §§ 15.2-2311 and 15.2-2313 provide optional avenues for appeal or whether they are sequential. Citing prior Virginia case law, the trial court granted the city's and zoning administrator's motion to dismiss the lawsuit, holding that an appeal under Virginia Code § 15.2-2311 is a "mandatory appeal" and the plaintiffs were precluded from direct judicial attack under Virginia Code § 15.2-2313 because they failed to timely exhaust their administrative remedies under Virginia Code § 15.2-2311. The trial court said that what the plaintiffs had attempted in this case "was essentially an end-run around that mandatory administrative appeal." The trial court in *Mirror Ridge Homeowners Association v. Board of Supervisors of Loudoun County*, 51 Va. Cir. 406 (2000) reached a similar conclusion. In dismissing both cases on the plaintiffs' failure to exhaust their remedy under Virginia Code § 15.2-2311, the trial courts do not satisfactorily address the express language in Virginia Code § 15.2-2313 that "the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals."

In those localities imposing civil penalties for zoning violations, the civil penalties may not be assessed by a court having jurisdiction during the 30-day appeal period. *Virginia Code § 15.2-2311(A).*

The notice of appeal must be filed with the zoning administrator and with the BZA and must specify the grounds for the appeal. *Virginia Code § 15.2-2311(A).* After the notice of appeal is filed, the zoning administrator must promptly transmit to the BZA all the papers constituting the record upon which the action appealed was taken. *Virginia Code § 15.2-2311(A).*

If an appellant fails to perfect the appeal because it was not filed within 30 days after the date of the determination or there is a question as to whether the appellant is aggrieved, the BZA should consider and act on these jurisdictional issues. It is not the locality's staff's role to reject or dismiss the appeal or to refuse to process it.

15-400 Effect of filing an appeal on pending proceedings

Generally, filing an appeal with the BZA stays all proceedings in furtherance of the action appealed from. *Virginia Code § 15.2-2311(B). Proceedings*, as the term is used in Virginia Code § 15.2-2311(B), refers to not only litigation, but also "any action that proceeds from the action appealed from." *Wahrhaftig v. Artman*, 73 Va. Cir. 37, 38 (2007) (because Virginia Code § 15.2-2311(B) is remedial in nature, it should be liberally construed and, therefore, construction of the structure authorized by the county's issuance of zoning permits was stayed pending an appeal to the BZA). For example, if the zoning administrator makes an official determination that a zoning violation exists on the landowner's property and initiates a zoning enforcement action, that action is stayed while the appeal is considered by the BZA. As another example, if a site plan is being processed and there is an appeal of the use classification related to the site plan, processing of the site plan is stayed until the appeal is resolved.

However, proceedings pertaining to parts of a project that are separate and distinct components, such as different phases of a phased site plan or subdivision plat, are not stayed. *Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010) (BZA appeal pertaining to the site plan for Phase 1A did not stay proceedings pertaining to Phase 1B; therefore, the zoning administrator was not stayed from acting on the site plan for Phase 1B of the project where the two phases were separate and distinct components).

Finally, a zoning administrator may certify to the BZA that facts exist such that a stay, in their opinion, would cause imminent peril to life or property. *Virginia Code § 15.2-2311(B).* If the zoning administrator makes such a certification, the pending proceedings will not be stayed unless the appellant successfully applies to the BZA or the circuit court for a restraining order. *Virginia Code § 15.2-2311(B).*

15-500 Procedural requirements before and during an appeal hearing

Several procedural rules apply to the conduct of an appeal hearing:

- Scheduling the hearing on the appeal: The BZA must "fix a reasonable time for the hearing" *Virginia Code § 15.2-2312.*

- Notice of the hearing: The BZA must "give public notice thereof as well as due notice to the parties in interest." *Virginia Code § 15.2-2312.* Notice of the hearing must be provided as required in Virginia Code § 15.2-2204. *Virginia Code § 15.2-2309(3).*

- Before the hearing; contact by parties with BZA members: The *non-legal staff* of the governing body, as well as the appellant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA before the hearing but may not discuss the facts or law relative to the appeal. If any *ex parte* discussion of facts or law occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions before a public meeting to which the appellant, landowner, or its agent or attorney are all invited. The *non-legal staff of the governing body* is "any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542]." *Virginia Code § 15.2-2308.1(A) and (C).*

- Before the hearing; sharing locality-produced information: Any materials relating to an appeal, including a staff recommendation or report furnished to a BZA member, must be available without cost to the appellant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the appellant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code § 2.2-3700, et seq.*). *Virginia Code § 15.2-2308.1(B).*

- At the hearing; the right to equal time for a party to present its side of the case: The BZA must offer an equal amount of time in a hearing on the case to the appellant or other person aggrieved and the staff of the local governing body. *Virginia Code § 15.2-2308(C).*

- At the hearing; the zoning administrator's required explanation: At a hearing on an appeal, the zoning administrator must explain the basis for their decision. *Virginia Code § 15.2-2309(1).*

- At the hearing; the presumption of correctness: At the hearing, the zoning administrator's decision is presumed to be correct. *Virginia Code § 15.2-2309(1).*

- At the hearing; the burden of proof is on the appellant: After the zoning administrator explains the basis for the decision, the appellant has the burden of proof to rebut the presumption of correctness by a preponderance of the evidence. *Virginia Code § 15.2-2309(1).*

- Decision: The decision by the BZA must be based on its "judgment of whether the administrative officer was correct." *Virginia Code § 15.2-2309(1).* The BZA may reverse or affirm, wholly or partly, or may modify, the decision of the zoning administrator. *Virginia Code § 15.2-2312. See section 15-700 for further discussion.*

- Time for the decision: The decision must be made within 90 days. *Virginia Code § 15.2-2312.* The 90-day period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on an appeal after the time period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

- Required vote: The concurring vote of a majority of the BZA's membership is necessary to reverse the determination of the zoning administrator. *Virginia Code § 15.2-2312.* This means that a seven-member BZA may reverse the zoning administrator's determination only if at least four members vote for reversal, and a five-member BZA may reverse only if at least three members vote for reversal. *See Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (3-3 vote of a seven-member BZA was a "decision" because the vote established that the BZA could not and would not reverse the zoning administrator's decision). Thus, if only three members of a five-

member BZA are present for the vote, all three must vote in favor of reversal; however, the zoning administrator's determination may be affirmed or modified on a 2-1 vote. If the BZA's vote on an appeal results in a tie vote, the person filing the appeal may request to have the matter carried over until the next meeting, but the BZA is not required to grant the request. *Virginia Code § 15.2-2311(D).*

- Findings to support the decision: To facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, "the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal"). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) ("In fact, the verbatim transcript contains numerous findings of fact in support of the BZA's decision").

15-600 Considering an appeal; matters the BZA may and may not decide

The BZA's decision on appeal is limited to the issue of whether the zoning administrator's decision was correct. *Virginia Code § 15.2-2309(1)*; *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 295, 435 S.E.2d 385, 388 (1993); *see In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) (BZA correctly determined that the zoning administrator erred when he determined that he needed more information before he could make a determination as to the nonconforming status of a towing and recovery lot when the zoning ordinance at the time had a by-right use classification that was consistent with the actual use at the time). This does not mean that the BZA's inquiry is limited only to the reasons and authority cited in the zoning administrator's written decision. *Town of Madison v. Board of Zoning Appeals/Potichas*, 65 Va. Cir. 433, 434-435 (2004). Regardless of what the zoning administrator states in their determination, the BZA's role is to determine whether the *decision* was correct and must apply the terms and provisions of the zoning ordinance even if the zoning administrator did not cite them. *Madison, supra.*

Summary of the Scope of Review on Appeal
• The issue for the BZA is whether the zoning administrator's decision was correct. • Statements by the appellant or their attorney may further limit the scope of the appeal. • In the consideration of an appeal, the BZA may not: → Determine whether a proposed use is appropriate in the zoning district. → Determine what is in the public interest. → Amend or repeal a zoning regulation. → Determine that a zoning regulation is invalid.

The scope of the proceeding before the BZA may be limited by statements made by the appellant or their attorney. *See Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). In *Adams*, the applicant's attorney stated at the BZA hearing on his client's application for a variance for a sign that the "only issue is whether Adams spent too much on the sign and whether, because of the misunderstanding between the City and Adams [on] what could be done and what could not be done and whether it would in fact be proper for a variance. That's all that's before you." Because the scope of the BZA proceeding was limited by the attorney's statements, the scope of judicial review was likewise limited. The Virginia Supreme Court determined that the BZA correctly denied the variance, particularly since the BZA did not have the authority to grant a variance on the grounds presented. *Adams*, 261 Va. at 414, 544 S.E.2d at 319.

A BZA may not determine what uses are appropriate in a zoning district because that is a legislative function reserved to the governing body. *Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (the BZA does not have the power to rezone property); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982) (the decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category, is a legislative action). In such an appeal, the BZA's role is only to determine whether the use is within one of the use classifications the governing body has decided to allow in the district.

Likewise, a BZA may not determine what is in the public interest because that determination requires the balancing of private conduct and the public interest, which is a legislative decision that lies with the governing body, not the BZA. *Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (the exercise of legislative power involves the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety"); *Southland Corp.*, 224 Va. at 521, 297 S.E.2d at 721 (the power to regulate the use of land by zoning laws is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles). Administrative zoning decisions such as those made by the BZA must be grounded within the legislative framework provided. *Higgs v. Kirkbride*, 258 Va. 567, 573, 522 S.E.2d 861, 864 (1999). While the BZA should consider the zoning ordinance, the ordinance should not be extended by interpretation or construction beyond its intended purpose. *Higgs, supra*. In addition, equitable considerations are inappropriate. *Coleman v. Board of Zoning Appeals of the City of Fairfax*, 2011 Va. Cir. LEXIS 66 (2011) (reversing decision of the BZA because a single BZA member relied on "equitable considerations" in voting to overturn the decision of the zoning administrator that the counseling center had engaged in an activity not allowed by the zoning ordinance; the circuit court said that the BZA member's statements revealed that he arrived at his decision because the counseling center had engaged in that activity for years). *See Chapter 29 for discussion of the rule that public bodies act only as a corporate body and not by the actions of its members separately and individually.*

Lastly, one of the common duties of the BZA on an appeal may be to determine whether the zoning administrator correctly interpreted the zoning ordinance. The power to interpret the zoning ordinance has its limitations. Although the BZA (as well as the zoning administrator) must necessarily interpret the zoning ordinance to execute its responsibilities, that obligation does not give rise to a power to declare a regulation invalid, which is a determination within the sole province of the judiciary. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997). In addition, the BZA does not have the power to amend or repeal portions of a zoning ordinance. *Foster, supra.* The principles relevant to the interpretation of the zoning ordinance by the BZA are well established. *Higgs, supra. See Chapter 16 for a discussion of some of those key principles.*

15-700 The effect of a decision on an owner who did not receive a notice of violation or order

For a notice of violation or an order of the zoning administrator to be binding against a landowner, the landowner must have been given notice of the violation or the order. *Virginia Code § 15.2-2311(A)*. Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. *Virginia Code § 15.2-2311(A)*. If the landowner had actual notice of the violation or the order, or participated in the appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

15-800 Presenting an appeal to the BZA

Appeals to the BZA can become legal free-for-alls resulting in long, drawn-out hearings where a multitude of issues, both relevant and irrelevant, are raised by the participants and the BZA, and where the relevant and material issues may be lost in the confusion. This risk is especially true where the BZA's practices and procedures do not require a level of formality that imposes structure to the proceedings and the participants and the BZA are not familiar with the relevant issues and the applicable legal standards.

15-810 Insist on a clearly stated and comprehensive statement of the basis for the appeal

The appellant's written appeal must clearly state the basis for the appeal. When the appeal is received, the BZA or its staff must review the statement to ensure this requirement is satisfied. A statement of the basis for the appeal is critical because it should be relied on to frame *and limit* the issues on appeal.

If the statement is unclear or needs further information, the BZA or its staff should ask the appellant to elaborate on the basis for the appeal. Without a clearly stated basis for appeal, the parties and the BZA can only guess what the key issues will be on appeal (such as whether a use is nonconforming). In any event, the appellant must provide as much information as possible about the appeal before the appeal is scheduled for hearing.

15-820 Presenting the appeal

There are several things a locality's staff can do to present their side of an appeal to ensure that the BZA understands and focuses on the material issues.

- Identify the dispositive issues: Staff must identify the dispositive issues and keep them at the forefront for the BZA's consideration. This will depend, in part, on the appellant providing a detailed statement of the basis for the appeal.

- Provide a legal memorandum: Appeals to the BZA are quasi-judicial proceedings that often raise legal issues that need to be explained to the BZA. For example, assume that the issue on appeal is whether a use is accessory to a primary use; the BZA may need to be briefed on the elements of establishing an accessory use and how those elements have been interpreted under the case law. If necessary, a legal memorandum prepared by the locality's attorney should accompany the staff report. Staff should not be concerned that a legal memorandum will cause the appeal to become too legalistic. The BZA is always obligated to apply the correct legal principles when it makes its decision.

- Use visual aids: Presentations should include a visual component for several reasons. Maps, aerial photographs, and ground-level photographs familiarize the BZA and the persons attending the public hearing with the property at issue. Applicable zoning regulations, definitions of key terms, and other information provide the BZA, the participants, and others in attendance points of reference that they can easily refer to when necessary.

- Focus the oral presentation on the dispositive issues: BZA members must read the locality's staff report and other materials, the appellant's written materials, and all the other writings received pertaining to the appeal before the public hearing. Staff should assume that the BZA has read these materials and focus its oral presentation on the dispositive issues and the relevant materials and facts, rather than merely re-read the staff report at the public hearing.

- Minimize the detours to the irrelevant and immaterial issues: All parties to an appeal need to ensure that the BZA understands the relevant and material issues. Whether intentional or not, some appellants may raise irrelevant or immaterial issues and arguments (*e.g.*, common topics include the claim that the owner is a longstanding resident who pays taxes; less obvious though irrelevant topics include the claim that the zoning on the property is inappropriate for the neighborhood), misstate or misrepresent the law (*e.g.*, by stating that a regulation or a case stands for A, when it actually stands for B), or play the victim or seek sympathy (*e.g.*, "I already built the structure"; "I didn't know it was a violation"; "So and so said it was okay"; "So and so has been harassing me about this/has been verbally abusive"; "Doesn't the zoning department have anything better to do with its time?"). Unfortunately, this strategy may be effective with some BZA members.

The strategies applied to properly present a particular appeal will depend on the issues and parties involved, and the public interest that may be generated by the appeal.

15-900 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board, or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314*.

15-910 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314*. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine

the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the "official filing date," which was a date specified in the BZA clerk's letter that was eight days after the BZA voted on the appeal). The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

15-920 The parties in an appeal to the circuit court

The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the appellant before the BZA (assuming the latter is different from the landowner). The third paragraph of Virginia Code § 15.2-2314 states:

> Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. *The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court.* The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals. (italics added)

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after the writ of certiorari is served on it. *Virginia Code § 15.2-2314*.

In *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017), Boasso appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, Boasso's petition did not name the city council as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city council had to be named in the petition within the 30-day period, or whether Boasso could add it as a necessary party by amending its petition after the 30-day period had run. The trial court granted the city's motion to dismiss the petition because the city council had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality's governing body that "is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition."

The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*. Naming the governing body in the style of the case is not required. *See In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 2014 WL 1391769 (Va. Cir. Ct. 2014).

15-930 The nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 "has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance." *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The court's review of the BZA's decision is limited to the scope of the BZA proceeding, *i.e.*, whether the zoning administrator's decision was correct. *Foster v. Geller*, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294-295, 435 S.E.2d 385, 388 (1993). Thus, the court's role, like the BZA's, is to determine whether the *decision* was correct, applying all the applicable terms and provisions of the zoning ordinance, even if the zoning administrator did not cite them.

The limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity

or constitutionality of the ordinance or statute underlying the BZA's decision. *City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. *See Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra.*

An appeal may be dismissed as moot if the landowners no longer own the property to which an appeal pertains. *Board of Supervisors of Fairfax County v. Ratcliff*, 298 Va. 622, 842 S.E.2d 377 (2020) (landowners sold their home while the county's appeal of the circuit court decision in favor of the landowners was pending; the Virginia Supreme Court vacated the judgment of the trial court).

15-940 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions arising from appeals from decisions by the zoning administrator, two rules apply. On questions of fact, the findings and conclusions of the BZA are presumed to be correct. *Virginia Code § 15.2-2314*. The appealing party may rebut that presumption by proving by a preponderance of the evidence, which includes the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*. On questions of law, the court hears arguments on those questions *de novo* ("anew"), as though the BZA had not decided the question and, therefore, without any presumptions. *Virginia Code § 15.2-2314*. The interpretation of statutes and ordinances are questions of law to which no presumption of correctness applies. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009).

The party challenging the BZA's decision has the burden of proof. *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 380-381, 641 S.E.2d 104, 107 (2007); *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 805 (1994). Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA's decision. *Virginia Code § 15.2-2314*. If the BZA's decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code § 15.2-2314*. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code § 15.2-2314*.