Chapter 13

Variances

13-100 Introduction

A variance is a "reasonable deviation from" certain provisions of a locality's zoning ordinance. *Virginia Code § 15.2-2201*; *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). Specifically, a *variance* is defined as:

> [A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Virginia Code § 15.2-2201. The 2015 amendments to the definition replaced the phrase "unnecessary or unreasonable hardship to the property owner" with "unreasonably restrict the utilization of the property." The extent to which this amended definition, as well as the changes to the criteria for granting a variance (discussed in section 13-600), have changed the law of variances is still unfolding. However, the concepts of regulations *unreasonably restricting* utilization of the property or causing *hardship* remain and these are still high bars to satisfy.

A variance "allows a property owner to do what is otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). Stated a different way, variances allow someone to do something "in violation of the ordinance." *Bell, supra*. By comparison, special use permits (which include special exceptions and conditional use permits) do not allow a landowner to do something in violation of the zoning regulations but, instead, allow the property to be developed in a way consistent with those regulations, but only with approval of the governing body following a case-specific review. Therefore, a governing body desiring to retain legislative control of its zoning ordinance should consider incorporating flexibility into zoning regulations and expanding the availability of special use permits.

13-200 The nature of variances

Historically, variances provided an administrative remedy in those rare circumstances when a facially valid zoning ordinance may prove to be unconstitutional (*e.g.*, a regulatory taking of the property without just compensation) in its application to a particular property, and to do so without destroying the viability of the locality's zoning ordinance. *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980). The variance process furnished "elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner." *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764, 767, 222 S.E.2d 570, 573 (1976). Under the standards and criteria in effect today, variances are available even when the restrictions on the use of property are not such that they have constitutional implications. Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E.2d 606 (1994). A variance ensures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57, 278 S.E.2d 814 (1981).

A variance cannot confer on a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra*. A variance also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232, 657 S.E.2d 153 (2008). In addition, a variance may not allow a change in use, which only may be accomplished "by a rezoning or by a conditional zoning." *Virginia Code § 15.2-2201; Tolman v. Richmond*

Board of Zoning Appeals, 46 Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district. The courts may revise some of these longstanding principles as the case law applying the current variance laws develops.

Five Things to Know About Variances
• Variances should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance. • Variances should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications. • Variances run with the land, and the consequences of a board of zoning appeals' ("BZA") decision to grant a variance may last for years. • Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a variance from the same restriction in the same neighborhood if there are factual differences. • If there is an existing reasonable use of the property, neither an unreasonable restriction on the property's use nor a hardship exists and a variance may not be lawfully granted; applications for variances to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are addressed in section 13-800.

13-300 The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. *Virginia Code § 15.2-2309(2)*.

When considering an application for a variance, a BZA is acting in an administrative capacity and, under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

13-400 The application

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. *Virginia Code § 15.2-2310*. Applications are made to the zoning administrator. *Virginia Code § 15.2-2310*. Before a variance application is considered by the BZA, the application and accompanying maps, plans, or other information must be transmitted to the secretary of the BZA, who must place the matter on the docket. *Virginia Code § 15.2-2310*.

13-500 Procedural requirements prior to and during a hearing on a variance application

Several procedural rules apply to the conduct of a hearing on a variance application:

- Scheduling the hearing on the variance application: The BZA must "fix a reasonable time for the hearing" on a variance. *Virginia Code § 15.2-2312*.

- Notice of the hearing: The BZA must "give public notice thereof as well as due notice to the parties in interest."

Virginia Code § 15.2-2312. Notice of the hearing must be provided as required in Virginia Code § 15.2-2204. *Virginia Code § 15.2-2310.*

- Before the hearing; contact by parties with BZA members: The *non-legal staff* of the governing body, as well as the applicant, landowner, or its agent or attorney, may have *ex parte* communications with a member of the BZA before the hearing but may not discuss the facts or law relative to the variance. If any *ex parte* discussion of facts or law occurs, the party engaging in the communication must inform the other party as soon as practicable and advise the other party of the substance of the communication. Prohibited *ex parte* communications do not include discussions that are part of a public meeting or discussions before a public meeting to which the applicant, landowner, or their agent or attorney are all invited. The *non-legal staff of the governing body* is "any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to [Virginia Code] § 15.2-1542]." *Virginia Code § 15.2-2308.1(A) and (C).* The legal staff of a governing body is not similarly prohibited from having *ex parte* communications with BZA members.

- Before the hearing; sharing of locality-produced information: Any materials relating to a variance, including a staff recommendation or report furnished to a BZA member, must be available without cost to the applicant or any person aggrieved as soon as practicable thereafter, but in no event more than three business days after the materials are provided to a BZA member. If the applicant or person aggrieved requests additional documents or materials that were not provided to a BZA member, the request should be evaluated under the Virginia Freedom of Information Act (*Virginia Code § 2.2-3700, et seq.*). *Virginia Code § 15.2-2308.1(B).*

- At the hearing; the right to equal time for a party to present its side of the case: The BZA must offer an equal amount of time in a hearing on the case to the applicant and the staff of the local governing body. *Virginia Code § 15.2-2308(C).*

- At the hearing; the burden of proof is on the applicant: The applicant has the burden of proof to prove by a preponderance of the evidence that their application meets the standard for a variance as defined in Virginia Code § 15.2-2201 and the criteria in Virginia Code § 15.2-2309(2). *Virginia Code § 15.2-2309(2).*

- Decision: The BZA *must grant* a variance if the evidence shows that the strict application of the terms of the zoning ordinance would "*unreasonably restrict* the utilization of the property or that granting of the variance would alleviate a *hardship* due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance" and "(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application." *Virginia Code § 15.2-2309(2). See section 13-600 for further discussion.*

- Time for the decision: The decision must be made within 90 days. *Virginia Code § 15.2-2312.* This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the 90-day period has passed. *See Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654, 536 S.E.2d 913 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

- Required vote: The concurring vote of a majority of the BZA's membership is necessary to grant a variance. *Virginia Code § 15.2-2312.* This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

- Explaining the basis for the decision: A BZA may grant a variance only if the evidence *shows* that all of the criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion so that the circuit court can properly adjudicate the issues if there is an appeal.

13-600 Criteria to establish a right to a variance

The criteria that the BZA must consider when reviewing an application for a variance are referenced in section 13-500 (under "*Decision*"). The reader should anticipate that most variance decisions will come down to the question of whether an *unreasonable restriction* or a *hardship* exists and, unless BZAs and the courts give very relaxed readings of those criteria, there should be few variance applications that actually satisfy the criteria to establish the right to a variance.

13-610 The strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance or alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.

The evidence must show "that the strict application of the terms of the zoning ordinance would unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance." *Virginia Code § 15.2-2309(2)(¶2)*. If a variance is necessary to accommodate a person with a disability, the evidence must show that the granting of a variance is necessary to alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability. *Virginia Code § 15.2-2309(2)(¶2). For a discussion of the hardship arising for persons with disabilities, see section 13-820.*

13-611 Unreasonable restriction on the utilization of the property or a hardship due to a physical condition relating to the property or improvements

The key criteria that must be satisfied for a variance to be granted is whether there is an *unreasonable restriction* on the utilization of the property or a *hardship* due to a physical condition relating to the property or improvements. Of those two criteria, the *hardship* that may arise if a variance is not granted has been by far the more commonly analyzed criterion. That may change under the current variance laws because of a peculiarity in the required showing for a hardship. Under either the *unreasonable restriction* or *hardship* criterion, the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the "standard" that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, an applicant seeking a variance under the *hardship* criterion must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be high standard to satisfy).

There are few, if any, cases where the *unreasonable restriction* criterion has been analyzed or formed the basis for granting a variance. The word *unreasonable* cannot be overlooked during the analysis. Something is *reasonable* when it is "[f]air, proper, or moderate under the circumstances; sensible." *BASF and James City County v. State Corporation Commission*, 289 Va. 375, 770 S.E.2d 458 770 S.E.2d 458 (2015). Something is *unreasonable* if it, in the context here, is "absurd, inappropriate," "exceeding the bounds of reason or moderation," or "unconscionable." *Webster's Third New International Dictionary (2002).* If an application for a variance is based on the criterion that a restriction is *unreasonable*, the locality should consider whether the restriction – the regulation – should be amended or repealed because unreasonableness raises an issue of whether the regulation is constitutional or facially valid.

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA incorrectly decided that a 35-foot rear-yard setback was not an unreasonable restriction where the setback prevented the petitioners from adding a screen porch that would extend into the setback. The 2,124 square-foot house was built in 1959 on a corner lot and the house had a diagonal footprint on the lot. There

also were utilities and other setbacks that limited extension into other areas on the lot. Although the rear-yard setback was a restriction, the court engaged in no meaningful analysis as to why the 35-foot rear yard setback was *unreasonable* beyond the fact that the setback did not allow the petitioners to do what they wanted to do.

The *hardship* criterion has experienced a profound evolution since 2009. Before 2009, the criterion called for an *undue hardship approaching confiscation* – language that is tantamount to circumstances approaching a regulatory taking of private property for a public use requiring compensation. In 2009, the criterion was amended to require the applicant to merely show an *undue hardship*, though the BZA still had to find an undue hardship approaching confiscation. Beginning in 2015, Virginia Code § 15.2-2309(2) merely requires a *hardship* due to a physical condition relating to the property or improvements. In *In re December 12, 2019 Decision of Board of Zoning Appeals of City of Chesapeake*, 105 Va. Cir. 54 (2020), the trial court affirmed the decision of the BZA granting a variance, concluding that the record supported the BZA's finding of a hardship. In rejecting the petitioner neighbor's arguments based on pre-2015 variance law that imposed a higher *hardship* threshold, the court said the following: "This Court must give effect to the removal of the language [that had been in the prior variance law]; the Court 'will not construe legislative action in a manner that would ascribe to the General Assembly a futile gesture. Legislative amendments are presumed as intended to effect a change in the law. . . We will not read into the statute language which the legislature purposefully deleted.'" *Shaw v. Commonwealth,* 9 Va. App. 331, 334 (1990)."

13-612 The physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance

The attributes composing the *physical condition of the property* are not described in either the definition of *variance* in Virginia Code § 15.2-2201 or in the variance elements in Virginia Code § 15.2-2309(2). However, the reader should consider the property's narrowness, shallowness, size, shape, exceptional topographic conditions, or any other similar physical conditions. These conditions, in effect, define the *hardship* the BZA must find in order to grant a variance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The attributes of any *improvements* on the property existing on the effective date of the zoning ordinance may also be considered, an element that was added in the 2015 amendments. The effect of this change is seen in *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), where the presence of and limitations caused by utilities on the lot affected the trial court's decision to hold that the BZA erred when it did not grant a variance to the petitioners.

13-620 The property for which the variance is being requested was acquired in good faith

The evidence must show that "the property for which the variance is being requested was acquired in good faith." *Virginia Code § 15.2-2309(2)(¶2(i)).*

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner's knowledge that the previous owner of the property had been denied a variance does not affect "good faith" status. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. *Spence, supra.*

13-630 Any hardship was not created by the applicant for the variance

The evidence must show that "any hardship was not created by the applicant for the variance." *Virginia Code § 15.2-2309(2)(¶2(i)).* This appears to be similar to the prior standard that prohibited *self-inflicted* hardships, and the cases below were evaluated under that standard.

The situation where the applicant has created a hardship would arise when an owner violates a provision of the

zoning ordinance and then seeks a variance to provide relief from the unlawful act. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). Following are some examples where the court considered whether a hardship was self-inflicted:

- <u>To correct zoning violation; reliance on erroneous boundary markers</u>: Hardship was self-inflicted where the owners constructed a house in violation of side yard setback requirements, although done inadvertently in reliance on misplaced property line markers. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453 (1993) (reliance on statement by homeowners' association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line).

- <u>To correct zoning violation</u>: 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).

- <u>Knowing need for variance</u>: Hardship was not self-inflicted where the owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998).

The standard must be satisfied regardless of whether the hardship was created intentionally or inadvertently. It is an open question as to whether the acts of a contractor or some other third party will be attributed to the *applicant*.

13-640 <u>Granting the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area</u>

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)(¶2(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 <u>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</u>

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)(¶2(iii)).*

An owner's showing that the special condition of the property and the resulting hardship are non-recurring is of considerable importance in determining the propriety of the variance. *Martin v. City of Alexandria*, 286 Va. 61, 743 S.E.2d 139 (2013) (in determining that a variance from setbacks was improperly granted, the Court rejected the

argument that the historic overlay district regulations were intended to apply only to old buildings and granting a setback variance for the proposed new building would render the zoning ordinance meaningless; rejected the argument that a variance was justified because the lot was exceptionally wide and shallow compared to other lots in the area because one-third of the lots in the area were even more shallow yet they complied with the zoning ordinance and the piecemeal granting of variances would nullify the zoning regulations; and, there was "no factual support" for the claim that the condition was unique since all lots in the area must comply with the base and overlay district regulations and the issue must be addressed legislatively).

In *In re July 17, 2019 Decision of the Board of Zoning Appeals of the Town of Vienna*, 105 Va. Cir. 359 (2020), the trial court held that the BZA erred when it denied the petitioners' variance that would have provided relief from a 35-foot rear yard setback that prevented the petitioners from adding a screened porch that would extend into the setback. The BZA's conclusion that the setback issue was recurring and could be addressed through a zoning text amendment was based on the 35-foot rear yard setback and its effect on the residents of the zoning district being restricted from having screened porches, which had a greater setback than open decks. The court rejected that reasoning because the BZA failed to base its decision on whether the *condition or the situation of the property* was of so general or recurring that it could be resolved by amending the zoning ordinance. The court said that this issue had to be understood in the context of the petitioners' lot being a corner lot that was wider than deep, with a house having a diagonal footprint, and with expansion to allow a screened porch into other areas on the lot constrained by utilities and other setbacks. Given the apparently unique condition or situation of the property at issue, the court concluded that the condition or situation was not general or recurring, and therefore a legislative solution was not reasonably practicable.

Why are variances for general or recurring problems prohibited? A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. If there is a problem with the zoning ordinance, that problem needs to be addressed legislatively. *Martin, supra.* As the Virginia Supreme Court has said, variances are an "administrative infringement upon the legislative prerogatives of the local governing body." *Packer v. Hornsby*, 221 Va. 117, 123, 267 S.E.2d 140, 143 (1980). Thus, a legislative solution is always preferred over the piecemeal granting of variances. In *Hendrix v. Board of Zoning Appeals of the City of Virginia Beach*, 222 Va. 57, 61, 278 S.E.2d 814, 817 (1981), the Virginia Supreme Court said that "[t]he power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the local governing body." The Court added that using variances to resolve these problems when a legislative solution is reasonably practicable is prohibited "because the piecemeal granting of variances could 'ultimately nullify a zoning restriction throughout [a] zoning district' (internal citation omitted)."

13-660 <u>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</u>

Granting a variance may not "result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property." *Virginia Code § 15.2-2309(2)(¶2(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 <u>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</u>

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)(¶2(v)).*

This provision is consistent with those cases explaining that a variance "allows a property owner to do what is

otherwise not allowed under the ordinance." *Bell v. City Council of the City of Charlottesville*, 224 Va. 490, 496, 297 S.E.2d 810, 813-814 (1982). If the zoning ordinance provides an alternative remedy, a variance is unnecessary. In other words, a variance is only a remedy of last resort.

13-680 The variance is not contrary to the purpose of the ordinance

Virginia Code § 15.2-2309(2) requires that the evidence show not only the elements discussed in sections 13-610 through 13-670, but also that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201. The definition of *variance* provides that it shall not be "contrary to the purpose of the ordinance." *Virginia Code § 15.2-2201*.

For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed. As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

13-690 The variance application must meet the standard for a variance as defined in Virginia Code § 15.2-2201

Virginia Code § 15.2-2309(2) requires that the evidence show that the variance application "meets the standard for a variance as defined" in Virginia Code § 15.2-2201.

Whether the applicant is seeking a variance under either the *unreasonable restriction* or *hardship* criterion in Virginia Code § 15.2-2309(2), the applicant must also demonstrate that its application meets the standards in the definition of a variance in Virginia Code § 15.2-2201, which includes the "standard" that the "strict application of the ordinance would unreasonably restrict the utilization of the property." Thus, an applicant seeking a variance under the *hardship* criterion in Virginia Code § 15.2-2309(2) must establish both a hardship and an unreasonable restriction (the latter to satisfy the standard in Virginia Code § 15.2-2201), whereas an applicant seeking a variance under the *unreasonable restriction* criterion need only establish an unreasonable restriction (which continues to be a high standard to satisfy). This issue is also discussed in section 13-611 as part of the discussion of the *unreasonable restriction* and *hardship* criteria.

13-700 Consideration of a variance application; matters the BZA may and may not decide

A BZA acts in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004).

13-710 The BZA acts with discretion, to a point

Within the context of the applicant's burden of proof to show by a preponderance of the evidence that it has satisfied the criteria for granting a variance, the BZA must exercise its discretion with regard to the particular facts of the application, including the precise extent of the relief sought. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116, 496 S.E.2d 61 (1998). In the performance of this duty, the BZA is "clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily." *Board of Zoning Appeals v. Fowler*, 201 Va. 942, 948, 114 S.E.2d 753, 758 (1960); *see also Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471, 106 S.E.2d 755 (1959). "Any arbitrary or unreasonable action, contrary to the terms or spirit of the zoning law, or contrary to or unsupported by facts, is an illegal action by a board of zoning appeals." *Martin v. City of Alexandria*, 286 Va. 61, 69, 743 S.E.2d 139, 143 (2013).

However, if the standards and criteria for granting a variance are satisfied, Virginia Code § 15.2-2309(2) states that the BZA *must* grant the variance.

13-720 The BZA should explain its decision

Under the prior law, the Virginia Supreme Court said repeatedly that, if the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990); *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980); *see also 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 the standards and criteria have been satisfied. Whether called findings or something else, the BZA needs to explain the evidence that supports each criterion.

13-730 Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied

Variances may not be approved unless the standards and criteria in Virginia Code § 15.2-2309(2) are satisfied. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004); *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk, or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance.

In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court's opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. An attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court's opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

13-740 The BZA may impose conditions

In granting a variance, a BZA may impose conditions regarding the location, character, and other features of the proposed structure or use as it may deem necessary in the public interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2).* Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2).* Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance is required. *Virginia Code § 15.2-2309(2). See section 13-820 for authority to condition variances to accommodate persons with disabilities for as long as the need for the variance exists.*

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

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least three special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

13-810 Condominium conversions

Virginia Code § 55.1-1905(E) provides in part that localities may provide by ordinance that a proposed conversion condominium that does not conform to the zoning, land use, and site plan regulations obtain a variance

before the property becoming a conversion condominium. The BZA must grant the variance "if the applicant can demonstrate to the reasonable satisfaction of the [BZA] that the nonconformities are not likely to be adversely affected by the proposed conversion." *Virginia Code § 55.1-1905(E).*

13-820 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (*e.g.*, its zoning regulations and the criteria for granting a variance in Virginia Code § 15.2-2309(2)) so as not to discriminate against disabled persons.

Virginia Code § 15.2-2309(2) expressly recognizes modifying zoning regulations to accommodate persons with disabilities by allowing variances to "alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability." Virginia Code § 15.2-2309(2) continues: "Any variance granted to provide a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability may expire when the person benefited by it is no longer in need of the modification to such property or improvements provided by the variance, subject to the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq*.), as applicable. If a request for a reasonable modification is made to a locality and is appropriate under the provisions of state and federal fair housing laws, or the Americans with Disabilities Act of 1990 (42 U.S.C. § 12131 *et seq*.), as applicable, such request shall be granted by the locality unless a variance from the board of zoning appeals under this section is required in order for such request to be granted."

13-830 National Flood Insurance Program

Localities participating in the National Flood Insurance Program are required to adopt floodplain management regulations required by federal law either as part of its zoning ordinance or otherwise. *44 CFR § 59.1 et seq.*

A locality's floodplain management regulations must include a provision that provides a procedure and standards for variances for development in the floodplain. A landowner may be eligible for a variance under the floodplain management regulations in two circumstances: (1) for new construction or substantial improvements where nearby structures were constructed below the base flood elevation, generally for parcels less than ½ acre in size; and (2) for new construction, substantial improvement, or development that is required for water-dependent facilities. *44 CFR § 60.6*. Encroachment standards and construction standards specific to the floodplain are among the standards that may be varied. *44 CFR § 60.6*. The findings required to be made by the BZA include a finding substantially similar to the hardship standard applicable to variances considered under Virginia Code § 15.2-2309(2), as well as a finding that the variance will not result in unacceptable or prohibited increases in flood heights. *44 CFR § 60.6*. The BZA is also required to consider a number of factors related to the impact of the variance, if granted. *44 CFR § 60.6*.

13-900 Modifications

Virginia Code § 15.2-2286(A)(4) enables localities to authorize zoning administrators to review and approve *modifications* from zoning regulations. A *modification* is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements.

13-1000 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314*. Persons challenging a decision as a person aggrieved must allege that they are aggrieved within the meaning of the Virginia Supreme Court's decision in *Friends of the Rappahannock v. Caroline County*, 286 Va.

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

13-1010 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314*. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 268, 618 S.E.2d 311, 315 (2005). Local zoning regulations or BZA by-laws establishing a different method to determine the running of the 30-day period are inconsistent with Virginia Code § 15.2-2314 and are invalid. *West Lewinsville, supra* (holding invalid BZA by-laws that commenced the 30-day period on the "official filing date," which was a date specified in the BZA clerk's letter that was eight days after the BZA voted on the appeal).

The failure of a party to file a petition for writ of certiorari within the 30-day period does not divest the circuit court of its subject matter jurisdiction, so the issue of timely filing is waived if it is not raised in the circuit court. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 347-348, 626 S.E.2d 374, 381 (2006).

13-1020 Nature of the proceeding in circuit court

A proceeding under Virginia Code § 15.2-2314 "has the indicia of an appeal in which the circuit court acts as a reviewing tribunal rather than as a trial court resolving an issue in the first instance." *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 275 Va. 452, 456-457, 657 S.E.2d 147, 149 (2008) (proceeding under Virginia Code § 15.2-2314 is not a trial proceeding for which nonsuit is available under Virginia Code § 8.01-380(B); adding that the option to take additional evidence was insufficient to change the nature of the proceeding from an appeal to a trial).

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after being served with the writ of certiorari. *Virginia Code § 15.2-2314*. The necessary parties in a case challenging a BZA decision are the governing body, the landowner, and the applicant before the BZA (assuming the latter is different from the landowner). *Virginia Code § 15.2-2314*. The governing body must be named in the petition within the 30-day appeal period. *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017). In *Boasso*, the petitioner appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, the petition did not name the city as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city had to be named in the petition within the 30-day period, or whether the petitioner could add the city as a necessary party by amending the petition after the 30-day period had run. The trial court granted the city's motion to dismiss the petition because the city had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality's governing body that "is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition." In *In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 88 Va. Cir. 114 (2014), the trial court concluded that the failure to serve the governing body with the petition may implicate the provisions of Virginia Code §§ 8.01-275.1 and 8.01-277, but would not constitute grounds for dismissing the case under a motion to dismiss for failing to name a necessary party because the county was included in the style of the case). The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*.

The court's role is to determine whether the BZA's *decision* was correct. This limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity or constitutionality of the ordinance or statute underlying the BZA's decision. *City of Emporia v. Mangum*, 263 Va. 38, 44, 556 S.E.2d 779, 783 (2002); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294, 435 S.E.2d 385, 388 (1993); *Kebaish v. Board of Zoning Appeals of Fairfax County*, 2004 Va. Cir. LEXIS 37 at 17-18, 2004 WL 516224 at 6-7 (2004) (trial court would not rule on the constitutionality of the federal Religious Land Use and Institutionalized Persons Act of 2000 in a certiorari proceeding).

Because the individual members of a BZA act only as a single entity, the court does not review the individual actions of each member of the BZA but reviews the decision of the BZA. *Sundlun v. Board of Zoning Appeals of Fauquier County*, 23 Va. Cir. 53 (1991). The result reached by the circuit court in *Sundlun* is consistent with the broader principle that public bodies act only through the body itself, and not by the acts of its individual members. *See Campbell County v. Howard*, 133 Va. 19, 59, 112 S.E. 876, 888 (1922) (a board of supervisors can act only at authorized meetings as a corporate body and not by actions of its members separately and individually).

A petitioner in a certiorari proceeding to review a decision of the BZA cannot challenge the composition of the BZA or the authority of a member to sit on the BZA. *Sundlun, supra.*

13-1030 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions on variance applications, the decision of the BZA is presumed to be correct. *Virginia Code § 15.2-2314*. The petitioner may rebut that presumption by proving by a preponderance of the evidence, including the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*.

The circuit court may reverse or affirm, wholly or partly, or modify the BZA's decision. *Virginia Code § 15.2-2314*. If the BZA's decision is affirmed and the circuit court finds that the appeal was frivolous, the petitioner may be ordered to pay the costs incurred in making the return of the record. *Virginia Code § 15.2-2314*. The petitioner may be entitled to recover its costs only if the court determines that the BZA acted in bad faith or with malice in making the decision that was appealed. *Virginia Code § 15.2-2314*. Any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.