SANDS ANDERSON MARKS & MILLER
A PROFESSIONAL CORPORATION

Virginia Local Government Law

It's getting hot in here: Things are getting tough at the BZA

By: Andrew McRoberts. ***This was posted Wednesday, December 9th, 2009***

The General Assembly, Virginia Supreme Court and the Virginia State Bar have combined to make the job of our local Boards of Zoning Appeals (BZAs), and that of the local government attorney who deals with them, much more complicated. As a long-time county attorney and currently counsel to the Stafford County BZA, I have seen this first hand.

Let me briefly mention some of the more significant ways that life at the BZA has become more complicated and difficult over time:

1993. First statutory authorization of zoning administrator vested rights determinations, complex legal and factual cases that are quite adversarial when appealed to the BZA. 1993 Acts ch. 672 (amending former Virginia Code § 15.1-491, now § 15.2-2286(A)(4)).

1995. The so-called "sixty-day rule" is adopted. 1995 Va Acts ch. 424 (amending Virginia Code § 15.1-496.1, now § 15.2-2311(c)). The complicated and curious statutory exception to the settled general "no estoppel against local government" has been raised more and more by landowners in recent years. See, e.g., Goyonaga v. Board of Zoning Appeals of Falls Church, 275 Va. 232, 244, 657 S.E.2d 153 (2008)

2003. Virginia State Bar issued LEO 1785 (November 14, 2003), which declared it unethical for a local government attorney to provide any legal services to a BZA (even review the advertisement) and later represent the zoning administrator in that case. This caused many local government attorneys (including this one) to take the position that they would not represent the BZA at all. Many local governments decline to hire their BZAs counsel when requested. Given the complex nature of what a BZA is expected to do, this has sometimes caused or exacerbated a division between the local BZA and the governing body. See, e.g., Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 550, 666 S.E.2d 315 (2008).

2004. BZAs used to issue variances more frequently as a "relief valve" in many communities. Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 756, 594 S.E.2d 571 (2004) largely shut the valve by clarifying the tough standard to qualify for a variance. This has caused more appeals of zoning administrator determinations to the BZA, which are frequently quite adversarial between the locality and the landowner.

2006. As BZAs were called upon to hear increasingly complex and numerous appeals from zoning administrator determinations, they were given less deference on appeal. 2006 Va. Acts c.446 (amending Virginia Code § 15.2-2314). Since July 1, 2006, BZAs are only given a presumption of correctness on factual determinations, and all legal issues are presented to the circuit court de novo. And, of course, when an appeal goes to circuit court, the BZA gets named as a party.

There is going to be greater detail in an article I will publish in the coming year. What are your thoughts on the plight of our BZAs and the increasing complexity of their job? What's a better way for local governments deal with them? (Please see website url below for response form).