Boards of Zoning Appeals in Virginia: Quasi-Judicial and Quite Difficult

by Andrew R. McRoberts, Esq.

Sands Anderson PC

Imagine a situation in which a business asks your zoning administrator whether a use is permitted on property the business hopes to buy. The zoning administrator looks at the definitions and uses in the zoning ordinance, which are fairly broad, and given what the business has said, tells the business that the planned use is permitted by right in the zoning district.

In this case, the business starts spending money to make the dream a reality. A few months later, the neighbors learn about the business' plans, and start calling the locality. They complain to the local government administration and the governing body that the proposed business will have a detrimental impact on their area due to noise, traffic and other issues. The proposed business proves to be hugely unpopular and opposed by the neighbors, the local government administration, and the governing body. It is too late for the governing body to appeal the decision to the board of zoning appeals (BZA). However, with sharp criticism of the zoning administrator coming from the public, the local governing body acts to amend the zoning ordinance to clarify that this use is not permitted by right. Fearing the loss of investment, and realizing that a legislative approval is not likely, the business owner makes a claim of vested rights to the zoning administrator, who denies it. The business owner appeals the vested rights determination to the BZA.

In a case with difficult factual and legal issues, everyone is unhappy. The business owner in angry and sees his dream slipping away as the bills start piling up. The public is outraged that their locality could allow such a use near them, and say so repeatedly in the local newspaper. The zoning administrator suffers repeated and very public criticism. The local elected officials are getting calls at their homes from the angry constituents. The local government attorney is facing a complicated defense of the zoning administrator's vested rights determination in a politically-charged environment. Lastly, the members of the BZA are watching these events unfold in the news and know the dispute is heading for their next meeting.

Many of you know that this scenario is not imaginary at all. With some literary license (Crucible went straight to court, for example), these are the events underlying *Board of Supervisors of Stafford County v. Crucible, Inc*., 278 Va. 152, 677 S.E.2d 283 (2009). And this sort of situation is quite common.

* * * *

Having been a full-time county attorney for many years, and counsel to the Stafford County Board of Zoning Appeals for many months, I have seen first-hand how difficult cases that come before our local boards of zoning appeals

(BZAs) in Virginia can be. BZA cases have often been difficult in the past. But, markedly, these cases have become more complex legally due to a series of case law decisions and statutory amendments over the years.

At the same time, BZAs routinely go without legal representation due to a concerns over conflicts of interest, lack of funds, political disputes with the governing body, or all of the above. In the past, many BZAs often had representation from the local county, city or town attorney on a regular or case-by-case basis. A few continue to do so, alternating between attorney for the locality and attorney for the BZA, but this can be confusing to or undesired by some BZAs, or undesired or simply prohibited by the locality's governing body or its county, city or town attorney.

A BZA has the power to hear appeals from orders and determinations of the local zoning administrator, applications for variances, and, in some localities, applications for special exceptions or use permits. Virginia Code § 15.2-2309. In all except the last category mentioned, the BZA acts in a quasi-judicial capacity.

For many local BZAs, with lay people acting as "quasi-judges" in an increasingly complex legal environment, and often left without independent representation, "quasi-judicial" has become routinely "quite difficult."

This article explores some of the statutory changes, Supreme Court decisions and Virginia State Bar ethics opinions over the years that have made cases before BZAs more complicated and caused many BZAs to seek help and even sue to get it.

I. 1993 – Statutory Vested Rights Determinations Virginia Code § 15.2-2286(A)(4)

Historically, since the advent of zoning in Virginia, zoning administrators have had the power to interpret zoning ordinances and enforce their provisions. See Virginia Code § 15.2-2286(A)(4) and its predecessor provisions, § 15.1-491 and § 15-968. However, with the development in Virginia of the common law of vested rights, beginning with *Fairfax County v. Medical Structures*, 213 Va. 355, 192 S.E.2d 799 (1972) and *Fairfax County v. Cities Service*, 213 Va. 359, 193 S.E.2d 1 (1972), questions arose over whether a zoning administrator had the power to make a vested rights determination.

In *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 356 (1991), the answer was no. The Virginia Supreme Court said, "A vested right in a land use is a property right which is created and protected by law. An adjudication regarding the creation, existence, or termination of that right can be made only by a court of competent jurisdiction." *Id.* at 556, 403 S.E.2d at 358. With developers and localities alike interested in some means short of litigation to determine vested rights, the General Assembly promptly amended former Virginia Code § 15.1-491, the predecessor of current § 15.2-2286, to grant localities the power to authorize zoning administrators to determine vested rights through findings of fact, and, in concurrence of the local government attorney, conclusions of law. *See* 1993 Acts Ch. 672; Virginia Code § 15.2-2286(A)(4).

However, this has not resolved the question of whether zoning administrators have the authority as a constitutional matter to make such determinations. *See Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 158 n.1, 677 S.E.2d 283, 286 n.1 (2009) ("Because the constitutionality of Code § 15.2-2286 has not been raised as an issue in this appeal, we do not consider the issue."); Foote, *LGA Handbook of Virginia Local Government Law*, Planning and Zoning § 1-14.07 ("It is not clear, however, whether this provision can in fact withstand judicial challenge, given the Supreme Court's constitutionally-based conclusion in Holland that a vested right is a property right, adjudication of which can only be by a court.").

Thus, vested rights determinations continue to be made by zoning administrators. And, since large sums of money are often at stake in these determinations, and (perhaps) since they often are requested after the legislative will has turned against the developer, many of these determinations get appealed to the local BZA. *See, e.g., Hale v. Board of Zoning Appeals of Blacksburg,* 277 Va. 250, 673 S.E.2d 170 (2009). This drops a heated dispute of fact and the complex and developing law of vested rights into the lap of the BZA.

These vested rights appeals are often complicated, dependent upon zoning law that can be complex and difficult to apply, even for the courts or experienced counsel. One circuit court judge said recently in recommending counsel to a *pro se* plaintiff, "Land use cases are complex and difficult to resolve, even for experienced counsel and even for the Court." These comments most assuredly apply to most citizen members appointed to the BZA by the circuit court.

II. 1995 – The "Sixty-Day Rule:" Statutory Estoppel Virginia Code § 15.2-2311(C)

It is well-settled that "[e]stoppel does not apply to the government in the discharge of its governmental functions." *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988).
This includes land use and zoning. *Board of Supervisors v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *WANV v. Houff*, 219 Va. 57, 57, 244 S.E.2d 760 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968).

However, in 1995, to address perceived unfairness and inflexibility in that doctrine, the General Assembly adopted a statutory exception and added subsection (C) to then Virginia Code § 15.1-496.1 (now § 15.2-2311). 1995 Va Acts Ch. 424. It states as follows:

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

This is a rare and solitary exception to the "no estoppel" rule against localities in their governmental capacity. How much of an exception has been tested in recent cases, and the full scope of this specialized (and individualized) form of statutory vesting is still in some doubt. However, some case law has emerged to begin defining the exception.

Whether minor or major, landowners and their attorneys cite this exception with increasing frequency because it is a means to overcome the language of the ordinance itself. The Virginia Supreme Court has recognized that § 15.2-2311(C) can "provide for potential vesting of a right to use property in a manner that 'otherwise would not have been allowed.'" *Goyonaga v. Board of Zoning Appeals of Falls Church*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008), *citing Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 407, 448 S.E.2d 606, 608 (1994).

Of course landowners' attorneys cite § 15.2-2311(C) frequently! It can result in a site-specific reversal of the law in favor of the client, notwithstanding the legislative will or even the (pesky) language of the zoning ordinance itself!

And before the BZA, a claim under § 15.2-2311(C) comes with a guaranteed adversarial approach. After all, few zoning administrators will admit that they erred, and even fewer will admit that they knowingly waived the requirements adopted by the local governing body. With the adoption of HB 1250 by the 2010 General Assembly, a valid claim of right under Virginia Code § 15.2-2311(C) might even result in a vested right if the zoning ordinance itself changes and the requirements of 15.2-2307 are met. Zoning administrators and their counsel must be more careful than ever. These are complex legal issues with high-stakes that increase the pressure on the local BZA.

III. 2003 – VSB Attorney Ethics Opinion on Counsel for BZAs LEO 1785 (November 14, 2003)

At the same time the General Assembly was creating more legal complexity for the BZAs to face, the Virginia State Bar issued ethics opinions that had the effect of denying many of them counsel.

Although not true everywhere, many local government attorney offices provided some level of legal support to their local BZA. This is arguably supported by the statute by which the local government attorney is appointed. Virginia Code § 15.2-1542 (vesting in local government attorney responsibility for "advising the governing body and all boards, departments, agencies, officials and employees of the locality"). Of course, the local governing body could always appropriate funds for hiring of outside counsel. Virginia Code § 15.2-2308(D).

In 2003, the Virginia State Bar issued an opinion came as a surprise to many local government attorneys, and to their BZAs. The opinion stated that even the review of the advertisement for a BZA public hearing (done in all likelihood at the request of a zoning office staff member assisting the BZA rather than by direction of the BZA itself) prohibited the local government attorney from representing the local government/zoning administrator in the matter when it came before the BZA. LEO 1785 (November 14, 2003). A concern for conflicts arising from LEO 1785 has resulted in less counsel for BZAs.

Up until 2003, many local government attorneys provided representation to the BZA, as they did for the Planning Commission and other boards and commissions. Now, after this opinion, far fewer do. Some local government attorneys still represent their BZAs on a case-by-case basis, presumably relying upon the guidance of LEO 1815, which allows representation of the BZA in a *different matter* even if the local government attorney represents the zoning administrator in other matters, but only if the strict requirements of the Ethics Rules permit. See LEO 1815 (January 10, 2006). In these localities, presumably the advertisements are not reviewed by the local government attorney to avoid the result in LEO 1785.

These opinions lead many local government attorneys to take the position that they do not represent the BZA in any matter. And, the local government attorneys have properly advised the BZA that their role at the meeting is to serve as counsel to the zoning administrator and locality, and not to the BZA. In response, many BZAs have requested counsel, either in general or on a case-by-case basis. In some localities, counsel has been denied, and funds not appropriated when requested as permitted in Virginia Code § 15.2-2308(D).

This and other disagreements have lead to disputes between some governing bodies and their local BZA, and in one locality, resulted in a lengthy series of cases ending up in the Virginia Supreme Court, from 2004-2008. *See Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008); *Board of*

Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 275 Va. 452, 657 S.E.2d 147 (2008); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006); *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 618 S.E.2d 311 (2005) (consolidated on appeal with *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, Record No. 042326); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 604 S.E.2d 7 (2004). The last case may have perhaps ended this string of cases, since the Supreme Court ruled that a BZA may not file a lawsuit, reasoning that a BZA has no express statutory authority to file a lawsuit against "any defendant."

Without counsel, the BZAs are often faced with argument by counsel for the locality on one side, and counsel for the applicant on the other, facing complex legal issues that often have no plain, on point legal authority on which to rely, or even to guide the decision-making process. While local government attorneys often feel that they are the ones with the most credibility and expertise on these issues, BZAs sometimes feel – rightly or wrongly – that counsel for both sides have comparable credibility and expertise.

IV. 2004 – Legal Standard for Variances Clarified, Making Them Less Attractive *Cochrane v. Fairfax County BZA*, 267 Va. 756, 594 S.E.2d 571 (2004)

The statutory standard for obtaining a variance has always been difficult. *See* Virginia Code § 15.2-2309(2) (procedure and proof) and 15.2-2201 (definition of "variance").

In 2004, the Virginia Supreme Court reiterated this statutory standard and made plain how difficult that standard should be in *Cochrane v. Fairfax County BZA*, 267 Va. 756, 594 S.E.2d 571 (2004). As a practical matter, in many localities, variances were often a "pressure valve" for legislatively difficult cases. After *Cochrane*, the legal standard for a variance was clear and fewer of these variance cases have been filed, with their small likelihood of success apparent. (Although the statute was amended in 2009 to delete the term "approaching confiscation" from the end of the requirement for a "clearly demonstrable hardship," the true extent of this change is unknown at this time, and given all the other hurdles an applicant for a variance must face, this change is unlikely to change the results in many applications for variances, in this author's opinion.)

The *Cochrane* case appears to have resulted in more appeals of zoning administrator determinations, with their more adversarial nature and more complex legal issues, discussed above. As a practical matter, appeals of zoning administrator determinations have largely replaced the variance for attempted end-runs around the local legislative process.

V. 2003 & 2006 – Deference Afforded BZA Decisions on Appeal Reduced Virginia Code § 15.2-2314

In 2003 and again in 2006, the General Assembly reduced the deference BZAs traditionally received in those appeals to the circuit court of BZA decisions on zoning administrator determinations. This raises the stakes for the local BZA, and makes appeal of BZA decisions more likely.

"Prior to the … 2003 amendment, the common law standard of review provided that the presumption of correctness of a BZA decision was rebutted only when the BZA applied 'erroneous principles of law' or its interpretation was 'plainly wrong and in violation of the purpose and intent of the zoning ordinance.'" *Herbert v. Board of Zoning Appeals of the City of Suffolk*, 266 Va. 137, 142, 580 S.E.2d 796, 798 (2003). After 2006, the rebuttable presumption of

correctness for the BZA's conclusions of law was stripped from Virginia Code § 15.2-2314, so the only deference that remains is a rebuttable presumption for the BZA's findings of fact:

> [The] trial court utilized the standard of review contained in Code § 15.2-2314, giving deference to findings of fact incidental to BZA review of decisions of the zoning administrator. Under this standard, "the findings and conclusions of the [BZA] on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence . . . that the [BZA] erred in its decision." Code § 15.2-2314. Conclusions of law reached by the BZA are not afforded the same presumption of correctness. *See id*. ("The court shall hear any arguments on questions of law de novo").

Board of Supervisors of Loudoun County v. Town of Purcellville, 276 Va. 419, 439, 666 S.E.2d 512, 522 (2008). As the pressure has mounted on BZAs, the likelihood of their decisions being challenged successfully was increased and more appeals have resulted.

VI. 2010 – BZA No Longer A Necessary Party to Petition for Writ of Certiorari

This increase in the frequency of appeals of BZA decisions to circuit court has for years exacerbated a long-standing issue in BZA jurisprudence – the requirement to bring the petition for a writ of certiorari against the BZA by name. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 225 Va. 235, 238, 302 S.E.2d 19, 21 (1983) ("Considering these factors, we believe it is clear that, until return on the writ of certiorari is made by the board of zoning appeals, the only necessary parties to a proceeding under Code § 15.1-497 are the aggrieved person and the board [of zoning appeals].").

This legal requirement has caused many BZA members, perhaps understandably, to take an appeal to the circuit court personally. They have been "sued." Local government attorneys have explained that the naming of the BZA is a procedural requirement only, the BZA acted as a quasi-judicial body, and the BZA does not need counsel in an appeal of their decision.

Many BZA members are not comforted, and many BZAs want and demand that their local governing body appropriate funds for counsel, as permitted in Virginia Code § 15.2-2308(D). At least in Fairfax County, this has lead to substantial litigation. *See, e.g., Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008) (declaratory judgment action by BZA to obtain funds for counsel dismissed because BZAs do not have authority to initiate litigation in their name).

To compound the feeling of "being sued," statutes dealing with service of process for governmental bodies like a BZA without counsel require service on "any member of the governing body of such entity." Virginia Code § 8.01-300(3). So, when a BZA is named as a party as required by law, the law compounds the sting by serving the papers on a member of the BZA itself, typically the Chair. When the sheriff shows up at the Chair's house with papers from the circuit court, this understandably gets the Chair's attention, and understandably causes the Chair to seek counsel on the lawsuit naming his public body as a defendant.

In 2010, there appears to be some relief on this point. As of this writing, HB 1063 has passed the General Assembly, and if signed into law by the Governor, would statutorily end the requirement to name the BZA as a party. Instead, Virginia Code § 15.2-2314 would expressly provide that the petition would be styled "In Re: [date] Decision of the Board of Zoning Appeals of [locality name]." This could help address the feeling on the part of the BZA that they

have "been sued." The bill goes on to provide that "[a]ny 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." This is a welcome change by the General Assembly.

VII. 2010 – Merging Vested Rights under 15.2-2307 and Estoppel under 15.2-2311(C) HB 1250

Just as the General Assembly may be making life a little easier on the local BZA in the event of an appeal to the circuit court, it complicated the vested rights and 15.2-2311(C) issues discussed above by combining them in Virginia Code § 15.2-2307.

The 2010 General Assembly approved HB 1250, which if signed into law by the Governor, will amend § 15.2-2307 to add a new "significant affirmative government act allowing development of a specific project" (SAGA) to the acts "deemed" to be a SAGA. The new SAGA would require as follows:

> (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

Note the reference to Virginia Code § 15.2-2311(C), discussed above.

The real scope of HB 1250's new SAGA will not be known for some time, after these issues percolate through BZAs, into the circuit courts and up to the Virginia Supreme Court. With scant authority to assist BZAs to apply this newly-constructed process to achieve a property right, however, HB 1250 guarantees to cause confusion, increase litigation and ensure more appeals of BZA decisions to the circuit court. Again, zoning administrators and their counsel must be more careful than ever.

For future publication, I will be writing an analysis of Virginia Code § 15.2-2311(C), including the likely impact of 2010's HB 1250 and the inclusion of § 15.2-2311(C) in the vested rights statute.

* * * *

Conclusion

So, here we are after about 15 years or so of various changes in the law making cases before our BZAs legally more complex for all. What is a BZA to do? And what can be done to help?

First, the BZA members can get trained. Michael Chandler and his organization, Plan Virginia, provides training for members of BZAs. Information may be obtained from a website, www.cpeav.org. BZA member training and certification classes typically occur in late March and early June. I note that the Virginia Code requires Boards of Equalization – also quasi-judicial and appointed by the circuit court – to be trained before they can take their oath of office. Perhaps this could similarly be required of BZA members. This would be in addition to the statutory requirement for BZAs, like all other public bodies, to read and familiarize themselves with the Virginia Freedom of Information Act and the Virginia State and Local Government Conflict of Interest Act. Local government attorneys are capable and may provide training, but given the concern over conflicts, they should be clear with the BZAs about their role as trainer and

not counsel, and may wish to arrange outside training by an organization like Plan Virginia or outside counsel. An appropriation by the locality may be required.

Second, BZAs can hire counsel and localities can appropriate funds for that purpose. This is expressly authorized by statute. Virginia Code § 15.2-2308(D). Given the complex legal issues confronting its BZA, the Stafford County Board of Supervisors appropriated funds for the current fiscal year. The arrangement has permitted some discussion, resolution and narrowing of legal issues in advance, which has helped the BZA, and permitted the Stafford County BZA to have experienced legal counsel give insight into complex legal issues. Of course, BZAs cannot sue to force such funding. *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008) (declaratory judgment action by BZA to obtain funds for counsel dismissed as BZAs do not have authority to file suit in their own name).

Third, local government attorneys can help their zoning administrators draft formal procedures regarding the issuance of official determinations. The stakes today are far higher and more formality seems warranted. Issues to address may include defining what constitutes an official zoning determination, how requests are prepared and reviewed by staff and counsel, what limitations exist on the recipients right to rely upon the determination, and provisions for notice and appeal.

Finally, with HB 1063, it appears that Virginia Code § 15.2-2314 will be amended to declare that appeals to the circuit court from a BZA decision are brought, not in the name of the BZA, but "In re" the decision or determination or appeal in issue. As a practical matter, the record sought by the circuit court on appeal is in the hands of the local government zoning and planning staff, who are clients of the local government attorney, and not in the hands of the part-time members of the BZA. This amendment would clarify that an appellant from the BZA is not "suing" the BZA, and would remove some of the feeling that the BZA is being personally attacked when a petition for writ of certiorari is filed and served. This will affirm the BZA's status as a quasi-judicial body rather than a litigant.

Our Boards of Zoning Appeals serve an important role for our citizens, and those who appear before them have important matters to be resolved. Yet, BZA cases have become far more legally complex in recent years due to an interesting convergence of legislative amendments by the General Assembly, judicial opinions of the Virginia Supreme Court and an administrative opinion of the Virginia State Bar. The ability of our BZAs to properly address these legal complexities and uphold the law should concern BZAs, localities, applicants, landowners, aggrieved parties who appear before the BZAs, and their counsel across Virginia.

This article was first published in the Journal of Local Government Law, the professional newsletter of the Local Government Section of the Virginia State Bar.

Andrew McRoberts, a former county attorney and currently a Virginia local government lawyer at the firm of Sands Anderson PC, is the managing editor of the VALocalityLaw.com blog and Twitter channel. He is a frequent speaker on local government issues and serves as counsel to local zoning boards, county staff and Boards of Supervisors who are clients of the firm. McRoberts is former President of the Local Government Attorneys of Virginia.