

Chapter 15

Appeals of Official Determinations to the Board of Zoning Appeals

15-100 Introduction

A 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). Others originate with either the zoning administrator or other administrative officers, and they come to the BZA in the nature of an appeal from that officer's decision. *Virginia Code § 15.2-2309*. This chapter focuses on the latter – appeals of official determinations made by the zoning administrator.

An official determination made in the administration or enforcement of the zoning enabling statutes or the zoning ordinance may be appealed to the BZA. *Virginia Code § 15.2-2311(A)*. In order to have a right to appeal an official determination, the appellant must be a *person aggrieved* by the determination, or be an officer, department, board or bureau of the locality. *Virginia Code § 15.2-2311(A)*. The meaning of *aggrieved* is settled under Virginia case law:

In 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 Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach, 231 Va. 415 (1986); *see, Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18 (1994). Organizations that neither own nor occupy any real property, nor hold any right that would be affected by an official determination, are not persons aggrieved. *Pearsall v. Virginia Racing Commission*, 26 Va. App. 376 (1998).

15-200 Procedure to perfect an appeal

An appeal must be filed within 30 days after the determination is made. *Virginia Code § 15.2-2311(A)*. A locality's zoning ordinance may provide for a shorter appeal period of less than 30 days, but not less than 10 days, for short-term recurring violations such as temporary or seasonal commercial uses, parking of commercial trucks in residential zoning districts, or maximum occupancy limitations of a residential dwelling unit. *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*. *See section 14-220*.

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)*.

After an appeal is filed, the BZA must fix a reasonable time for hearing the appeal, give public notice of the hearing, and provide notice to the parties in interest. *Virginia Code § 15.2-2312*.

15-300 Effect of filing an appeal on pending proceedings

Generally, the filing of an appeal 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 (2007) (since Virginia Code § 15.2-2311(B) is remedial in nature, it should be liberally construed and, therefore, construction of structure authorized by county’s issuance of zoning permits was stayed pending BZA appeal). 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, the zoning administrator may certify to the BZA that facts exist such that a stay, in her opinion, would cause imminent peril to life or property. *Virginia Code § 15.2-2311(B)*. If the zoning administrator so certifies, 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)*.

15-400 Consideration of an appeal

The BZA’s decision on appeal is limited to the issue of whether the zoning administrator’s decision was correct. *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290 (1993). 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 (2004). Regardless of what the zoning administrator states in his 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 they were not cited by the zoning administrator. *Madison, supra*.

The scope of the proceeding before the BZA may be limited by statements made by the appellant or his attorney. *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407 (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 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.

Summary of the Scope of Review on Appeal
<ul style="list-style-type: none"> • The issue for the BZA is whether the zoning administrator’s decision was correct. • Statements by the appellant or his attorney may further limit the scope of the appeal. • In the consideration of an appeal, the BZA may not: <ul style="list-style-type: none"> → 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.

A BZA may not determine what uses are appropriate in a zoning district because that is a legislative function reserved to the governing body. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982). The BZA’s role is not to determine whether a proposed use is appropriate in the zoning district, but 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, and this is a legislative decision that lies with the governing body, not the BZA. *Helmick v. Town of Warrenton*, 254 Va. 225 (1997) (the exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety”); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982) (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); *Foster v. Geller*, 248 Va. 563 (1994) (the BZA does not have the power to rezone property). Administrative zoning determinations such as those made by the BZA must be grounded within the legislative framework provided. *Higgs v. Kirkbride*, 258 Va. 567 (1999). While the BZA should consider the purpose and intent of the zoning ordinance, the ordinance should not be extended by interpretation or construction beyond its intended purpose. *Higgs, supra*.

Lastly, one of the 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; that is a determination within the sole province of the judiciary. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70 (1997). In addition, the BZA does not have the power to amend or repeal portions of a zoning ordinance. *Foster v. Geller*, 248 Va. 563 (1994). The principles relevant to the interpretation of the zoning ordinance by the BZA are well established. *Higgs v. Kirkbride*, 258 Va. 567 (1999). See chapter 16 for a discussion of some of those key principles.

15-500 Decision by the BZA; vote required

In exercising its powers, the BZA may reverse or affirm, wholly or partly, or may modify, the decision of the zoning administrator. *Virginia Code § 15.2-2312*. 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.

The BZA is required to make its decision within 90 days of the filing of the application or appeal. *Virginia Code § 15.2-2312*. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to decide an appeal after the time period has passed. *Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

In order 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 (1980).

15-600 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*.

Note however, that 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* 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.

This section pertains only to appeals of BZA decisions.

15-610 Time in which to file a petition for writ of certiorari

The petition for a 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 (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 (2006).

15-620 Nature of the proceeding in circuit court

A proceeding on a writ of certiorari is not a trial *de novo* on questions of fact. *Virginia Code § 15.2-2314*; *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290 (1993). This means that the trial in the circuit court is generally held on the record of the proceedings before the BZA. However, the court must allow additional evidence to be admitted. *Virginia Code § 15.2-2314*.

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 (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 (1994); *University Square Associates, supra*. The court’s inquiry is not 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 (2004). The court’s role, like the BZA’s, is to determine whether the *decision* was correct, applying all of the applicable terms and provisions of the zoning ordinance, even if they were not cited by the zoning administrator. *Madison, supra*.

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 (2002); *University Square Associates, supra*; *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 (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). 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*.

15-630 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions pertaining to official determinations, 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, including 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*. By comparison, on appeals from decisions pertaining to variances and special use permits, the appealing party may rebut the presumption by proving by a preponderance of the evidence that the BZA applied erroneous principles of law, or where the BZA’s discretion is involved, its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance. *Virginia Code § 15.2-2314*. Prior to July 1, 2006, different presumptions and standards of review applied, and the version of Virginia Code § 15.2-2314 in effect when the petition for writ of certiorari was filed applies. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232 (2008), *fn. 3*; *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, *fn. 3* (2007).

The party challenging the BZA’s decision has the burden of proof. *Foster v. Geller*, 248 Va. 563 (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 court. *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*.

15-700 Presenting an appeal to the BZA

Appeals to the BZA can become legal free-for-all resulting in long, drawn-out hearings where a multitude of issues, relevant and irrelevant, are raised by the appellant, the public or the BZA, and where relevant and material issues may be lost in the confusion. This risk is especially true where the BZA’s procedures do not require a level of formality that imposes structure to the proceedings.

15-710 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, staff must review the statement to assure that this requirement is satisfied. A statement of the basis for the appeal is critical because that statement should be relied on to frame *and limit* the issues on appeal.

If the statement is unclear or needs further information, staff should contact the appellant and ask him or her to elaborate on the basis for the appeal. Without a clearly stated basis for appeal, staff can only guess what the key issues will be on appeal (such as whether a use is nonconforming). In any event, staff needs to elicit from the appellant as much information as possible about the appeal before the staff report is written.

15-720 Presenting the appeal

There are a number of things staff can do to present an appeal to assure 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 (*e.g.*, where 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 – that the use is *subordinate* and *customarily incidental* to the primary use – and how those elements have been interpreted under the case law). A legal memorandum, if necessary, should be included with the staff

report. Staff should not be concerned that the appeals will become too legalistic because the BZA is always obligated to apply the correct legal principles in making a decision.

- Use visual aids: Presentations should include a visual component for a number of 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 that are displayed throughout the hearing provide the BZA, the participants, and others in attendance points of reference that they can easily turn to when necessary.
- Focus the oral presentation on the dispositive issues: BZA members must read the staff report, the appellant's written materials, and all of 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 topics: Whether intentional or not, appellants often attempt to send some BZA members on detours by raising irrelevant or immaterial issues (*e.g.*, the owner is a longstanding resident, a local employer, pays taxes, and less obvious ones such as the zoning on the property is inappropriate for the neighborhood), misstate or misrepresent the law (*e.g.*, by stating that a regulation or a cases 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.

Undoubtedly, other strategies exist to improve the staff presentations to the BZA and the strategies needed 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.