

**TOWN OF FRONT ROYAL, VIRGINIA
BOARD OF ZONING APPEALS MEETING**

Tuesday, December 16, 2025 @ 7:00 PM
Front Royal Town Hall, 2nd Floor East Conference Room

AGENDA

1. Call to Order
2. Roll Call – Determination of Quorum
3. Approval of Minutes
 - August 19, 2025 – Regular Meeting
4. Other
 - By-Laws
 - Staff Training – Mock Cases
 - Zoning Determination Appeal
 - Variance Request
5. Adjournment



The following minutes are a summary of items on the agenda. This meeting may be viewed in its entirety by accessing the video of the same date online via the Town's website at www.frontroyalva.com for a limited time.

The Board of Zoning Appeals regular meeting of the Town of Front Royal, Virginia was held on August 19, 2025, at 7 p.m. in the Town of Front Royal 2nd floor conference room.

CALL TO ORDER:

Chairman Taylor called the Board of Zoning Appeals, August 19, 2025, meeting to order at 7:00 p.m.

ROLL CALL OF MEMBERS PRESENT

Chairman Cody Taylor
Vice Chairman Clare Schmitt
Board Member Maria Dutton
Board Member Lorie Noakes
Board Member James Jackson

MEMBERS ABSENT

None.

STAFF MEMBERS PRESENT

Lauren Kopishke, Planning & Zoning Director / Zoning Administrator
John Ware, Deputy Zoning Administrator
Connie L Potter, Executive Assistant / Clerk for the Board of Zoning Appeals

APPROVAL OF MINUTES

Motion to approve minutes for the February 18, 2025 meeting.

RESULT:	Approved
MOVER:	Taylor
SECONDER:	Noakes
AYES:	Noakes, Jackson, Taylor, Schmitt, Dutton
NAYS:	None
ABSENT:	None

PUBLIC HEARING

Variance Application 2500335 submitted by Orange Creek LLC for a variance from Town Code §175-24.A. pertaining to the construction of a building and the side yard setback located on the property at 15 & 17 W. 11th Street identified by Tax Map 20A2-4-43-24. The property is located in the R-2, Residential District. The variance would effectively allow the applicant a

side yard setback of 8.7 feet. The required side yard setback should be a minimum of ten feet (10'). The variance requested by the applicant is to allow a setback of less than ten feet (10') for a recently constructed two family attached dwelling.

Mr. Ware reviewed the request.

Mr. Henderson representing the applicant answered questions from the Board.

Chairman Taylor opened the public hearing.

No one spoke during the public hearing.

Chairman Taylor closed the public hearing.

Motion to deny the application for the variance application. The BZA cannot legally grant a variance in the clear with it being a self-created hardship.

The board members discussed the request.

RESULT:	Denied
MOVER:	Taylor
SECONDER:	Dutton
AYES:	Jackson, Taylor, Dutton, Noakes, Schmitt
NAYS:	None
ABSENT:	None

ADJOURNMENT

With no further business before the Board, the meeting adjourned at 7:49 p.m.

Approved by the Board of Zoning Appeals
Date: _____

FRONT ROYAL BOARD OF ZONING APPEALS BY-LAWS

ARTICLE I. MEMBERSHIP

The Board of Zoning Appeals, herein also referred to as the “BZA” or “Board”, shall consist of five (5) members appointed in accordance with §15.2-2308 VA Code Ann, and Section 175-138 of the Town Code.

ARTICLE II. OFFICERS

1. The Board of Zoning Appeals (BZA) shall organize and annually elect a Chair, Vice-Chair, and Secretary. Elections should take place the first meeting held during the calendar year. In the event any officer's position becomes vacant at any time during the year, an election must be held at the next regular meeting to fill the vacancy.
2. The Chair shall preside at the meetings and hearings of the BZA and shall decide all points of order and/or procedure, appoint any committees that are found to be needed, and set any desired time limitations for speakers.
3. The Vice-Chair shall assume the duties of the Chair in his or her absence. In the absence of both the Chair and Vice-Chair, and a quorum exists, an acting Chair shall be selected by the members present to preside over the meeting.
4. Town Planning & Zoning Staff shall serve as the Secretary of the Board unless otherwise specified by the Board during annual elections. The general duties of the Secretary include the following:
 - a. Prepare official correspondence at the direction of the BZA.
 - b. Send out required notices.
 - c. Keep the minutes and records of the BZA's proceedings.
 - d. Send copies of appeals and applications to the Planning Commission as required.
 - e. Maintain other BZA records.
 - f. In response to Writs of Certiorari served upon the BZA, prepare and file with the court, in a timely fashion, certified copies of the record of any BZA decision that has been appealed.
 - g. Prepare and file an annual report of the BZA with Town Council.
 - h. Notify the circuit court of any vacancies on the BZA.
 - i. Perform other clerical duties as assigned by the Board.

5. Sixty days prior to a term expiration, or upon such time that an immediate vacancy occurs, the Secretary to the BZA shall notify the Clerk of Council that the need exists to fill a vacancy or upcoming term expiration.

ARTICLE III. MEETINGS, QUORUM, AND VOTING.

1. The regular meeting of the BZA shall be held on the 3rd Tuesday as needed each month. If the BZA is unable to meet on the 3rd Tuesday of the month, the alternative meeting date will be the 4th Tuesday of the month. Each regular meeting shall begin at 7:00 P.M., unless otherwise specified by the Board.
2. Special meetings may be called by the Chair provided that at least five (5) days' notice of such meeting is given to each member in writing.
3. All meetings shall be open to the public unless a closed meeting is held pursuant to the Virginia Freedom of Information Act §2.2-3700, et seq., Virginia Code Ann.
4. A quorum is necessary to transact any BZA business. In the absence of a quorum, the BZA may not vote on any BZA business except adjournment. However, the BZA may engage in discussion of internal matters such as training, procedures, or personnel in open session without a quorum. The Secretary must record such discussion in minutes
5. A quorum shall consist of three (3) members (i.e., a majority) of the BZA.
6. The concurring vote of three (3) members (a simple majority of the membership) shall be required to:
 - a. Grant variances.
 - b. Reverse decisions or determinations of the Zoning Administrator.
 - c. Amend these By-laws.
 - d. Issuance of a special use or special exception permit, but only if such authority is delegated to the BZA in the future by Town Council.
 - e. Grant a rehearing.
7. The concurring vote of a majority of all members present and voting, or such other greater number as may be required by the Code of Virginia or the Zoning Ordinance, shall be required to affect all other actions of the Board.
8. A member shall make a disclosure of the member's interest in a specific matter before the BZA when required by law. Any disclosure shall be announced and made part of the

record of the BZA prior to a case being heard or as soon as a basis for disclosure is discovered.

9. A member shall be disqualified to act on a specific matter before the BZA when required by law.
 - a. A member shall disqualify themselves from acting on a specific matter before the BZA when required by law.
 - b. A member may disqualify themselves from acting under any circumstances, which in the opinion of the individual member, would create an appearance of impropriety or unfairness, but a member need not state the reasons for disqualification.
 - c. The disqualification shall be entered into the record of the BZA, prior to a case being heard or as soon as a basis for disqualification is discovered, and the disqualified member shall sit with the public for the duration of that specific matter.
10. In the event of inclement weather or other conditions that require closure of Town Hall (or such other location designated for the BZA's meeting in the notice of the meeting), or if the chair (or vice-chair if the chair is unable to act) finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting, all agenda items not yet heard by the time of adjournment must be rescheduled; Town staff is responsible to promptly reschedule such postponed items and to readvertise them if required by law.
11. The order of business at all regular meetings of the BZA may be as follows:
 - a. Call to order.
 - b. Approval of minutes of previous meetings as received, if applicable.
 - c. Business of members of the BZA, if applicable.
 - d. Review of BZA Procedure, if applicable.
 - e. Public Hearing of scheduled, continued, and deferred for decision items, if applicable.
 - f. Unscheduled items, if applicable.
 - g. Adjournment.

ARTICLE IV. DUTIES.

It shall be the duty of the BZA, in accordance with the provisions of §15.2-2309 VA Code Ann., to hear and decide cases involving the following:

1. Variances to the strict application of the requirements of the Zoning Ordinance.
2. Appeals from a decision of the Zoning Administrator, or other administrative officer, in accordance with the provisions of the Zoning Ordinance.
3. Applications for interpretation of the district map where there is any uncertainty as to the location of the district boundary.
4. Issuance of special use permits or special exceptions, as may be delegated to the BZA by Town Council (no such authority has been granted to the BZA by Town Council at this time).

ARTICLE V. APPLICATIONS TO THE BZA.

1. All applications to the BZA for variances and appeals shall be made on forms supplied by the Department of Planning and Zoning. The same shall apply for special use or special exception applications if authority is delegated to the BZA in the future for such matters. All other applications or requests, for which there is no required form, shall be made in writing.
2. All applications shall include all of the information required by the Zoning Ordinance before being scheduled for a public hearing.

ARTICLE VI. PROCESSING OF APPLICATION

1. All applications shall be filed with the Department of Planning and Zoning. The processing and scheduling of applications shall comply with the requirements of the Front Royal Zoning Ordinance and the Code of Virginia.
2. The Secretary of the BZA shall notify the applicants in writing of the date, time, and place of the scheduled public hearing.
3. The Secretary of the BZA shall, in accordance with the Code of Virginia, cause to be advertised by publication, in a newspaper of general circulation in the area of the application, the required legal notice of the application.
4. The applicant shall be responsible for fulfilling all applicable notice requirements to abutting and other property owners. Required notices shall be sent by registered or certified mail, with return receipts by the recipient.

5. The Department of Planning & Zoning shall prepare and distribute a staff report and any pertinent information to the BZA at or before the scheduled public hearing.
6. The BZA, Town staff, and applicants must comply with the Code of Virginia with respect to *ex parte* communications.

ARTICLE VII. THE HEARING

The following procedures should be followed when the BZA conducts a public hearing:

1. Chair announces the public hearing and the subject matter.
 - a. If the hearing is for a variance, appeal, special use permit or special exception the Chair should remind all parties present that the Zoning Ordinance requires a concurring vote of three (3) members of the BZA to approve a variance.
 - b. No cross-examination or questions of speakers testifying may be permitted, except by members of the BZA, without the permission of the Chair.
 - c. The Chair or the Secretary may swear in all staff and speakers wishing to testify.
2. Chair calls on the staff of the Department of Planning and Zoning to present Staff's position and the background of the case, the staff member may then identify the details of the property and briefly describe the application.
3. BZA members may pose questions to Staff.
4. Chair calls on the applicant or appellant and/or their authorized agent or attorney to present the applicant's or appellant's position.
5. BZA members may pose questions to the applicant or appellant and/or their authorized agent or attorney.
6. Chair calls for testimony from any person present, stressing that the testimony needs to be relevant and limited to the precise issue that is the subject of the hearing.
7. Chair calls on Staff to offer a rebuttal or additional remarks, if desired.
8. Chair calls on applicant or appellant and/or their authorized agent or attorney to rebut or for additional remarks, if desired.

9. BZA members may pose final questions to the applicant or appellant, and/or their authorized agent or attorney, or Staff.
10. Chair closes the public hearing.
11. The BZA may discuss the matter and take action. Decisions and other actions or orders of the BZA should be taken in the form of a motion or resolution. The form and scope of BZA decisions should be as set forth in §15.2-2309 VA Code Ann.
12. A decision of the BZA is considered a “final decision” for the purposes of appeal when the BZA has made a decision that: (i) resolves the merits of the action before the BZA, or (ii) effects a dismissal of the case with prejudice. The thirty (30) day appeal period to the Circuit Court shall commence upon the final decision of the BZA.
13. The final decision of the BZA shall be promptly filed with the Secretary and become part of the BZA’s public record. The Secretary shall promptly prepare and provide to the applicant or appellant the BZA’s final decision on the application.
14. All meetings shall be conducted in accordance with these By-laws, the Front Royal Zoning Ordinance, the Code of Virginia, and if needed, Robert’s Rules of Order.

ARTICLE VIII. REQUEST FOR REHEARING AND RECONSIDERATION.

1. A party may request a rehearing by filing said request in writing with the Secretary within seven (7) days of date of the decision sought to be reheard and reconsidered. A decision will not be reheard or reconsidered at the original meeting where it was made.
2. Any request for rehearing must establish one or more of the following:
 - a. The BZA overlooked or misunderstood a material fact or legal issue which would change the decision sought to be reheard.
 - b. The existence of new and material evidence, which (i) was not previously available, (ii) could not have been reasonably discovered previously after diligent investigation, and (iii) could change the decision sought to be reheard.
 - c. A request for rehearing and reconsideration will be considered by the BZA at its next regularly scheduled meeting.
 - d. A motion to grant a rehearing must be made by at least one (1) member who voted in favor of the decision sought to be reheard.
 - e. If a decision is made granting a request for rehearing, the BZA will (1) set a date for rehearing, and (2) notice will be given by the applicants or by the staff of the Department of Planning and Zoning as required by law and these By-laws.

- f. A rehearing shall proceed in the same manner as a regular BZA hearing.
- g. A request for rehearing and reconsideration alone will not change the deadlines for appeal under the Code of Virginia and Zoning Ordinance.

ARTICLE IX. RECORDS

1. A file containing all relevant material and decisions, including any final decision, relating to each case shall be kept by the Department of Planning and Zoning as part of the records of the BZA.
2. All records of the BZA shall be public records, unless they are exempted from disclosure under the Virginia Freedom of Information Act, §2.2-3700, et seq., VA Code Ann.

ARTICLE X. SEVERABILITY

If any word, clause, sentence, article, section, subsection, or other part or parts of these By-laws shall be held by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such unconstitutionality or invalidity shall not affect any of the remaining parts of these By-laws, nor shall it affect any application of these By-laws that may be given effect without the unconstitutional or invalid parts, and to this end, all provisions of these By-laws are hereby declared to be severable.

ARTICLE XI. REVISIONS

These By-laws, adopted by action of the Board of Zoning Appeals, may be amended by an affirmative vote of not less than three (3) members.

TOWN OF FRONT ROYAL
DEPARTMENT OF PLANNING & ZONING



STAFF REPORT FOR THE BOARD OF ZONING APPEALS MEETING

APPLICATION #:



APPLICANT:



APPLICATION SUMMARY:

The Applicant has submitted an application to appeal the Zoning Administrator's determination that his shed is a violation of Town Code 175-14. The application is included as **Attachment 1**.

GENERAL INFORMATION:

Site Address			
Zoning District	R-1 (Residential) District		
Overlay Districts	Historic Area – NO	Floodplain – NO	Entrance Corridor – NO
Tax Identification			
Location	The subject property is located on the west side of Oakmont Drive south of John Marshall Highway.		
Existing Use	Single-Family Detached Dwelling		



Vicinity Map (WC GIS)

ILLUSTRATIONS

Aerial (Town GIS)



Photo (Town Staff)



ADDITIONAL INFORMATION:

Background

On January 7, 2019, Town Staff provided the Applicant with a NOTICE of VIOLATION for constructing a shed without a permit. The Applicant then submitted a zoning permit application. Upon review of the Zoning Permit Application, the Applicant was informed that the shed did not comply with the minimum setback from the front property line. A meeting was held with the Applicant and his attorney, that followed with a notice of violation being issued on March 4, 2019 for violation of Town Code 175-14 (See **ATTACHMENT 2**).

The minimum setback required pursuant to Town Code 175-14 is fifty-five feet (55') from the center of the street right-of-way of Oakmont Drive. The actual distance of the shed is unknown because a location survey has not been completed. Based on the Town's GIS it appears that the shed may be approximately twenty-five (25') from the center of the street. The old survey of the property is also attached (See **ATTACHMENT 3**) for reference purposes.

Town Code

Section 175-139.A. of the Town Code, as authorized under Virginia Code § 15.2-2309, enables the Board of Zoning Appeals with the power “(t)o hear and decide appeals from any order, requirement, decision and determination made by an administrative officer in the administration or enforcement of this chapter.”

Section 175-143 states that “(t)he Board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and decide the same within sixty (60) days. In exercising its powers, the Board may reverse or affirm, wholly or partly, or may modify an order, requirement, decision or determination of an administrative officer or decide in favor of the applicant on any matter upon which it is required to pass under this chapter or effect any variance from the chapter. The Board shall keep minutes of its proceedings and other official actions, which shall be filed in the office of the Board and shall be public records. The Chairman of the Board or, in his absence, the Acting Chairman may administer oaths and compel the attendance of witnesses.”

Relevant Code References

TOWN CODE 175-14 (R-1 District Setbacks)

Structures shall be located thirty-five (35) feet or more from any street right-of-way which is fifty (50) feet or greater in width or fifty-five (55) feet or more from the center of any street right-of-way less than fifty (50) feet in width; however, no building need be set back more than the average of the setback of the immediately adjoining structures on either side. A vacant lot fifty (50) feet or more in width may be assumed to be occupied by a building having a minimum setback.

TOWN CODE 175-2 (Word Usage)

D. The word "building" includes the word "structure;" the word "lot" includes the words "plot" and "parcel."

TOWN CODE 175-3 (Definitions)

ACCESSORY BUILDING/ACCESSORY STRUCTURE - A building or structure that is subordinate to, and located on the same lot as the principal permitted use of the property, of which, the accessory building or accessory structure is used for purposes that are clearly incidental to that of the principal permitted use of the property, and which is not attached by any part of a common wall or roof to the main building, or buildings, if any. An accessory building shall not exceed the height of the main building(s) located on the property; shall not be located within a required yard area that abuts a public road; and shall not be permitted where no main building exists on the property, except in the following: (i) temporary buildings or structures permitted under this chapter, (ii) accessory buildings without utilities that are used for storage purposes and do not exceed 256 square feet, and (iii) buildings, such as barns and silos, used for agricultural purposes.

FENCE - An artificially constructed barrier, made of any material, including but not limited to posts and wire, boards, or masonry intended to prevent escape or intrusion

Appeal Summary

to make a boundary, or serve as screening.

STRUCTURE - Anything constructed or erected, the use of which requires permanent location on the ground or attachment to something having a permanent location on the ground.

The Applicant has included a document titled "Justification for an Appeal." This document is part of Attachment 1.

STAFF COMMENTS:

Virginia Code § 15.2-2309 states that "(t)he decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision."

A public hearing is required.

The Applicant's alternative interpretations that the shed is not in violation of Town Code 175-14 are not reasonable, nor correct. In brief, the shed is indeed a structure. Furthermore, the average setback provision referenced by the applicant would appear to require a greater setback distance than the standard required setback of fifty-five (55') from the center of the street right-of-way.

The Zoning Administrator and Assistant Town Attorney are scheduled to attend the public hearing if further clarification of the Town Code is needed, or if there are any other questions of the Board of Zoning Appeals.

ATTACHMENTS:

Attachment 1: BZA Application and other documents submitted by the Applicant.

Attachment 2: Notice of Violation, dated March 4, 2019.

Attachment 3: Plat of the Property

BOARD OF ZONING APPEALS MEETING

APPLICANT:

The applicant submitted this application to seek a variance to Town Code 175-22, the minimum required front yard setbacks for a primary structure. Approval would allow the applicant to turn the existing unenclosed porch into an enclosed porch. The applicant's application is attached as **Attachment 1**.

GENERAL INFORMATION:

Site Address			
Zoning District	R-2 (Residential) District		
Overlay Districts	Historic Area – NO	Floodplain – NO	Entrance Corridor – NO
Tax Identification			
Location			
Existing Use	Single-Family Detached Dwelling		

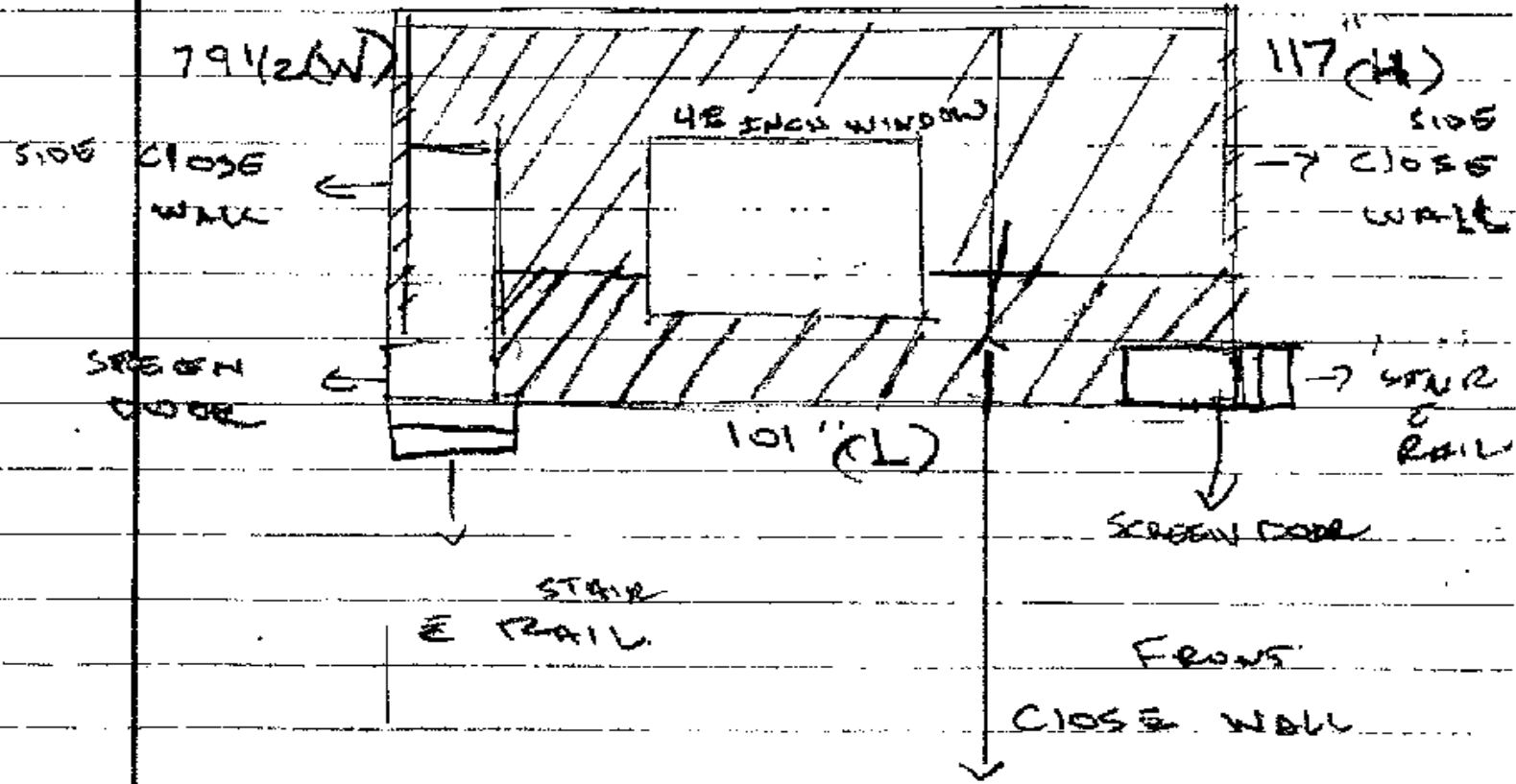


ILLUSTRATIONS



Conceptual Plan of Proposed Enclosure to Existing Porch (Applicant)

SAFETY PORCH



207" FRONT = 17.25'

140" Left = 11.66'

182" Right = 15.16'

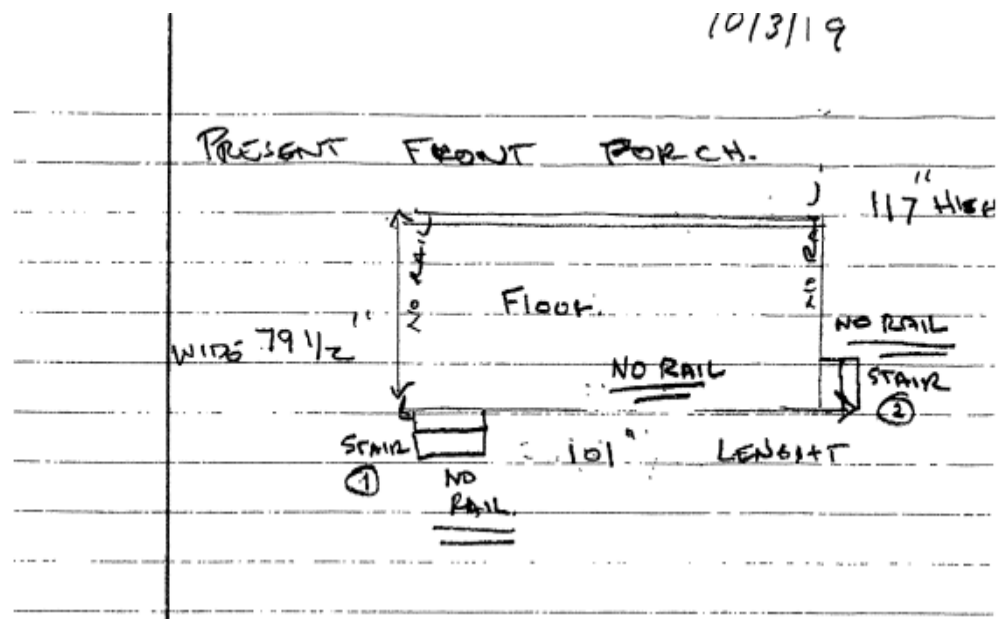
ADDITIONAL INFORMATION:

Background

The Applicant has submitted a zoning permit application after starting work on the porch. Staff advised the applicant that enclosing the porch could not be approved because it would not conform with the required front yard setback.

The existing porch is legally nonconforming as an unenclosed porch. This "grandfathers" the existing porch location, which is approximately 12 feet from the front property line along W. 13th Street. However, the Town Code requires different setbacks for enclosed porches versus unenclosed porches. Enclosed porches are required to meet the minimum setback of 30 feet from the front property line. Unenclosed porches, pursuant to the definition of porch under 175-3, may encroach within the 30-foot front setback area by as much as 10 feet, but shall have a setback of at least 15 feet. Therefore, enclosing the existing porch would create a new nonconformity because it extends into the front setback by more than ten (10) feet and is closer than fifteen (15) feet. Furthermore, the Town Code clearly does not intend to allow unenclosed porches to be constructed and then altered after the fact to not comply with the requirements, as defined under Town Code 175-3, as shown below:

"PORCH - Any porch, veranda or gallery (as the terms are commonly and customarily defined) or similar projection from the main wall of a structure, constructed upon the ground, and covered by a roof, canopy or awning; provided that the term shall not include any carport or other such improvement designed for and capable of accommodating the parking of a motor vehicle protected from the elements. An unenclosed porch shall mean a porch with no side enclosure, other than the side of the structure to which the porch is attached, with no screens or windows. An unenclosed porch may project into a front or rear yard not to exceed ten feet (10') nor extend any nearer than fifteen (15') from any front or rear property line. The area of a porch shall be included in the calculation of lot coverage. A porch shall not be considered an overhang, nor vice versa."



The application includes remarks from the Applicant that are for consideration of a

Application Summary	variance. The hardship listed on the application will need to be explained for consideration of a variance. • The Applicant states that the home is closer to the road than other homes in the immediate vicinity. • The Applicant also states that the porch needs to be enclosed for the safety and security of their 85-year old mother.
Evaluation	In Staff's opinion, the Applicant has not demonstrated a hardship. The reasons for hardship are inconclusive and may not be relevant. A hardship has to be related to the property per Town Code 175-3 under the definition of a "Variance". VARIANCE - A relaxation of the terms of the Zoning Ordinance where such "variance" will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the action of the applicant, a literal enforcement of the ordinance will work undue hardships on the property owner; a "variance" is authorized only for height, area and size of a structure or size of yards and open spaces; establishment or expansion of a use otherwise prohibited shall not be allowed by "variance," nor shall a "variance" be granted because of the presence of nonconformities in the zoning division or district or adjoining divisions or districts nor solely for the economic benefit of the person requesting such "variance."
Town Code And Virginia Code	<u>VARIANCES</u> Town Code 175-139.B authorizes the Board of Zoning Appeals with the ability to issue variances, as stipulated below: "To authorize, upon appeal in specific cases, such variance from the terms of the chapter as will not be contrary to the public interest when, owing to special conditions, a literal enforcement of the provisions will result in unnecessary hardship, provided that the spirit of the chapter shall be observed, and substantial justice done, as follows: 1. When a property owner can show that his property was acquired in good faith and where, by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the chapter, or where, by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the chapter would effectively prohibit or unreasonably restrict the use of the property, or where the Board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the chapter. 2. No such variance shall be authorized by the Board, unless it finds: a. That the strict application of the chapter would produce undue hardship. b. That such hardship is not shared generally by other properties in the same zoning district and the same vicinity. c. That the authorization of such variance will not be of substantial detriment

to adjacent property and that the character of the district will not be changed by the granting of the variance.

3. No such variance shall be authorized except after notice and hearing as required by Section 15. 2-2204 of the Code of Virginia as amended.
4. No variance shall be authorized unless the Board finds that the condition or situation of the property concerned, or the intended use of the property 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 chapter.
5. In authorizing a variance, the Board may impose such 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 guaranty or bond to ensure that the conditions imposed are being and will continue to be complied with.
6. In the event that a variance is not granted, the same variance application, or a variance application that is substantially the same, may not be submitted to the Board for consideration for a period of one (1) year from the date on which the variance request was denied.

Virginia Code § 15.2-2309.2 states the following in regard to Variances and the BZA:

“Notwithstanding any other provision of law, general or special, to grant upon appeal or original application in specific cases a variance as defined in § 15.2-2201, provided that the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the 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 A 4 of § 15.2-2286 at the time of the filing of the variance application.

No variance shall be considered except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

In granting a variance, the board may impose such 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. Notwithstanding any other provision of law, general or special, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the 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 ordinance. 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 shall be required."

Based on Virginia Code § 15.2-2309(2), that went into effect on July 1, 2015, 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 the following:

- (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)*.

CONCLUSION:

The applicant has not presented a substantial amount of information to demonstrate an undue/unnecessary hardship. If the applicant can prove a hardship, the BZA should consider those arguments first before determination for a variance.

A public hearing is scheduled and the BZA should hear and consider testimony of those that speak at the public hearing. Adjoining property owners were sent notification letters and a legal advertisement was posted.

ATTACHMENTS: Attachment 1: BZA Application, including supportive information submitted by the Applicant.

§ 15.2-2309. Powers and duties of boards of zoning appeals

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. Altering the order of evidence is a reversible error only if the appellant lodges an objection citing this section and the board subsequently refuses to reorder the hearing. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision, or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.

2. Notwithstanding any other provision of law, general or special, to grant upon appeal or original application in specific cases a variance as defined in § 15.2-2201, provided that the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the 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, 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 A 4 of § 15.2-2286 at the time of the filing of the variance application. 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.

No variance shall be considered except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

In granting a variance, the board may impose such 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. Notwithstanding any other provision of law, general or special, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance; however, the structure permitted by the 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 ordinance. 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 shall be required.

3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

4. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret the map in such way as to carry out the intent and purpose of the ordinance for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. The board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

5. No provision of this section shall be construed as granting any board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.

6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail.

7. To revoke a special exception previously granted by the board of zoning appeals if the board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may give such notice by first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that there has not been compliance with the terms and conditions of the permit, then it may also revoke special exceptions in the manner provided by this subdivision.

8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

Code 1950, §§ 15-831, 15-850, 15-968.9; 1950, p. 176; 1962, c. 407, § 15.1-495; 1964, c. 535; 1972, c. 695; 1975, cc. 521, 641; 1987, c. 8; 1991, c. 513; 1996, c. 555; 1997, c.; 2000, c. 1050; 2002, c. 546; 2003, c. 403; 2006, c. 264; 2008, c. 318; 2009, c. 206; 2015, c. 597; 2018, c. 757; 2025, c. 512.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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)(A)(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)(A)(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)(i)(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)(i)(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)(i)*. 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)(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 Amberst County Board of Supervisors v. Amberst 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.

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 14

Decisions by Zoning Officials

14-100 Introduction

This chapter examines the typical decisions referred to in various provisions of the Virginia Code as decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*), and except where otherwise noted, this refers to written decisions) made by the zoning administrator and other administrative officers (collectively, the *zoning administrator*), and what makes a decision one that may have binding effect. *See James v. City of Falls Church*, 280 Va. 31, 43, 694 S.E.2d 568, 575 (2010) (a planning commission is not an administrative officer for purposes of making decisions under Virginia Code § 15.2-2311).

Chapter 15 explores the BZA's consideration of appeals from decisions made by the zoning administrator. Chapter 16 (Interpreting a Statute or Ordinance), Chapter 17 (Classifying Primary Uses Determining Whether a Use is an Accessory Use), Chapter 18 (Nonconforming Uses and Structures), and Chapter 19 (Vested Rights) provide guidance on a selected range of issues frequently considered by a zoning administrator and a BZA.

14-200 Decisions made by the zoning administrator

A locality is enabled to provide for administering and enforcing its the zoning ordinance. *Virginia Code § 15.2-2286(A)(4)*. The decisions made by the zoning administrator and other administrative officers under this authority invariably affect the interests of various persons, including the landowner and its neighbors. The zoning administrator in particular has all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, and this authority includes: (1) ordering in writing the remedying of any condition found in violation of the ordinance; (2) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal; and (3) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of vested rights under Virginia Code §§ 15.2-2307 and 15.2-2311(C). *Virginia Code § 15.2-2286(A)(4)*.

When a request for a decision is made, the zoning administrator must respond within 90 days unless the requester has agreed to a longer period. *Virginia Code § 15.2-2286(A)(4)*. The range of issues that the zoning administrator may be asked to resolve in a decision 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 setback, height, bulk and other requirements.
- Whether a use or structure is nonconforming.
- Whether an owner has vested rights.
- Whether a lot meets minimum lot size requirements.
- Whether a use or structure complies with the zoning ordinance.

Even though zoning administrators must necessarily interpret the zoning ordinance to execute their responsibilities, they may not rule upon the validity of a zoning regulation, nor waive any requirement they are not expressly authorized to waive. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997) (declaring a

zoning ordinance invalid is within the sole province of the courts); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992) (waiver).

14-210 What makes a decision by the zoning administrator one that may have binding effect

A decision, and in particular, a determination, must be based upon a set of existing facts, rather than upon a recitation of non-existent facts, hypotheticals, proposals, ideas, concepts, or “what-if” suppositions. *See Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997).

If a zoning violation is not the issue, there must be some application pending for specific relief that triggers the zoning administrator’s need to make a decision. *Lilly v. Caroline County*, 259 Va. 291, 298, 526 S.E.2d 743, 746 (2000). The application for specific relief need not pertain directly to a decision on the question answered. *Lilly, supra* (a determination of whether a radio tower was a use permitted by right arose in the context of a proposed zoning amendment and an application for a special use permit).

If a zoning violation is the issue, a decision need not be triggered by an application for specific relief. The zoning administrator may decide that a zoning violation exists upon any information that comes to their attention, by any means. *Gwinn v. Alward*, 235 Va. 616, 622, 369 S.E.2d 410, 412 (1988). Any other approach would hamstring the zoning administrator in enforcing the locality’s zoning laws. *Gwinn, supra*.

When a Decision May Have Binding Effect	
Decision Pertains to a Zoning Violation	Decision Pertains to Another Issue
• Need not be based on a pending application before the locality, but may be based on information that comes to the zoning administrator’s attention • Must be based upon a set of existing facts • Must be in writing	• Must be a pending application before the locality • Must be based upon a set of existing facts • Should be in writing, but may be made orally

If there is no pending application or no zoning violation in issue, any decision by the zoning administrator will likely be found to be an advisory opinion that does not trigger the right to appeal under Virginia Code § 15.2-2311. *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994). This rule has been highlighted in two decisions of the Virginia Supreme Court.

In *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 677 S.E.2d 283 (2009), Crucible operated a security training facility in Stafford County and wanted to expand its facility. It sought and obtained from the zoning administrator an “interpretation” that the proposed facility would be classified as a “school,” a by-right use in the applicable zoning district at the time. The zoning administrator’s interpretation was contained in a letter entitled “Zoning Verification,” and the interpretation was conditioned on it being valid as of the date of the letter and was subject to change. Relying on that letter, Crucible bought the property. When the county changed its zoning regulations to allow schools only by special use permit, Crucible sought to claim vested rights based on the zoning administrator’s “Zoning Verification.” The Virginia Supreme Court held that the “Zoning Verification” was not a determination within the meaning of Virginia Code § 15.2-2311(C) so as to allow rights to vest, stating:

The zoning verification letter merely stated that Crucible’s facility fell within the definition of “school” according to the then-current zoning laws and that those laws were subject to change. The zoning verification letter did not permit Crucible to use its property in a way that was otherwise not allowed under then-current zoning laws, and Crucible cannot establish a right to proceed based upon Code § 15.2-2311(C).

Crucible, 278 Va. at 161, 677 S.E.2d at 288.

In *James v. City of Falls Church*, 280 Va. 31, 694 S.E.2d 568 (2010), the city’s zoning administrator was asked to interpret the zoning ordinance to decide whether church parcels within a historic district could be consolidated and concluded that they could. Based on the zoning administrator’s interpretation, the church filed a plat to consolidate

the parcels. When the plat reached the city's planning commission, the commission disagreed with the zoning administrator's interpretation and disapproved the plat. In concluding that the zoning administrator's interpretation did not rise to the level of a decision to which vested rights might accrue under Virginia Code § 15.2-2311(C), the Virginia Supreme Court said:

[T]he zoning administrator merely provided an interpretation of City Code § 48-800(a). In its letter to the zoning administrator, Columbia Baptist requested a "zoning interpretation." And in his reply letter, the zoning administrator made clear that he was responding to a "request for an interpretation." He further stated: "while the actual consolidation process is a Planning Commission function [,] it is my *interpretation*" [emphasis in original] that the ordinances permit the consolidation . . . That "interpretation" lacked the finality of an "order, requirement, decision or determination" under Code § 15.2-2311(C).

James, 280 Va. at 44, 694 S.E.2d at 575. The Court went on to hold that the planning commission had the authority to interpret the zoning ordinance in consideration of the plat, and it was not obliged to adopt the zoning administrator's interpretation. *See also Greene v. Board of Zoning Appeals of Fairfax County*, 34 Va. Cir. 227 (1994) (erroneous written determination as to whether property was to be used only for open space was advisory to the county only, it was not one triggering rights and obligations under what is now Virginia Code § 15.2-2311).

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*. At first impression, a different procedure applies when one seeks to challenge a zoning decision made in conjunction with the issuance of a building permit and received no actual notice of the issuance of the permit. *Virginia Code § 15.2-2313*. In such a situation, Virginia Code § 15.2-2313 appears to allow the aggrieved party to pursue relief in court even though no appeal was taken from the decision of the administrative officer to the BZA, provided that the lawsuit is filed within 15 days after the start of construction. However, relying on the Virginia Supreme Court's description in *Lilly*, *supra*, of an appeal to the BZA as a *mandatory appeal*, two trial courts have concluded that an appeal to the BZA under Virginia Code § 15.2-2311 is a prerequisite to an action under Virginia Code § 15.2-2313. *Campbell v. Davidson*, 96 Va. Cir. 55 (2017); *Mirror Ridge Homeowners Association v. Loudoun County Board of Supervisors*, 51 Va. Cir. 406 (2000). *See section 14-230 for required notice of right to appeal written notices of violation or orders.*

14-220 The thing decided rule

Important legal rights and responsibilities attach to a decision. A person aggrieved by a decision of the zoning administrator has the right to appeal it to the BZA. *Virginia Code § 15.2-2311*; *see Chapter 15*. If this mandatory appeal is not timely filed, the zoning administrator's decision becomes a *thing decided* and, thus, it is not subject to court challenge. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (zoning administrator's determination that a landowner operated a junkyard on his property in violation of the zoning ordinance became a thing decided and not subject to attack because the landowner did not appeal the decision); *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990) (landowners who failed to appeal decisions to the BZA would not later be allowed to put on evidence of their claim that their use was nonconforming).

When an application for specific relief is pending, a decision or determination that triggers the right to appeal may be made orally. *Lilly*, *supra* (zoning administrator orally determined at a public hearing whether a use was by-right, the persons aggrieved were present at the hearing, and the zoning administrator advised the public that they could appeal the determination to the BZA).

14-221 The rationale for the rule

The thing decided rule is based on a fundamental principle of administrative law – when an administrative remedy is provided, that remedy must be exhausted before an administrative determination may be challenged in court. In the zoning context, "a landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust 'adequate and available administrative remedies before proceeding

with a court challenge.” *Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994), quoting *Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989); *Henrico County v. Market Inns, Inc.*, 228 Va. 82, 319 S.E.2d 737 (1984). Thus, a person aggrieved by a decision of the zoning administrator must exhaust the administrative remedy provided – a timely appeal to the BZA under Virginia Code § 15.2-2311 – before an issue may be raised in court.

The exhaustion doctrine serves several purposes: (1) it permits the BZA to apply its experience with the zoning ordinance and to perform functions within its area of expertise; (2) it provides an opportunity for the locality and the other parties to more fully develop the facts upon which the decision is based; (3) it avoids unnecessary judicial review by giving the BZA an opportunity to correct any mistakes of the zoning administrator; and (4) it preserves the autonomy of the administrative system established by a locality for reviewing official determinations.

Thus, an aggrieved person who fails to timely appeal a zoning administrator’s decision to the BZA is thereafter precluded from challenging the following in a civil court proceeding:

- Interpretation: The interpretation of a zoning regulation. *See Phillips v. Telum, Inc.*, 223 Va. 585, 292 S.E.2d 311 (1982); *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 222 S.E.2d 570 (1976); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Noel v. Chesterfield County*, 37 Va. Cir. 219 (1995).
- Use classification: The classification of a use on the property. *Lilly v. Caroline County*, 259 Va. 291 (2000) (tower was a use allowed by right); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988) (activities and use constituted a junkyard).
- Nonconforming status: Whether a use has nonconforming status. *Board of Supervisors of Fairfax County v. Martin*, 23 Va. Cir. 37 (1990).
- Vested rights: Whether a landowner has vested rights to develop its property. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 831, S.E.2d 483 (2019).
- Violations: Whether a violation of the zoning ordinance exists in a civil enforcement proceeding. *County of Chesterfield v. Lane*, 104 Va. Cir. 1 (2019); *City of Chesapeake v. Kinser*, 97 Va. Cir. 453 (2015) (in civil action seeking declaratory and injunctive relief, the city was entitled to summary judgment supported by the thing decided rule where the defendants had withdrawn their appeal to the BZA); *see City of Virginia Beach v. Witchduck Lake Enterprises*, 99 Va. Cir. 151 (2018) (declining to apply the thing decided rule in a criminal enforcement proceeding).

This short list is not exhaustive. Essentially, the determination of any issue germane to a zoning administrator’s decision may become a thing decided if it is not timely appealed.

The preclusive effect of the rule applies in civil zoning enforcement actions, thereby preventing a defendant from raising issues not appealed as defenses. *Dick Kelly Enterprises, supra*. The rule also may facilitate the resolution of civil zoning enforcement actions. In *McLane v. Clark*, 2010 Va. Cir. LEXIS 66, 2010 WL 2693526 (2010), a Fairfax County zoning inspector issued a notice of violation in 2008 to the owners of a bed and breakfast. The notice of violation was never appealed, but the county did not enforce the alleged violation at that time. Almost two years later, the zoning administrator filed a civil enforcement action in which the county sought both mandatory and prohibitory injunctive relief. The circuit court concluded that the thing decided rule entitled the county to obtain a prohibitory injunction without a trial. The court noted that one of the purposes of a prohibitory injunction was to prevent the future commission of an anticipated wrong. Citing the statutory authority for injunctive relief under Virginia Code §§ 15.2-2208 and 15.2-2286(A)(4), the court concluded:

Given that these statutes expressly provide for injunctive relief for the violation of a zoning ordinance, all that is required by the County in this case is proof of a violation. A Notice of Violation was issued to the Clarks on March 18, 2008, and it was not appealed. Therefore, the fact

that the Clarks were in violation of a zoning ordinance is a thing decided. [citation omitted]
Accordingly, the County has shown all that is required for entry of a prohibitory injunction.

McLane, 2010 Va. Cir. LEXIS at 9, 2010 WL 2693526.

As for the county's request for a mandatory injunction, the court observed that its purpose is to "undo an existing wrongful condition" whose "use is justified only when it appears that, if it is not applied, the wrongful condition is likely to continue." *McLane*, 2010 Va. Cir. LEXIS at 4, 2010 WL 2693526 (2010). Although the thing decided rule conclusively determined that the owners were in violation in 2008, the owners contended that the 2008 violation had been abated. The court concluded that the 2008 notice of violation was insufficient to establish that the violation still existed so as to justify the issuance of a mandatory injunction without a trial on the issue.

There are circumstances when the administrative remedy – appeal to the BZA – need not be exhausted. Because neither the zoning administrator nor the BZA may rule on the validity of a zoning ordinance, there is no requirement to exhaust administrative remedies before challenging the validity of an ordinance. *Dail v. York County*, 259 Va. 577, 582, 528 S.E.2d 447, 450 (2000) (challenge to county ordinance); *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997) (no requirement to appeal the county building inspector's determination or to apply for a new zoning permit because there was no administrative remedy equal to the relief sought).

In addition, a landowner need not exhaust administrative remedies by seeking a vested rights determination from the zoning administrator before asking the court to make such a determination. *Board of Supervisors of Stafford County v. Crucible, Inc.*, 278 Va. 152, 157-158, 677 S.E.2d 283, 286 (2009). This is so because, historically, the courts were empowered to make vested rights determinations. The 1993 amendment to Virginia Code § 15.2-2286 that authorized zoning administrators to make vested rights determinations did not divest the courts of their authority. Thus, the authority exists concurrently in the zoning administrator and the courts. However, once a landowner pursues a vested rights determination through the zoning administrator and the BZA, it must exhaust that remedy and, if it fails to do so, the matter is a thing decided. *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566, 583, 831 S.E.2d 483 (2019). The Virginia Supreme Court explained: "To allow Bragg Hill to independently seek a vested rights determination in circuit court, beyond the 30-day appeal period following the BZA's determination would render Code § 15.2-2314 meaningless" and would defeat the purpose of the administrative remedy, which "would be eternally subject to collateral attack in a future circuit court proceeding." *Bragg Hill*, 297 Va. at 583-584, 831 S.E.2d 492.

14-222 The rule will apply if the zoning administrator made the basis of the decision clear

The thing decided rule will apply if the zoning administrator has made the basis of the decision clear. *Lilly v. Caroline County*, 259 Va. 291, 526 S.E.2d 743 (2000); *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992); *Gwinn v. Alward*, 235 Va. 616, 369 S.E.2d 410 (1988). It does not appear that this requirement is overly demanding or requires an unusual amount of detail.

In *Lilly*, the Virginia Supreme Court concluded that the oral statement by the zoning administrator at a public hearing that a "radio tower was a by-right use in the Rural Preservation zoning district" was a sufficient explanation of the basis for his determination. *Lilly*, 259 Va. at 297, 526 S.E.2d at 746.

In *Dick Kelly Enterprises*, the zoning administrator had notified the landowner of certain "zoning and building code violations at the subject property," noted that the property was located in a "Bay Front Residential District," and that "we have learned that for a period in excess of two years you have used it as a forty-two (42) unit apartment complex" rather than as a 42-unit motel. The zoning administrator further stated that the subject property's use was "inconsistent with the use approved in the Certificate of Occupancy, violates Section 904 of the zoning ordinance and Sections 112 and 115 of the building code" and "violates the area, parking, and other BFR district regulations." The Virginia Supreme Court concluded that the zoning administrator had adequately made clear the basis for the decision. *Dick Kelly Enterprises*, 243 Va. at 379, 416 S.E.2d at 684.

In *Alward*, zoning officials sent the landowner a series of letters stating that the use of his property was “considered by the Fairfax County Zoning Ordinance to be a junk yard . . . Consequently, the use of this commercial property as a repository for junk vehicles, trash service equipment, and miscellaneous junk and debris is in violation of the Ordinance.” The letter also advised the landowner that the property was located in a C-8, highway commercial, zoning district and, as such, could not be used for “trash hauling and related storage of vehicles,” and that the use of the property “as the location for a refuse collection service and the related storage of vehicles observed on September 13, 1984, is in violation of the Fairfax County Zoning Ordinance.” The Virginia Supreme Court concluded that the zoning officials had adequately made clear the basis for their determination. *Alward*, 235 Va. at 622, 369 S.E.2d at 413.

14-230 Required notice to the owner when a request for a decision is made by a person other than the owner

Virginia Code § 15.2-2204(H) provides that when a person other than the landowner or the landowner’s agent requests a decision, determination, order, or requirement from either the zoning administrator, or another administrative officer that is subject to appeal under Virginia Code §§ 15.2-2311 and 15.2-2314, written notice of the request must be given to the landowner of the property within 10 days after receipt of the request.

The written notice to the landowner must either be given by the zoning administrator or other administrative officer or, at the direction of the zoning administrator or other officer, the requesting applicant. If the applicant is required to provide the notice to the landowner, the applicant also must provide satisfactory evidence to the zoning administrator or other administrative officer that the notice has been given. Written notice mailed to the owner at the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records satisfies the notice requirements.

14-240 Required notice to the owner of a notice of violation or order

A notice of violation or an order of the zoning administrator will be binding against a landowner only if the zoning administrator provided notice of violation or the order to the landowner. *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 notice of violation or the order, or participated in the BZA appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

14-250 Required notice of right to appeal written notices of violation or orders

Any written notice of a zoning violation or a written order of the zoning administrator must include a statement informing the recipient that they may have a right to appeal the notice of zoning violation or written order within 30 days, and that the decision will be final and unappealable if not appealed within 30 days. The 30-day appeal period for the recipient of the notice or order does not begin until they are advised of the right to appeal. *Virginia Code § 15.2-2311(A)*. A written notice that is sent by registered or certified mail to, or posted at, the last known address of the landowner as shown on the current real estate tax assessment books or current real estate tax assessment records, is deemed sufficient notice to the landowner and satisfies the notice requirements. *Virginia Code § 15.2-2311(A)*. Finally, the notice of appeal must inform the recipient of the applicable appeal fee and provide a reference to where additional information may be obtained regarding filing an appeal. *Virginia Code § 15.2-2311(A)*.

Under Virginia Code § 15.2-2311(A), the required notice of appeal applies only to written notices of violation and written orders of the zoning administrator. It does not apply to other decisions and determinations that may be made and, thus, the 30-day appeal period may run against someone who may not have received, or may not have been entitled to receive, notice of the decision or determination. In other words, third parties do not have an unlimited period of time to appeal a decision, even if they assert that they are aggrieved. Otherwise, there would be no finality to a decision or determination. *But see Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010), where third-parties were allowed to challenge a decision as to whether a proposed use was a “school” long after the 30-day appeal period had passed because the decision was not directed to them and there was no evidence that the petitioners knew about the decision when it was made.

14-300 The doctrine of estoppel and its application to erroneous decisions

A zoning official may make an incorrect decision, and that incorrect decision may place a burden on the person affected by it; other times an incorrect decision may give landowners greater rights than they might otherwise be entitled to and, once discovered, the locality may seek to correct that error.

14-310 The doctrine of estoppel

In the land use context, the doctrine of estoppel is typically raised by a landowner who has been erroneously granted a permit or some other kind of approval. For example, a building official may issue a building permit for a building that will be unlawfully located within the setback area on the lot. When the mistake is discovered, but construction on the building has begun, the landowner will claim that the locality is estopped (prevented) from applying the setback regulations to the lot because it relied on the building permit issued by the locality.

Except in the circumstances discussed in section 14-320, the doctrine of estoppel does not apply to Virginia localities. *Wolfe v. Board of Zoning Appeals of Fairfax County*, 260 Va. 7, 532 S.E.2d 621 (2000); *Hurt v. Caldwell*, 222 Va. 91, 279 S.E.2d 138 (1981); *WANV, Inc. v. Houff*, 219 Va. 57, 244 S.E.2d 760 (1978); *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968). The doctrine of estoppel does not apply to localities because:

An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.

WANV, 219 Va. at 63, 244 S.E.2d at 763-764.

No subordinate municipal official can bind the municipality to an incorrect . . . interpretation of the [locality's] ordinances.

Wolfe, 260 Va. at 19, 532 S.E.2d at 627; *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992).

If a building permit is issued in violation of law, it confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance or authorize a structure at a location prohibited by the ordinance. Its issuance by such a municipal officer is unauthorized and void. [citations omitted] Administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them.

Segaloff, 209 Va. at 382, 163 S.E.2d at 685 (building canopy constructed in setback as shown on approved building permit plans, but in violation of setback regulations).

Thus, estoppel does not apply because the laws of the state and a locality are supreme to any decision of an official in the administration of those laws. The effect is to prevent a law from being overridden or circumscribed by erroneous decisions at the administrative level. It is irrelevant whether the official is acting in good faith. *Hurt*, 222 Va. at 97, 279 S.E.2d at 142 (estoppel would not apply even though the building official acted in good faith and under the honest belief that he had a legal right to issue the building permit, because he was without authority to issue a building permit for the construction of a multi-family apartment building unless and until the county regulation had been met).

14-320 Virginia Code § 15.2-2311(C) and statutory estoppel

Virginia Code § 15.2-2311(C) provides “for the potential vesting of a right to use property in a manner that otherwise would not have been allowed.” *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 244, 657 S.E.2d 153, 160 (2008). When a zoning administrator makes an erroneous written decision that works to the benefit of a landowner (e.g., by allowing the landowner to do something not otherwise allowed by the zoning ordinance) and that error is discovered, the zoning administrator presumably will seek to correct it. Virginia Code

§ 15.2-2311(C) creates a limited circumstance when estoppel principles apply to localities, and vests rights in the landowner if the zoning administrator does not correct an erroneous written determination within 60 days after the date of the decision.

Specifically, Virginia Code § 15.2-2311(C) provides:

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 errors.

See section 19-400 for a discussion of the vested rights that may attach to an erroneous determination.

14-400 The doctrine of laches as applied to decisions related to zoning enforcement

In most Virginia localities, zoning enforcement is triggered by a complaint, which is usually lodged by a neighbor of the alleged violator or other concerned citizens. Some localities are engaged in proactive zoning enforcement where zoning inspectors go out seeking zoning violations on their own. Under this prevailing state of zoning enforcement, it is possible for zoning violations to go unnoticed by the locality for years, sometimes decades. The passage of time, however, in no way legitimizes the illegal use or prevents the locality from enforcing its zoning regulations.

Laches is an equitable defense that may be raised by a party who claims that the failure of another party to assert a known right for an unexplained length of time is prejudicial to the party raising the defense. *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 47, 353 S.E.2d 727, 735 (1987). Assuming for the sake of argument that the defense of laches applies against localities, the defense would be raised by a zoning violator facing a zoning enforcement action. However, laches does not apply to a locality in the discharge of its governmental functions, and this includes the enforcement of its zoning regulations. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 381, 416 S.E.2d 680, 685 (1992); *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *City of Portsmouth v. City of Chesapeake*, 232 Va. 158, 164, 349 S.E.2d 351, 354 (1986).

In *Dick Kelly Enterprises*, the landowner unsuccessfully argued that the doctrine should apply because it had been illegally operating an apartment building in a building zoned for a motel use for six years before the zoning regulations were enforced. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the circuit court rejected the landowner's claim that laches should prevent the county from enjoining him from operating his illegal vehicle light service business because the county had not enforced against his property for over 40 years, the business was now his sole source of income, and because he was no longer able to work away from his home due to his and his wife's medical conditions.

To put it simply, an illegal use does not become a legal use solely because it has escaped detection from zoning inspectors for a certain period of time.

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 Levinsville 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.