

## Chapter 13

### Variances

#### 13-100 Introduction

By statute, 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” It is an open question whether the amended definition effects a material change in how variances are reviewed by BZA’s and by the courts. The concepts of regulations that unreasonably restrict utilization of the property or cause hardship remain in the standards for granting variances in *Virginia Code* § 15.2-2309(2). Moreover, an *unreasonable* restriction on the utilization of property, even if it is not joined with the concept of hardship to the owner, remains a very high bar 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); *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012) (county’s regulations which allowed the disturbance of steep slopes only if a “waiver” was obtained after county review to ensure that the disturbance would not create adverse effects was not a variance; therefore, the criteria for variances in *Virginia Code* § 15.2-2309(2) did not apply); *Horner v. Board of Zoning Appeals of Fairfax County*, 74 Va. Cir. 124 (2007) (variance is not required to expand a structure that is located within the otherwise applicable setbacks under a previously approved variance where the proposed expansion would not be located in the setbacks to which the variance pertained). As the *Bell* court explained, variances allow someone to do something “in violation of the ordinance.”

In contrast, 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 locality after specified conditions are met. Therefore, a locality desiring to allow for flexibility in its zoning regulations, or in how they are administered, may do so by expanding the use of special use permits.

#### 13-200 The nature of variances

Because a facially valid zoning ordinance may prove to be unconstitutional in its application to a particular property, some device is needed to protect landowners’ rights without destroying the viability of zoning ordinances. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an “escape hatch,” or “escape valve.” *Packer, supra*. The variance process furnishes “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).

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)) or because the ordinance imposes an *unreasonable restriction*. A variance insures 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).

#### Five Key Principles 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 BZA's 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 similar variance in the same neighborhood.
- If there is an existing reasonable use of the property, neither an unreasonable restriction 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.

The grant of a variance cannot confer upon a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra*. It 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) (grant of variance did not immunize the owners from the city's regulation that a nonconforming structure cannot be removed or demolished or damaged). In addition, a variance may not allow a change in use, which only may be accomplished by a rezoning or 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.

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

A number of 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.*
- *Prior to 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 prior to the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law in fact 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 prior to a public meeting to which the applicant, landowner or his 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.
- *Prior to 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 his 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 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 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.
- *Findings to support the decision.* 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, 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”). The findings must address the elements that must be established by the applicant in order for the BZA to grant a variance.

### 13-600 Elements 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*”). These criteria became effective on July 1, 2015 and are, in many respects, reformulations of Virginia Code § 15.2-2309(2)’s evidentiary and finding requirements for variances that existed prior to that date.

Section 13-1100 provides summaries of variance cases decided by Virginia’s courts under the prior statutory criteria. Although the new criteria are similar, not all of them are identical. Therefore, while it is anticipated that many of the cases cited in this outline provide valuable guidance as to how variance applications should be evaluated, the revised criteria nonetheless may lead to different results.

The reader may be confident that the overwhelming majority of variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists. Moreover, many years’ experience and Virginia case law confirm that very few variance applications actually pertain to circumstances involving truly unreasonable restrictions or hardship conditions.

#### 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

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*.

#### 13-611 Unreasonable restrictions or hardships

The key element that must be established in order for a variance to be granted is whether there is an *unreasonable restriction* or a *hardship* arising from a physical condition of the property. 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 new variance laws effective July 1, 2015 because of a peculiarity in the required showing for a hardship – under either the unreasonable restriction or hardship standard, 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, 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. Something is “reasonable” when it is “[f]air, proper, or moderate under the circumstances; sensible.” *BASF and James City County v. State Corporation Commission*, \_\_\_ Va. \_\_\_, 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*.

One unreasonable restriction case is *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E.2d 295 (1986), where the Virginia Supreme Court concluded that a regulation that prohibited apartments from being converted to condominiums under the state Condominium Act with no changes in the land use constituted an unreasonable restriction. 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.

The *hardship* criterion, has, at least on paper, experienced a profound evolution since 2009. Prior to 2009, the criterion called for an *undue hardship approaching confiscation*. Beginning in 2009, the applicant was required 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) now merely asks for a *hardship*. Upon review of the variance case law, however *hardship* has been modified over the years, it is clear that those cases in which a hardship was not found one would likely be similarly decided under the current criterion, and those cases in which a hardship was found likewise would be similarly decided under the current criterion. These cases are summarized in section 13-1100.

### **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. All of these conditions were delineated in the version of Virginia Code § 15.2-2309(2) that existed prior to July 1, 2015. These conditions refer to the natural physical characteristics of the property itself, not to man-made objects placed on the property. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (rejecting argument that utility markers placed on the property were a situation or condition of the property). 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 day of the zoning ordinance may also be considered, an element added effective July 1, 2015. This amendment would not have aided the owners in *Steele*, referenced above, because the improvements that created the need to vary the applicable setback standard were established after the zoning ordinance became effective. However, it appears that this new element will allow a way for a landowner seek a variance to transform a nonconforming structure into a conforming structure.

If the zoning regulation from which the variance is sought existed before the property was created (so as to be a lot of record), a variance may not be granted. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 675, 628 S.E.2d 324, 326 (2006) (“the applicant failed to show that the lots for which variances were sought were lots of record in 1988, when the Bay Act became effective. Because of the express language of the Bay Act and Code § 15.2-2309(2), that failure alone would have precluded variances based upon the shallowness of the lots.”).

### **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)(A)(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)(A)(i)*. This appears to be similar to the prior standard that prohibited *self-inflicted* hardships, and the cases below were evaluated under that standard. However, it is unclear whether an applicant may be disqualified from obtaining a variance solely where the owner’s contractor or a prior owner created the hardship.

The situation where a hardship has been created by the applicant 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 upon 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, was a self-inflicted hardship).
- *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 prior owner, 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)(A)(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).

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**

The granting of the 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)(iv)*.

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)(a)(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); *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance should only be 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 13-660, 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.

These “standards” include 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, whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which is a high bar in and of itself).

### **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).

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).

A statement of findings is crucial for judicial review of the BZA’s 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 *Amherst County Board of Supervisors v. Amherst 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 of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

Variations may not be approved for reasons other than those set forth in Virginia Code § 15.2-2309(2). *Cochran, supra*; *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, variations may not be approved solely because similar variations 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 variations 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 variations should have on the merits of a variance application before the BZA.

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 shall be required. *Virginia Code § 15.2-2309(2)*.

### **13-800 Special situations: condominium conversions, the Americans with Disabilities Act, and the Fair Housing Act; National Flood Insurance Program**

The preceding analysis pertains to variations 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 § 55-79.43(E) provides in part that localities may provide by ordinance that proposed conversion condominiums and the use thereof which are nonconforming obtain a variance (or special use permit) prior to the property becoming a conversion condominium. The variance “shall be granted if the applicant can demonstrate to the reasonable satisfaction of the local authority that the nonconformities are not likely to be adversely affected by the proposed conversion.” *Virginia Code § 55-79.43(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.

### **13-830 National Flood Insurance Program**

Localities such as Albemarle County 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**

In a 2006 bill introduced as a legislative response to *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004), the General Assembly ended up amending Virginia Code § 15.2-2286(A)(4). This enabling authority allows 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. *Virginia Code § 15.2-2286(A)(4).* Under the prior law, localities were enabled to authorize their zoning administrators to grant *variances* from any *building setback requirement*. *Virginia Code § 15.2-2286(A)(4).*

The findings required to grant a modification are similar to those for a variance. *Virginia Code § 15.2-2286(A)(4).* The zoning administrator's decision on a modification may be appealed to the BZA, and the BZA's decision may be appealed to circuit court.

The Albemarle County Zoning Ordinance does not authorize the zoning administrator to grant modifications.

### **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. 38, 743 S.E.2d 142 (2013)).

#### **13-1010 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. *Virginia Code § 15.2-2314*. The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the applicant/appellant before the BZA (assuming the latter is different from the landowner). *Virginia Code § 15.2-2314*; see *In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 2014 WL 1391769 (Va. Cir. Ct.) (naming the governing body in the style of the case is not required and, therefore, motion to dismiss petition on the ground that it failed to name a necessary party was denied; by statute the governing body is a necessary party and the style of the case complied with Virginia Code § 15.2-2314; however, 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 the motion brought). 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.

### 13-1100 Analysis of the hardship issue by Virginia courts prior to July 1, 2015

Under the law existing prior to July 1, 2015, the key element that had to be established in order for a variance to be granted was whether there was an *unreasonable restriction* or a *hardship* arising from a physical condition of the property. Of those two criteria, the *hardship* that may arise if a variance is not granted was by far the more commonly analyzed criterion.

#### Hardship: The Critical Analysis for Almost Every Variance Application

- *Hardship.* Almost every variance application will turn on whether, when the zoning ordinance is applied to the property, the regulations will produce a hardship relating to the property.
- *Consider reasonable uses of the property:* To determine whether the zoning regulations interfere with a reasonable use of the property, evaluate the existing uses of the land, whether any of those uses are reasonable, what other uses are allowed under the applicable zoning regulations without the need for a variance, and whether those uses, if pursued, would be reasonable. If, despite the regulations, there are existing or other possible reasonable uses, a hardship has not been established.
- *Consider whether the zoning regulations interfere with the uses on the property taken as a whole:* If you find that the regulations interfere with the reasonable use of the property, you must also determine that the regulations interfere with those uses on the property *taken as a whole*, rather than only some portion of the property. If there are other areas of the property where a reasonable use could be located without the need for a variance, an undue hardship has not been established.

### 13-1110 *Cochran v. Fairfax County Board of Zoning Appeals*

The Virginia Supreme Court ruled on three consolidated appeals pertaining to variances in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004). Because the nature of the variances sought, the underlying fact patterns, and the arguments raised by the applicants, are typical of those often seen by BZAs, each case is laid out in some detail below. Likewise, the Court's informative discussion of the controlling legal principles as to whether an undue hardship exists is set out at length. The Court's decision, of course, now must be considered in light of the July 1, 2015 amendments to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is *undue* and that it *approaches confiscation*. The facts in each of the cases considered in the consolidated appeal indicate that the Court would reach the same conclusions, though its holdings and guidance would be stated differently, *because there was no hardship within the meaning of Virginia Code § 15.2-2309(2) whatsoever*.

### 13-1111 The facts in *Cochran v. Fairfax County Board of Zoning Appeals*

In *Cochran*, the owner of a 20,000 (approximately) square foot parcel, improved with a house occupied by the owner for eight years, desired to demolish his existing house and construct a much larger house. The parcel rose 42 feet from the front property line to the rear property line. Along the northern property line, the proposed house would come within 13 feet of the side yard property line along the entire length of the house. The zoning district in which the parcel was located required 15-foot side yard setbacks. Thus, a 2-foot variance was sought.

A variance would not have been necessary if the proposed house had been moved two feet to the south (plus some additional accommodations for proposed chimneys on the northern side of the house). This change would have required that the house's proposed side-load garage on the south side of the house be replaced with a front-load garage. The owner did not want a front-load garage because it would diminish the house's "curb appeal." The relocation of the house also would have resulted in a loss of 152 square feet of living area (the house was described as having a footprint of 71 feet by 76 feet (5,396 square feet), and being two stories in height). The 152 square feet lost by complying with the setback regulations could have been recaptured either in the front or back of the house, or by adding a third story. The owner rejected these options because he wanted to save the front area for a children's play area, the back area for an outdoor courtyard, and he opined that a third story would be aesthetically undesirable.

The BZA granted the variance, finding among other things, that “the lot suffers from severe topographical conditions which the applicant has worked hard to accommodate” and that “the requests are modest.” Based on these findings, the BZA concluded that the physical conditions of the parcel were such that a strict interpretation of the zoning ordinance would result in an undue hardship that “would deprive the owner of all reasonable use of the land and/or the buildings involved.” The circuit court affirmed the decision of the BZA.

### **13-1112 The facts in *MacNeal v. Town of Pulaski Board of Zoning Appeals***

In *MacNeal*, the owners of a 0.6248-acre parcel bounded on three sides by public streets desired to construct a garage in the northeast corner of the parcel. There was no existing garage on the parcel, and the owners explained that the garage’s proposed location would provide the easiest access to a street. The topography of the parcel was described as “difficult.” The owners desired to construct the garage to the property line. The applicable setback regulations required a 15-foot setback. Thus, a 15-foot variance was sought.

A variance would not have been necessary if the proposed garage was constructed closer to the existing house, though this would have required construction of a ramp that would increase the cost of the project and weaken or destroy a five-foot tall stone retaining wall behind the house.

After four meetings, the BZA granted a modified variance permitting the garage to be constructed five feet from the northern property line and 15 feet from the eastern boundary line. The variance also included a condition that the construction not “alter or destroy the aesthetic looks of existing vegetation bordering the northern projected boundary” of the parcel. The circuit court affirmed the decision of the BZA.

### **13-1113 The facts in *Board of Zoning Appeals of the City of Virginia Beach v. Pennington***

In *Pennington*, the owners of a 1.25-acre parcel desired to construct a storage building on their parcel. The parcel was already improved by the owners’ home and a nonconforming detached garage. The proposed storage shed would have been 288 square feet in size, and the existing detached garage was 528 square feet. The zoning district regulations limited the area of accessory structures to 500 square feet. Thus, the owners sought a variance of 28 square feet to bring the garage into conformity (which was not in issue in the case), and a variance of 288 square feet for the storage shed. The zoning district in which the parcel was located would have allowed four dwellings.

A variance for the storage shed would not have been necessary if it had been attached to the existing house. The owners’ representative claimed that the shed would be nearly invisible from the street, would have no impact on neighboring properties, and that the impact of a small additional outbuilding would be minimal and in keeping with the spirit of the zoning ordinance, particularly when compared to the four dwelling units allowed by the zoning district regulations.

The BZA denied the variance that would have allowed the storage shed. At trial in the circuit court, the owners raised a new claim of hardship – that the owners’ daughter had returned to live with them to care for an ailing parent, and that the storage shed was needed as a place to store her belongings. The circuit court ruled that a hardship existed, overruled the BZA, and granted the variance.

### **13-1114 The Court’s discussion of the controlling legal principles and its holdings**

Concluding that the facts did not support the granting of a variance in any of the cases, the Virginia Supreme Court reversed all three circuit court judgments. The court’s analysis includes a discussion of the controlling legal principles applicable to variances authorized under Virginia Code § 15.2-2309(2):

The BZA, when considering an application for a variance, acts only in an administrative capacity. [citation omitted] Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law.

[citations omitted] The General Assembly has prescribed such standards regulating the authority of the BZA to grant variances by enacting Code § 15.2-2309(2) . . .

*Cochran*, 267 Va. at 765, 594 S.E.2d at 576-577.

The court concluded that under the facts of the three cases, without a variance “each of the properties retained substantial beneficial uses and substantial value.” In *Cochran*, the proposed house could have been reconfigured or moved two feet to the south, or the project could have been abandoned and the existing residential use continued in effect. In *MacNeal*, the proposed garage could have been moved to another location on the parcel or the project could have been abandoned. In *Pennington*, the storage shed could have been built as an addition to the existing house or the project could have been abandoned.

### **13-1115 The Court’s guidance on how to approach a variance application**

The Virginia Supreme Court provided some useful guidance on how a BZA is to approach a variance application:

The threshold question for the BZA in considering an application for a variance . . . is whether the effect of the zoning ordinance upon the property under consideration, as it stands, interferes with “all reasonable beneficial uses of the property, taken as a whole.” If the answer is in the negative, the BZA has no authority to go further.

*Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

The Court noted that the owners in the three cases had presented compelling reasons in favor of their applications, such as: their desires, supported by careful planning, to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support, of the application by neighbors; and a serious personal need for the proposed variance. The Court held that these factors were not relevant to the issue of undue hardship, and were material to a variance application only if an undue hardship was properly found to exist. In such a case, these factors could then be considered in the discretion of the BZA to tailor “a variance that will alleviate ‘hardship’ while remaining ‘in harmony with the intended spirit and purpose of the ordinance.’”

### **13-1120 Summaries of Virginia cases where an undue hardship was not found**

Following are brief summaries of cases in which an undue hardship was not found to exist. Before any of these cases are relied upon, they need to be considered in light of the Virginia Supreme Court’s analysis of the undue hardship standard in the *Cochran/MacNeal/Pennington* cases decided in 2004, as well as the July 1, 2015 amendment to Virginia Code § 15.2-2309(2) which deleted the requirement that the applicant show that a hardship is *undue* and that it *approaches confiscation*. Despite this change in the State law, it does not appear that any of the cases below turned on whether the undue hardship approached confiscation, or whether the hardship was “undue,” but, instead, turned on whether there was, in fact, a hardship at all.

- *Setback*: Owners of a 36’ by 44’ lot sought variances to reduce required side and rear yard setbacks; in prior applications, city staff described the lot as “level,” “large,” “buildable,” and “not unique,” with “characteristics . . . similar to other lots within this section of Prince Street” and that granting the variance would be “detrimental to the adjacent property”; city staff also stated that a house in compliance with setbacks could be built; in the most recent application for side (3’ variance) and rear (13’ variance) yard setbacks, city staff described the application as a “good development” compatible with its historic context, unique because the historic overlay district regulations were designed to apply to old building, the lot was shallower than 2/3 of lots in area, and variances allowed for “more historically appropriate width and depth.” The Virginia Supreme Court rejected the argument that deletion of the phrase “approaching confiscation” from the applicant’s burden to show a “clearly demonstrable hardship” now authorized BZA’s to grant variances in cases previously not authorized because

the change to the law did not change the findings required for the BZA to grant a variance; the Court also 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 lots in the area were even more shallow, yet they complied with the zoning ordinance; lastly, the Court rejected the argument that the lot was undevelopable without a variance on the theory that alternative designs could not comply with the base and historic overlay district regulations because the applicants admitted that they could submit a design that complied with the zoning regulations, it was “mere speculation” that the BAR would not approve an alternative design, and there was no factual support for the claim that the condition was unique because all lots in the area had to comply with the regulations. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (applying charter provisions virtually identical to Virginia Code § 15.2-2309(2)).

- *Setback*: Owner sought multiple variances from overlapping setbacks imposed by the county’s zoning ordinance (including those implementing the Chesapeake Bay Preservation Act) on 4 out of 5 lots in a 6.594 acre purported subdivision recorded soon after the owner purchased the property in 2004, and long after the setback regulations were imposed; without the variances the 4 lots were unbuildable; no undue hardship existed because the owner could have treated the property as a single 6.594 acre parcel and constructed a single residence on the property on that part which was not subject to the overlapping setbacks. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670, 628 S.E.2d 324 (2006).
- *Setback*: Owner sought variance from setback to expand the existing house closer to ocean; no hardship because expansion could be constructed on other side of house without violating the setback requirement. *Packer v. Hornsby*, 221 Va. 117, 121-122, 267 S.E.2d 140, 142 (1980) (“proximity to the ocean is doubtless a ‘privilege or convenience’ coveted by every homeowner along the beach”).
- *Setback*: Owner sought variance from setback so house could be constructed in the position desired by owner; no hardship because the house could be constructed without variance by shifting position of house. *Board of Zoning Appeals of City of Virginia Beach v. Nowak*, 227 Va. 201, 205, 315 S.E.2d 221, 223 (1984) (“to grant him a variance under these circumstances would bestow upon him a ‘special privilege or convenience’”).
- *Setback*: Owner sought variance from setbacks to allow a pier to be constructed on his property over wetlands, but the inability to build a pier did not leave the property with no reasonable beneficial use since there was already a single family residence on the property and no zoning regulation interfered with that use. *Gardner v. Board of Zoning Appeals and Kim*, 77 Va. Cir. 296 (2008) (noting that the BZA’s concerns that, without a variance, Kim “would be denied water access and that the variance requested was minimal” and that “the lot was designed to provide water access but the ordinances effectively deprived Mr. Kim of that right,” did not meet the test for an undue hardship).
- *Setback*: Owners sought variance from setback so that they could construct the house “they desired to have”; no hardship because there were other houses and configurations that would allow a reasonable use of the property. *Smith v. Spotsylvania County Board of Zoning Appeals*, 1989 WL 646478 (Va. Cir. Ct. 1989).
- *Minimum lot width*: Owner sought variance from minimum lot width requirements to allow existing lot to be subdivided into two lots, replacing existing house with new houses on each lot; lot had been illegally created in 1936. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441, 453, 604 S.E.2d 7, 13 (2004) (owner did not experience undue hardship given that he had enjoyed the use of his home since 1964; his “inability to subdivide his property does not constitute a hardship under the facts of this case. The effect of the zoning ordinance does not interfere ‘with all reasonable beneficial uses of the property, taken as a whole’”).
- *Develop to highest allowed density*: Owner’s inability to develop land at its highest allowable density by requiring compliance with ordinance requirements was a limitation shared by all property owners and did not constitute an undue hardship. *Prince William County Board of Zoning Appeals v. Bond*, 225 Va. 177, 180, 300 S.E.2d 781, 783 (1983) (regulation restricting density to one dwelling unit per acre was not an undue hardship where owner

desired to add second dwelling on 1.01-acre parcel; the owner's "application for a variance was, in effect, a request for a rezoning of their property").

- *Develop to highest allowed density*: Owner sought variance from regulation that prohibited property from being developed to maximum density; inability to achieve maximum density was not an undue hardship. *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993).
- *Financial loss*: Financial loss, standing alone, cannot establish a hardship justifying the granting of a variance. *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48, 431 S.E.2d 282 (1993); *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E.2d 295 (1986). However, the value of the property is relevant to both the unreasonable restriction and the hardship approaching confiscation issues. *Natrella, supra*.
- *Financial loss*: Expenditure of more than \$20,000 toward construction of a residence in the floodway was not an undue hardship, even though the owners had been erroneously informed that the site was out of the floodway and obtained zoning and building permits. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).
- *Increased profitability*: There is no undue hardship where the evidence shows only that the property owner would make more money if the connected town houses could be sold within the building to separate owners. Increased profitability is insufficient alone to justify a variance. *Leigh v. Board of Zoning Appeals of the Town of Woodstock*, 1982 WL 215189 (Va. Cir. Ct. 1982).
- *Health and safety zoning regulations*: Owners sought variances from several health and safety regulations applicable to uses allowed by right; no hardship found because the right to use property in a particular way is not absolute, but conditional, and to hold otherwise would render the requirements null and void. *Board of Zoning Appeals, City of Falls Church v. O'Malley*, 229 Va. 605, 331 S.E.2d 481 (1985).
- *Commercial parking on residentially zoned property*: Owner sought a variance to allow commercial parking lot on residentially zoned land to serve business on another lot; no hardship justifying grant of variance because the lot was level and adequately suitable for the construction of improvements permitted under the zoning classification and the only hardship was related to the business and the property upon which the owner conducted its business, not the property for which the variance was sought. *C. & C. Inc. v. Semple*, 207 Va. 438, 150 S.E.2d 536 (1966) (Note: the owner was seeking a use variance, not allowed in Virginia since 1988).
- *Additional signage*: Owners sought a variance that would have allowed them to display two signs, rather than one; the only hardship was that two signs would better identify the property. *McCall v. Board of Zoning Appeals of the City of Richmond*, 1987 WL 488782 (Va. Cir. Ct. 1987).
- *Structural height restriction*: Owner sought a variance that would allow farm equipment dealership sign to be 20 feet in height, where zoning regulations permitted signs approximately no taller than 10 feet, and claimed that a sign 10 feet in height would be partially obscured by farm equipment from the highway in one direction, and completely obscured from the highway in the other direction; no undue hardship because the farm equipment dealership already existed on the property and other general commercial uses could also be located there. *Amberst County Board of Supervisors v. Amberst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).
- *Erroneously approved site plan and building permit*: Owner sought a variance from an 8-foot setback where the approved site plan showed a 3-foot setback in violation of the zoning ordinance; no hardship justifying the granting of a variance because the only error was made by the city in the granting of the building permit, and the permit was void. *Dixon v. Zoning Appeals Board of Virginia Beach*, 50 Va. Cir. 424 (1999).
- *Location of accessory structure*: Owner sought a variance from a regulation that required accessory structures to be located in the rear yard of a single family dwelling; location of a new single family dwelling resulted in a pre-existing barn being located in front sideyard, and the locality refused to issue certificate of occupancy for the

dwelling; no undue hardship because the owner could dismantle the barn and eliminate the need for the variance. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005).

- *Preexisting variance limiting parcel's use*. A preexisting variance on a parcel that limited the parcel's use to the sale and repair of batteries, standing alone, does not amount to an undue hardship. *CL 11-93 & CL 11-41*, opinion letter dated November 28, 2011.

### **13-1130 Summaries of Virginia cases where an undue hardship was found**

Following are brief summaries of cases in which an undue hardship was found to exist under the standards that applied prior to July 1, 2015.

- *Expansion of sludge drying beds*: Utility company site needing a variance to expand sludge drying beds was a hardship approaching confiscation because without expansion, plant would violate water quality standards. *Tidewater Utilities Corp. v. City of Norfolk*, 208 Va. 705, 160 S.E.2d 799 (1968).
- *Lot size and width*: In a district where lots were required to contain at least 75,000 square feet and have a minimum width of 200 feet to be considered a "buildable lot," and the lot in question contained 45,733 square feet and was 199.45 feet wide, undue hardship existed because the lot was unbuildable under existing zoning regulations and the variance would alleviate a clearly demonstrable hardship approaching confiscation. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 2001 Va. Cir. LEXIS 381 (2001).
- *Setbacks*: Undue hardship existed so as to justify a variance from 30-foot setback requirement where the property was located at the corner of two residential streets and was exceptionally narrow and exceptionally shallow, and had no 90 degree corners. Other facts supporting the undue hardship included: (1) the owners sought to construct a 34-foot-wide house (a typical house being built in the immediate vicinity was 40 feet wide); (2) a house any narrower than the 34-foot-wide house proposed would have been too narrow to accommodate interior rooms; (3) a house any smaller or narrower than the proposed 34-foot-wide house would not be economically viable in the relevant real estate market; (4) the proposed house could not be shifted back on the property because it would infringe on the side yard setback of 10 feet, necessitating another variance; and (5) the house could not be rotated on the property because rotation would result in the other front corner of the house infringing on the front yard setback, which would require another variance. *Brown v. Fairfax County Board of Zoning Appeals*, 2001 Va. Cir. LEXIS 49, 2001 WL 543520 (2001).
- *Building height*: Undue hardship existed so as to justify a height variance where parcel sloped on edges, making construction that complied with city's tree preservation and protection regulations difficult or impossible; the terrain and the potential loss of additional large trees constituted the undue hardship. *McGhee v. Board of Zoning Appeals of the City of Roanoke*, 57 Va. Cir. 47 (2001).
- *Lot width*: Undue hardship was found so as to justify the granting of a variance to reduce the lot width requirement to divide property into three lots sharing a driveway where the property was an odd shape; to develop it appropriately without a variance required that an expensive road be constructed; and the construction of the road would require removal of mature trees, damage a vineyard, and encroach upon an historical house, three features which enhanced the pastoral character of the area. *McCoy v. Fairfax County Board of Zoning Appeals*, 48 Va. Cir. 227 (1999).

The Virginia Supreme Court case that found an undue hardship – *Tidewater Utilities* – is an atypical variance case and most likely is limited to the unique situation it presented.