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Virginia Local Government Law

The Push and Pull of BZAs and Variances

By: Andrew McRoberts. ***This was posted Wednesday, April 14th, 2010***

Recently, I helped the CPEAV train members of Boards of Zoning Appeals for various localities. The group of appointed zoning officials was lively and interested in the law they were expected to apply. But through their questions and comments, I was reminded just how difficult it can be to apply the legal standard for a variance when applied to "real world" cases.

As a local government attorney experienced in this area, I can easily recite the many statutory prerequisites and standards for granting a variance in Virginia Code § 15.2-2309(2). These are significant hurdles. They include (i) unnecessary hardship, (ii) not contrary to the public interest, (iii) physical/topographic limitations, (iv) effective prohibition or unreasonably restricted use, (v) undue hardship (although no longer "approaching confiscation"), (vi) hardship not shared generally by other properties, (vii) no substantial detriment to adjacent property, (viii) no change in character of district, and (ix) situation not so general or reoccurring that it could be addressed by general zoning amendment.

In the Virginia Supreme Court decision of *Cochran v. Fairfax County BZA*, 267 Va. 756 (2004), the Virginia Supreme Court construed these statutory requirements to mean that "the BZA has no authority to grant a variance unless the effect of the zoning ordinance, as applied to the piece of property under consideration, would, in the absence of a variance, 'interfere with all reasonable beneficial uses of the property, taken as a whole.'" *Cochran*, 267 Va. at 766.

Given this standard, the *Cochran* Court held against each of the landowners in the three consolidated cases. This result was despite "compelling reasons … in favor of each of the applications for variances: The desires of the owners, supported by careful planning to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support of the application by neighbors; and serious personal need, by the owners, for the proposed modification." *Cochran*, 267 Va. at 767.

BZA members may (and do) ask: What about the applicant whose mother who is ill? What about a business owner that cannot afford to put the addition in another location? What about the huge costs to the individual homeowner whose bad builder simply overshot the setback?

Good questions, all. The legal answer is these substantive considerations rarely meet the legal standard for a variance given the stiff, largely objective nature of that standard. And appropriately so. The law ought to apply equally to all.

But the push and pull of tough law and difficult facts make variance applications particularly difficult for BZA members who must face the applicants and vote. Often, the applicants will have a compelling need but will simply not meet the legal standard.

In those cases, it is far easier to be a local government attorney who recites the legal standard than the BZA member who has to apply it.