Chapter 15

Appeals of Decisions by Zoning Officials to the Board of Zoning Appeals

15-100 Introduction

A board of zoning appeals ("BZA") has the power and duty to consider a variety of matters. Some of those matters originate with the BZA, such as applications for special use permits (see Chapter 12) and variances (see Chapter 13). The procedures and standards applicable to those matters are covered in those respective chapters. Other matters originate with either the zoning administrator or other administrative officers (collectively, the *zoning administrator*), and they come to the BZA in the nature of an appeal from that zoning official's decisions, determinations, orders, and requirements, including notices of violation (collectively, *decisions*). *Virginia Code § 15.2-2309*. This chapter focuses on appeals of those decisions to the BZA.

The range of issues that the zoning administrator may be asked to resolve in a decision, and which may be appealed to the BZA, include:

- The meaning of a particular regulation in the zoning ordinance.
- How a land use should be classified and whether the use is permitted within a particular zoning district.
- Whether a proposed structure complies with lot size, setback, height, bulk, or other requirements.
- Whether a use or structure complies with the zoning ordinance or is nonconforming.
- Whether an owner has vested rights.

A decision has legal significance because, if a person aggrieved by the decision fails to timely appeal it to the BZA, it becomes a final, binding decision – a *thing decided. (see Chapter 14 for further discussion of the thing decided rule).*

15-200 Standing to appeal

Any person aggrieved, and any officer, department, board, or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision, or determination (to repeat, collectively, a *decision*) made by any other administrative officer in the administration or enforcement of the state zoning laws, the locality's zoning ordinance, or any modification of zoning requirements pursuant to Virginia Code § 15.2-2286, may appeal the decision to the BZA. *Virginia Code § 15.2-2311(A).*

To have a right to appeal a decision, a person who is not affiliated with the locality must be a *person aggrieved* by the decision. *Virginia Code § 15.2-2311(A)*. The meaning of *aggrieved* is settled under Virginia case law:

> . . . [I]n order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest" . . . The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Virginia Marine Resources Commission v. Clark, 281 Va. 679, 687, 709 S.E.2d 150, 155 (2011), quoting *Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach*, 231 Va. 415, 419-420, 344 S.E.2d 899, 902-903 (1986); *see Vulcan Materials Co. v. Board of Supervisors of Chesterfield County*, 248 Va. 18, 445 S.E.2d 97 (1994); *Mann v. Loudoun County Board of Supervisors*, 75 Va. Cir. 24 (2008). Organizations that neither own nor occupy any real

property, nor hold any right that would be affected by a decision, are not persons aggrieved. *Pearsall v. Virginia Racing Commission*, 26 Va. App. 376 (1998).

Mere proximity to the parcel that is the subject of the appeal alone is insufficient to establish standing; a *particularized harm* must exist. *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013) (to allege standing, proximity to the subject property, alone, is insufficient; instead, a plaintiff must allege sufficient facts showing harm to some personal right or property right different than that suffered by the public generally). This standard applies to appeals of zoning decisions to the BZA. *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County,* 89 Va. Cir. 345 (2014). The alleged harm also cannot be speculative. In *In Re: November 20, 2013 Decision of the Board of Zoning Appeals of Fairfax County,* the zoning administrator determined that a proposed warehouse was part of a "public benefit use" that could be allowed by special use permit, and not a prohibited "storage" use. The trial court concluded that the neighbor's alleged harm that the decision changed the nature of their residential neighborhood with resulting visual impacts, increased traffic flow, and noise from truck deliveries, and the need for increased vigilance, was "speculative" and insufficient to establish standing. The court noted that the proposed warehouse still required a special use permit from the board of supervisors, and until that board approved the special use permit, it was "impossible to know what harms, if any, might result."

15-300 Notice of the decision and perfecting an appeal

An appeal must be filed within 30 days after the decision is made. *Virginia Code§ 15.2-2311(A); see Voorhees v. County of Fairfax Board of Zoning Appeals*, 2009 Va. Cir. LEXIS 84, 2009 WL 1269384 (2009) (BZA did not err in denying appeal as untimely where zoning approval of grading plans was made on April 20, and the petitioner's appeal was not filed until May 23; failure of petitioners to receive notice of zoning approval does not trigger any due process rights where notice of the decision was not required by state law or county ordinance).

Written notice of a zoning violation or a written order of the zoning administrator must include a statement informing recipients that they may have a right to appeal the decision within 30 days in accordance with Virginia Code § 15.2-2311, and that the decision will be final and unappealable if it is not appealed within 30 days. *Virginia Code§ 15.2-2311(A).* The notice of the zoning violation or written order must state that the applicable appeal fee and explain where additional information may be obtained regarding the filing of an appeal. *Virginia Code§ 15.2-2311(A).* The appeal period does not begin until the statement is given and the zoning administrator's written order is sent by registered or certified mail to, or posted at, the last known address or usual place of abode of the property owner or its registered agent, if any. *Virginia Code§ 15.2-2311(A).*

A locality's zoning ordinance may provide for an appeal period of less than 30 days, but not less than 10 days, for short-term recurring violations pertaining to temporary or seasonal commercial uses, parking commercial trucks in residential zoning districts, or maximum occupancy limitations on residential dwelling units. *Virginia Code§ 15.2-2286(A)(4).*

The failure to file a timely appeal results in the official determination becoming final and binding – a *thing decided*, at least in a subsequent civil court proceeding.

At least one trial court has concluded that an appeal to the BZA pursuant to Virginia Code § 15.2-2311(A) may not be circumvented by filing a court action under Virginia Code § 15.2-2313. Virginia Code § 15.2-2313 provides:

> Where a building permit has been issued and the construction of the building for which the permit was issued is subsequently sought to be prevented, restrained, corrected or abated as a violation of the zoning ordinance, by suit filed within fifteen days after the start of construction by a person who had no actual notice of the issuance of the permit, the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals.

In *Campbell v. Davidson*, 96 Va. Cir. 55 (2017), the city had issued building permits for the construction of a 301-unit multifamily apartment complex on April 11, 2017. On April 25, 2017, the plaintiffs, who were landowners in

the vicinity of the apartment complex, filed a lawsuit against the city and the zoning administrator pursuant to Virginia Code § 15.2-2313. The plaintiffs alleged that the building permits had been issued in violation of the zoning ordinance. The plaintiffs never filed an appeal to the board of zoning appeals under Virginia Code § 15.2-2311.

The issue in *Campbell* was whether Virginia Code §§ 15.2-2311 and 15.2-2313 provide optional avenues for appeal or whether they are sequential. Citing prior Virginia case law, the trial court granted the city's and zoning administrator's motion to dismiss the lawsuit, holding that an appeal under Virginia Code § 15.2-2311 is a "mandatory appeal" and the plaintiffs were precluded from direct judicial attack under Virginia Code § 15.2-2313 because they failed to timely exhaust their administrative remedies under Virginia Code § 15.2-2311. The trial court said that what the plaintiffs had attempted in this case "was essentially an end-run around that mandatory administrative appeal." The trial court in *Mirror Ridge Homeowners Association v. Board of Supervisors of Loudoun County*, 51 Va. Cir. 406 (2000) reached a similar conclusion. In dismissing both cases on the plaintiffs' failure to exhaust their remedy under Virginia Code § 15.2-2311, the trial courts do not satisfactorily address the express language in Virginia Code § 15.2-2313 that "the court may hear and determine the issues raised in the litigation even though no appeal was taken from the decision of the administrative officer to the board of zoning appeals."

In those localities imposing civil penalties for zoning violations, the civil penalties may not be assessed by a court having jurisdiction during the 30-day appeal period. *Virginia Code § 15.2-2311(A).*

The notice of appeal must be filed with the zoning administrator and with the BZA and must specify the grounds for the appeal. *Virginia Code § 15.2-2311(A).* After the notice of appeal is filed, the zoning administrator must promptly transmit to the BZA all the papers constituting the record upon which the action appealed was taken. *Virginia Code § 15.2-2311(A).*

If an appellant fails to perfect the appeal because it was not filed within 30 days after the date of the determination or there is a question as to whether the appellant is aggrieved, the BZA should consider and act on these jurisdictional issues. It is not the locality's staff's role to reject or dismiss the appeal or to refuse to process it.

15-400 Effect of filing an appeal on pending proceedings

Generally, filing an appeal with the BZA stays all proceedings in furtherance of the action appealed from. *Virginia Code § 15.2-2311(B). Proceedings*, as the term is used in Virginia Code § 15.2-2311(B), refers to not only litigation, but also "any action that proceeds from the action appealed from." *Wahrhaftig v. Artman*, 73 Va. Cir. 37, 38 (2007) (because Virginia Code § 15.2-2311(B) is remedial in nature, it should be liberally construed and, therefore, construction of the structure authorized by the county's issuance of zoning permits was stayed pending an appeal to the BZA). For example, if the zoning administrator makes an official determination that a zoning violation exists on the landowner's property and initiates a zoning enforcement action, that action is stayed while the appeal is considered by the BZA. As another example, if a site plan is being processed and there is an appeal of the use classification related to the site plan, processing of the site plan is stayed until the appeal is resolved.

However, proceedings pertaining to parts of a project that are separate and distinct components, such as different phases of a phased site plan or subdivision plat, are not stayed. *Ripol v. Westmoreland County Industrial Development Authority*, 82 Va. Cir. 69 (2010) (BZA appeal pertaining to the site plan for Phase 1A did not stay proceedings pertaining to Phase 1B; therefore, the zoning administrator was not stayed from acting on the site plan for Phase 1B of the project where the two phases were separate and distinct components).

Finally, a zoning administrator may certify to the BZA that facts exist such that a stay, in their opinion, would cause imminent peril to life or property. *Virginia Code § 15.2-2311(B).* If the zoning administrator makes such a certification, the pending proceedings will not be stayed unless the appellant successfully applies to the BZA or the circuit court for a restraining order. *Virginia Code § 15.2-2311(B).*

15-500 Procedural requirements before and during an appeal hearing

Several procedural rules apply to the conduct of an appeal hearing:

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

- Notice of the hearing: The BZA must "give public notice thereof as well as due notice to the parties in interest." *Virginia Code § 15.2-2312.* Notice of the hearing must be provided as required in Virginia Code § 15.2-2204. *Virginia Code § 15.2-2309(3).*

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

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

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

- At the hearing; the zoning administrator's required explanation: At a hearing on an appeal, the zoning administrator must explain the basis for their decision. *Virginia Code § 15.2-2309(1).*

- At the hearing; the presumption of correctness: At the hearing, the zoning administrator's decision is presumed to be correct. *Virginia Code § 15.2-2309(1).*

- At the hearing; the burden of proof is on the appellant: After the zoning administrator explains the basis for the decision, the appellant has the burden of proof to rebut the presumption of correctness by a preponderance of the evidence. *Virginia Code § 15.2-2309(1).*

- Decision: The decision by the BZA must be based on its "judgment of whether the administrative officer was correct." *Virginia Code § 15.2-2309(1).* The BZA may reverse or affirm, wholly or partly, or may modify, the decision of the zoning administrator. *Virginia Code § 15.2-2312. See section 15-700 for further discussion.*

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

- Required vote: The concurring vote of a majority of the BZA's membership is necessary to reverse the determination of the zoning administrator. *Virginia Code § 15.2-2312.* This means that a seven-member BZA may reverse the zoning administrator's determination only if at least four members vote for reversal, and a five-member BZA may reverse only if at least three members vote for reversal. *See Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (3-3 vote of a seven-member BZA was a "decision" because the vote established that the BZA could not and would not reverse the zoning administrator's decision). Thus, if only three members of a five-

member BZA are present for the vote, all three must vote in favor of reversal; however, the zoning administrator's determination may be affirmed or modified on a 2-1 vote. If the BZA's vote on an appeal results in a tie vote, the person filing the appeal may request to have the matter carried over until the next meeting, but the BZA is not required to grant the request. *Virginia Code § 15.2-2311(D).*

- Findings to support the decision: To facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (adding that if the BZA does not, "the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal"). There is no minimum standard to which a BZA must adhere in making findings of fact. At bottom, the BZA must ensure that it has created a record that addresses the findings so that the circuit court can properly adjudicate the issues on appeal. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) ("In fact, the verbatim transcript contains numerous findings of fact in support of the BZA's decision").

15-600 Considering an appeal; matters the BZA may and may not decide

The BZA's decision on appeal is limited to the issue of whether the zoning administrator's decision was correct. *Virginia Code § 15.2-2309(1)*; *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 295, 435 S.E.2d 385, 388 (1993); *see In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) (BZA correctly determined that the zoning administrator erred when he determined that he needed more information before he could make a determination as to the nonconforming status of a towing and recovery lot when the zoning ordinance at the time had a by-right use classification that was consistent with the actual use at the time). This does not mean that the BZA's inquiry is limited only to the reasons and authority cited in the zoning administrator's written decision. *Town of Madison v. Board of Zoning Appeals/Potichas*, 65 Va. Cir. 433, 434-435 (2004). Regardless of what the zoning administrator states in their determination, the BZA's role is to determine whether the *decision* was correct and must apply the terms and provisions of the zoning ordinance even if the zoning administrator did not cite them. *Madison, supra.*

Summary of the Scope of Review on Appeal
• The issue for the BZA is whether the zoning administrator's decision was correct. • Statements by the appellant or their attorney may further limit the scope of the appeal. • In the consideration of an appeal, the BZA may not: → Determine whether a proposed use is appropriate in the zoning district. → Determine what is in the public interest. → Amend or repeal a zoning regulation. → Determine that a zoning regulation is invalid.

The scope of the proceeding before the BZA may be limited by statements made by the appellant or their attorney. *See Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of the City of Virginia Beach*, 261 Va. 407, 544 S.E.2d 315 (2001). In *Adams*, the applicant's attorney stated at the BZA hearing on his client's application for a variance for a sign that the "only issue is whether Adams spent too much on the sign and whether, because of the misunderstanding between the City and Adams [on] what could be done and what could not be done and whether it would in fact be proper for a variance. That's all that's before you." Because the scope of the BZA proceeding was limited by the attorney's statements, the scope of judicial review was likewise limited. The Virginia Supreme Court determined that the BZA correctly denied the variance, particularly since the BZA did not have the authority to grant a variance on the grounds presented. *Adams*, 261 Va. at 414, 544 S.E.2d at 319.

A BZA may not determine what uses are appropriate in a zoning district because that is a legislative function reserved to the governing body. *Foster v. Geller*, 248 Va. 563, 568, 449 S.E.2d 802, 806 (1994) (the BZA does not have the power to rezone property); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982) (the decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category, is a legislative action). In such an appeal, the BZA's role is only to determine whether the use is within one of the use classifications the governing body has decided to allow in the district.

Likewise, a BZA may not determine what is in the public interest because that determination requires the balancing of private conduct and the public interest, which is a legislative decision that lies with the governing body, not the BZA. *Helmick v. Town of Warrenton*, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (the exercise of legislative power involves the "balancing of the consequences of private conduct against the interests of public welfare, health, and safety"); *Southland Corp.*, 224 Va. at 521, 297 S.E.2d at 721 (the power to regulate the use of land by zoning laws is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles). Administrative zoning decisions such as those made by the BZA must be grounded within the legislative framework provided. *Higgs v. Kirkbride*, 258 Va. 567, 573, 522 S.E.2d 861, 864 (1999). While the BZA should consider the zoning ordinance, the ordinance should not be extended by interpretation or construction beyond its intended purpose. *Higgs, supra*. In addition, equitable considerations are inappropriate. *Coleman v. Board of Zoning Appeals of the City of Fairfax*, 2011 Va. Cir. LEXIS 66 (2011) (reversing decision of the BZA because a single BZA member relied on "equitable considerations" in voting to overturn the decision of the zoning administrator that the counseling center had engaged in an activity not allowed by the zoning ordinance; the circuit court said that the BZA member's statements revealed that he arrived at his decision because the counseling center had engaged in that activity for years). *See Chapter 29 for discussion of the rule that public bodies act only as a corporate body and not by the actions of its members separately and individually.*

Lastly, one of the common duties of the BZA on an appeal may be to determine whether the zoning administrator correctly interpreted the zoning ordinance. The power to interpret the zoning ordinance has its limitations. Although the BZA (as well as the zoning administrator) must necessarily interpret the zoning ordinance to execute its responsibilities, that obligation does not give rise to a power to declare a regulation invalid, which is a determination within the sole province of the judiciary. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 487 S.E.2d 207 (1997). In addition, the BZA does not have the power to amend or repeal portions of a zoning ordinance. *Foster, supra*. The principles relevant to the interpretation of the zoning ordinance by the BZA are well established. *Higgs, supra. See Chapter 16 for a discussion of some of those key principles.*

15-700 The effect of a decision on an owner who did not receive a notice of violation or order

For a notice of violation or an order of the zoning administrator to be binding against a landowner, the landowner must have been given notice of the violation or the order. *Virginia Code § 15.2-2311(A)*. Otherwise, any decision of the BZA on the matter is nonbinding against the landowner. *Virginia Code § 15.2-2311(A)*. If the landowner had actual notice of the violation or the order, or participated in the appeal hearing, the lack of notice is waived. *Virginia Code § 15.2-2311(A)*.

15-800 Presenting an appeal to the BZA

Appeals to the BZA can become legal free-for-alls resulting in long, drawn-out hearings where a multitude of issues, both relevant and irrelevant, are raised by the participants and the BZA, and where the relevant and material issues may be lost in the confusion. This risk is especially true where the BZA's practices and procedures do not require a level of formality that imposes structure to the proceedings and the participants and the BZA are not familiar with the relevant issues and the applicable legal standards.

15-810 Insist on a clearly stated and comprehensive statement of the basis for the appeal

The appellant's written appeal must clearly state the basis for the appeal. When the appeal is received, the BZA or its staff must review the statement to ensure this requirement is satisfied. A statement of the basis for the appeal is critical because it should be relied on to frame *and limit* the issues on appeal.

If the statement is unclear or needs further information, the BZA or its staff should ask the appellant to elaborate on the basis for the appeal. Without a clearly stated basis for appeal, the parties and the BZA can only guess what the key issues will be on appeal (such as whether a use is nonconforming). In any event, the appellant must provide as much information as possible about the appeal before the appeal is scheduled for hearing.

15-820 Presenting the appeal

There are several things a locality's staff can do to present their side of an appeal to ensure that the BZA understands and focuses on the material issues.

- Identify the dispositive issues: Staff must identify the dispositive issues and keep them at the forefront for the BZA's consideration. This will depend, in part, on the appellant providing a detailed statement of the basis for the appeal.

- Provide a legal memorandum: Appeals to the BZA are quasi-judicial proceedings that often raise legal issues that need to be explained to the BZA. For example, assume that the issue on appeal is whether a use is accessory to a primary use; the BZA may need to be briefed on the elements of establishing an accessory use and how those elements have been interpreted under the case law. If necessary, a legal memorandum prepared by the locality's attorney should accompany the staff report. Staff should not be concerned that a legal memorandum will cause the appeal to become too legalistic. The BZA is always obligated to apply the correct legal principles when it makes its decision.

- Use visual aids: Presentations should include a visual component for several reasons. Maps, aerial photographs, and ground-level photographs familiarize the BZA and the persons attending the public hearing with the property at issue. Applicable zoning regulations, definitions of key terms, and other information provide the BZA, the participants, and others in attendance points of reference that they can easily refer to when necessary.

- Focus the oral presentation on the dispositive issues: BZA members must read the locality's staff report and other materials, the appellant's written materials, and all the other writings received pertaining to the appeal before the public hearing. Staff should assume that the BZA has read these materials and focus its oral presentation on the dispositive issues and the relevant materials and facts, rather than merely re-read the staff report at the public hearing.

- Minimize the detours to the irrelevant and immaterial issues: All parties to an appeal need to ensure that the BZA understands the relevant and material issues. Whether intentional or not, some appellants may raise irrelevant or immaterial issues and arguments (*e.g.*, common topics include the claim that the owner is a longstanding resident who pays taxes; less obvious though irrelevant topics include the claim that the zoning on the property is inappropriate for the neighborhood), misstate or misrepresent the law (*e.g.*, by stating that a regulation or a case stands for A, when it actually stands for B), or play the victim or seek sympathy (*e.g.*, "I already built the structure"; "I didn't know it was a violation"; "So and so said it was okay"; "So and so has been harassing me about this/has been verbally abusive"; "Doesn't the zoning department have anything better to do with its time?"). Unfortunately, this strategy may be effective with some BZA members.

The strategies applied to properly present a particular appeal will depend on the issues and parties involved, and the public interest that may be generated by the appeal.

15-900 Appeals of BZA decisions to the circuit court

A person aggrieved by a decision of the BZA, or any aggrieved taxpayer or any officer, department, board, or bureau of the locality, may appeal the BZA's decision to the circuit court by filing a petition for writ of certiorari. *Virginia Code § 15.2-2314*.

15-910 The time in which to file a petition for writ of certiorari

The petition for writ of certiorari must be filed in the circuit court within 30 days after the final decision of the BZA. *Virginia Code § 15.2-2314*. The date of the *final decision* is the date the BZA takes its vote on the matter that decides its merits. *West 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).

15-920 The parties in an appeal to the circuit court

The necessary parties in a case challenging a BZA decision are the governing body and the landowner and the appellant before the BZA (assuming the latter is different from the landowner). The third paragraph of Virginia Code § 15.2-2314 states:

> Any review of a decision of the board shall not be considered an action against the board and the board shall not be a party to the proceedings; however, the board shall participate in the proceedings to the extent required by this section. *The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court.* The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals. (italics added)

The BZA is not a party to the proceeding, and its sole role is to prepare and submit the record of the BZA proceedings to the circuit court within 21 days after the writ of certiorari is served on it. *Virginia Code § 15.2-2314*.

In *Boasso America Corporation v. Zoning Administrator of the City of Chesapeake*, 293 Va. 203, 796 S.E.2d 545 (2017), Boasso appealed the decision of the BZA to the circuit court within the 30-day appeal period required by Virginia Code § 15.2-2314. However, Boasso's petition did not name the city council as a necessary party and it sought to amend its petition to add the city after the 30-day period had run. The issue in the case was whether the city council had to be named in the petition within the 30-day period, or whether Boasso could add it as a necessary party by amending its petition after the 30-day period had run. The trial court granted the city's motion to dismiss the petition because the city council had not been named as a necessary party within the 30-day appeal period. The Virginia Supreme Court affirmed. The Court held that a locality's governing body that "is expressly identified in [Virginia Code § 15.2-2314] as a necessary party must be included in the petition within 30 days of the final decision of the board of zoning appeals, not at some undefined future date by amendment to the petition."

The court may also allow other aggrieved parties to intervene in the proceeding. *Virginia Code § 15.2-2314*. Naming the governing body in the style of the case is not required. *See In Re: October 31, 2012 Decision of the Board of Zoning Appeals of Fairfax County*, 2014 WL 1391769 (Va. Cir. Ct. 2014).

15-930 The nature of the proceeding in circuit court

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

The court's review of the BZA's decision is limited to the scope of the BZA proceeding, *i.e.*, whether the zoning administrator's decision was correct. *Foster v. Geller*, 248 Va. 563, 567, 449 S.E.2d 802, 805 (1994); *Board of Zoning Appeals of James City County v. University Square Associates*, 246 Va. 290, 294-295, 435 S.E.2d 385, 388 (1993). Thus, the court's role, like the BZA's, is to determine whether the *decision* was correct, applying all the applicable terms and provisions of the zoning ordinance, even if the zoning administrator did not cite them.

The limited scope of review that applies in a certiorari proceeding prohibits the court from ruling on the validity

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

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

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

An appeal may be dismissed as moot if the landowners no longer own the property to which an appeal pertains. *Board of Supervisors of Fairfax County v. Ratcliff*, 298 Va. 622, 842 S.E.2d 377 (2020) (landowners sold their home while the county's appeal of the circuit court decision in favor of the landowners was pending; the Virginia Supreme Court vacated the judgment of the trial court).

15-940 Presumptions attached to BZA decisions and standard of review

On appeals from BZA decisions arising from appeals from decisions by the zoning administrator, two rules apply. On questions of fact, the findings and conclusions of the BZA are presumed to be correct. *Virginia Code § 15.2-2314*. The appealing party may rebut that presumption by proving by a preponderance of the evidence, which includes the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*. On questions of law, the court hears arguments on those questions *de novo* ("anew"), as though the BZA had not decided the question and, therefore, without any presumptions. *Virginia Code § 15.2-2314*. The interpretation of statutes and ordinances are questions of law to which no presumption of correctness applies. *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 269, 673 S.E.2d 170, 179 (2009).

The party challenging the BZA's decision has the burden of proof. *Trustees of the Christ and St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 380-381, 641 S.E.2d 104, 107 (2007); *Foster v. Geller*, 248 Va. 563, 566, 449 S.E.2d 802, 805 (1994). Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia. *Virginia Code § 15.2-2314*.

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