

ALBEMARLE COUNTY BOARD OF ZONING APPEALS  
COUNTY OFFICE BUILDING  
401 MCINTIRE ROAD – LANE AUDITORIUM  
TUESDAY, MARCH 5, 2019 – 2:00 P.M.

Board Members: Randy Rinehart  
Ed Robb  
David Bowerman  
John Shepherd

Staff Members: Amelia McCulley  
Bart Svoboda  
Marsha Alley, BZA Clerk and Recorder

County Attorney: Andy Herrick, Deputy County Attorney

**1. Call to Order**

The meeting was called to order at 2:01 p.m. by Chair John Shepherd.

**2. Establish a Quorum**

The BZA established a quorum, with four members present.

**3. Public Hearing**

A. There were no public hearings held.

**4. Approval of Minutes**

A. February 5, 2019

Mr. Robb presented several corrections as follows:

- on page 3, next to last paragraph, attributing a statement to him instead of Mr. Rinehart
- on page 7, to change Mr. Bowerman's motion to motion to approve
- and revise his own comment to be approved by the Zoning Administrator, not the Board of Zoning.

**MOTION:** Mr. Rinehart moved to approve the February 5, 2019 minutes as amended. Mr. Bowerman seconded the motion, which passed unanimously (4-0).

Mr. Rinehart asked if they needed to address the January 5, 2019 minutes.

Mr. Shepherd responded that he had withdrawn his objection regarding comments from the audience, and the BZA had approved those minutes at its February 5, 2019 meeting.

**5. Old Business**

**A. Work Session: BZA Rules of Procedure**

Mr. Shepherd noted that Mr. Robb had questions he wanted to address and changes he wanted to suggest.

Mr. Robb stated that he had done extensive reading of the state code and ordinances and had issues with them, but the BZA cannot recommend changes to those – but perhaps they could take it up at a later date. He said that as they went through the rules of procedure and got to the Recording Secretary section, he suggested replacing

“shall” with “may” in “the Zoning Administrator or his/her designee shall serve the BZA” because there may be a point in time they want a Recording Secretary other than the Zoning Administrator. He asked if the County Attorney would want to address this matter after the BZA’s other suggested changes.

Mr. Shepherd asked what he was anticipating in terms of needing that change, and asked if this was in the event they had someone else record the minutes.

Mr. Robb confirmed that this was his intent.

Mr. Rinehart commented that it was a finite point but he did not have a problem with it legally.

Mr. Herrick stated that changing “shall” to “may” was within the BZA’s discretion. He noted that typically, the reason that Secretary and Recording Secretary were kept as separate offices was that the Secretary was typically a member of the Board itself, whereas the Recording Secretary was a county staff member such as the Zoning Administrator or Recording Clerk who also kept the day-to-day records.

Mr. Robb commented that making this change did not affect anything other than giving an option that future boards might want to have a Recording Secretary other than the Zoning Administrator.

Mr. Robb stated that with vacancies in offices, this had created a problem when the BZA barely had a quorum which had been compounded when there were tie votes. He said that some BZAs had five members, some had seven, and some counties had more than one board. He stated that he was suggesting having three alternate members. The Chair, if given a notice of 24 hours that someone was not going to be available, could contact others so there would be a full five members and eliminate the problem with tie votes, which ended as failed motions. Mr. Robb added that they needed at least five members and he was not suggesting seven.

Mr. Bowerman asked if he was suggesting having alternates such as with a jury, and he was not understanding Mr. Robb’s recommendations.

Mr. Robb replied that state law allowed alternates and he thought it was fairly common. They would have three alternates who would be active on the Board in the event of a BZA member’s absence, called up by the Chair.

Mr. Rinehart stated that he wasn’t sure he supported that because as long as he had been on the BZA, he did not recall having a tie. He said that with them meeting six or seven times a year, when they used to meet every month, it would be cumbersome with just a 24-hour notice unless the alternates were also kept apprised of information.

Mr. Robb said that there may be individuals who were willing to serve as alternates, noting that it was done in other localities. But he was not sure what the effects of that would be.

Mr. Shepherd commented that he agreed with Mr. Rinehart in terms of this being a bit cumbersome. And he envisioned a lack of cohesion whereby the regular members gained more experience operating together as a Board. He said they were facing a problem, but there were two other ways to address it. Help Judge Cheryl Higgins expedite the process for reappointments. State motions in the affirmative. He noted that the requirement for three votes to overturn the Zoning Administrator’s determination was the controlling factor, so there was no question as to whether the decision was valid and understood. He said that fulfillment of the vacancy and strict adherence to the BZA’s Rules of Procedure and Robert’s Rules of Order would address the tie situation, but he appreciated Mr. Robb’s suggestion.

Mr. Robb stated that as he reviewed the state code, a majority was the threshold in that, it would be three votes in the case of five members and four votes in the case of seven members. He added that the same concurrence also applied to supporting the appellant, and most of the time he agreed with the Zoning Administrator's decision. He emphasized that he was trying to avoid the creation of a problem. In the years since he had been a member, he did not recall an issue until recently.

Mr. Rinehart said that Mr. Robb raised a good point. He said that if they only had three members present, they could still hold a meeting – but he asked staff if a majority would be two or three.

Staff confirmed that three would be a majority of the board.

Mr. Rinehart commented that this was a risk, and he had already let Ms. McCulley know of three dates he would be absent from meetings. He encouraged other BZA members to do the same.

Mr. Robb stated that it seemed his suggestion did not have support, so he would move on.

Mr. Rinehart asked if an appellant could find out from staff if there were only going to be three members present and request to be moved to the following month's meeting.

Mr. Herrick said that he thought the Rules of Procedure addressed that issue at the top of page 4, section 3D, regarding continuation of deferrals and allowed for a more liberal deferral if only three members were present on a particular day. He confirmed that the applicant could request a deferral.

Mr. Robb stated that the board had 90 days from the date an appeal was first entered to render a decision.

Mr. Herrick responded that the appellant had the right to a decision within 90 days but if they were requesting a deferral, there would be an extension of that timeframe.

Mr. Shepherd said he was still unclear on the practice of notification by staff that there wouldn't be a full board, and whether that allowed them to defer ahead of time.

Ms. McCulley responded that it is not the BZA's standard practice to let people know in advance, but sometimes appellants would ask. She stated that there was no real assurance in the end how many members would be present at a meeting.

Mr. Robb stated that for the language on page 2, item B, "and to the press as promptly as possible," he would change "possible" to "practicable."

Mr. Rinehart said that was acceptable to him.

Mr. Shepherd said he also supported it.

Mr. Bowerman agreed.

Mr. Robb said that with paragraph C regarding notice, he would ask for an addition of "electronic communication" to the language so that it stipulated "mailed, delivered, or by electronic communication" five days prior to the special meeting. He stated that regarding the stipulation that matters shall not be specified in a meeting unless all members are present, it should be changed to "a quorum" instead of "all members." He also said that he did not understand the provision for a waiver.

Mr. Herrick stated that it dealt with a notice requirement, which was there because it required that advanced notice be given to all members. And even if members haven't received formal notice, if they all show up at the meeting they can waive the formal notice requirements.

Mr. Robb asked if it was possible that they can legally put in a proxy.

Mr. Rinehart asked if he had looked at this with other BZAs in the state.

Mr. Robb responded that he had not, but he was aware of proxy votes and sometimes that was an effective approach in the event of an absence. He added that it may complicate the issue too much to add that.

Mr. Bowerman commented that it may be unnecessary.

Mr. Herrick stated that he did not believe proxy votes were enabled for a public body.

Mr. Shepherd said that with the information pertaining to rules for meetings and procedures, voting had to be in person or required a very safeguarded set of protocols.

Mr. Herrick stated that he had not researched whether that electronic participation was available to Boards of Zoning Appeals or just to local governing bodies such as Boards of Supervisors.

Mr. Rinehart asked if he could be remote and hear the testimony for a particular item if the BZA was tight on votes.

Mr. Herrick responded that the code did allow for remote participation in some cases, but he was not sure whether the BZA was enabled to do that noting that there were a number of procedural hurdles.

Mr. Robb said that he was going to ask that question also, as the BZA meetings were only being audio recorded but not video.

Mr. Herrick stated that the room was equipped for video but that had not been done for BZA meetings, and video participation was not necessary on the bodies that did allow for remote participation, as audio was deemed sufficient.

Mr. Robb asked if the BZA should ask for video recordings to be activated.

Mr. Herrick responded that there may be an additional expense because it required additional staff to man the video cameras. He added that there was a dedicated person handling the Board of Supervisors' meetings but noted that the request could be made from County Administration for the BZA.

Mr. Shepherd stated that he was on another Board that did a lot of work with conference calls and knew the value of that, but it would likely be difficult to apply that here as the rules were more stringent.

Mr. Herrick agreed, stating that the rules were originally done if someone was laid up in a hospital or in another serious situation which they were required to document. He said that the rules had been liberalized since then but there was still a need for the absent member to explain why he or she was absent. There were a lot of hurdles that made it more formal than for other types of meetings.

Mr. Robb said that with paragraph C and the language that states, "The Recording Secretary shall act as a timekeeper. The BZA may set alternate time limits," he recommended that it say, "The Chair may set alternate

time limits at his discretion.” He explained that in the past it had worked well when the Chair managed the discussion held and cut off conversation rather than the entire Board having to decide procedural aspects.

Mr. Rinehart stated that this was a good point because they may lobby the Chair, but it was ultimately his or her decision.

Mr. Robb said that he would also add the language, “provided that they are identified at the BZA meeting.”

Mr. Shepherd commented that it seemed there would be times when longer time limits were deemed appropriate for a specific matter – and while he had no problem making that decision, the full board should weigh in. He stated that his understanding was that this pertained to the amount of time people were allowed to speak.

Mr. Robb stated that this should be a discretionary point. If a speaker asked for more time, the Chair should be allowed to go beyond the allotted time, but it also needed to be equalized for all speakers.

Mr. Shepherd responded that it was the Chair’s responsibility to maintain good order, but he was always seeking support from other members.

Mr. Rinehart said that he supported this and agreed that it must go through the Chair.

Mr. Robb stated that regarding deferrals, he felt that “may” was fine and did not need “shall.” He said that regarding the request for deferrals, he wasn’t clear as to “prior to the vote” meant that a motion should be made by a Board member including during discussion and roll call. He stated that in his mind, a vote was not complete until the last person voted, and roll was called. He asked at what point they would be able to ask for a “substitute motion.”

Mr. Shepherd responded that the rules provided for that, and if the appellant was seeing how the deliberation was going and asked to be recognized, the proper thing to do would be for the Chair to recognize them. He said there would then be a motion to make a request for the deferral, and then the BZA would act on that request before proceeding to a vote. He stated that he was not looking to the past but was looking to the future that the mechanisms for the proper hearing of a deferral were in the rules as they were currently written.

Mr. Rinehart stated that if the question had been called and the Recording Secretary was getting ready to take a vote, it was in appropriate for an appellant to shout out that they wanted a deferral.

Mr. Shepherd said that he would recognize it, vote it down, and then proceed but would not let it hang as something appealable later. He stated that this was not to say he would be entertaining as a valid reason for deferral and have an applicant try to stop an item in the middle because they saw which way a vote was going. He added that this was fairly hypothetical.

Mr. Rinehart stated that it was hypothetical and would be inappropriate, and it would mean that the BZA had lost control.

Mr. Robb stated that he would like to see it clarified in their procedures, but perhaps it already was and he just hadn’t seen it.

Mr. Herrick said that the way it was currently written, “prior to the vote” meant prior to the beginning of the roll call. And once the roll call was underway, they would be interrupting a procedure in process.

Mr. Robb commented that he agreed with that and just wanted to make sure they understood.

Mr. Bowerman asked if call for the question was different from the actual vote. There was the opportunity for members to decide not to take the vote, and he wasn't sure the BZA members understood this.

Mr. Herrick explained that if an individual member called the question and there were other members who felt they were not ready to vote at that point, they were not required to take an immediate vote. He added that once there was agreement that the roll should be called and the vote should proceed, then that was when voting began. Under the current rule, a request for deferral would be out of order.

Mr. Robb said that a call for the question had to be seconded.

Mr. Herrick stated that it could be informal, and just because someone asked to call the question did not mean the BZA had to vote on it at that point.

Mr. Bowerman commented that if someone called the question, there was a vote on whether to proceed and if the majority of the BZA did not want to call the question, they could vote down the call. He emphasized that this was a separate issue than what was before them.

Mr. Robb said that the Chair made the decision on the question and did not have to recognize the call for the question.

Mr. Herrick stated that Mr. Bowerman's point was correct that a calling of the question was not an automatic vote at that moment and could be affirmed or rejected. And if anyone else spoke up and said they wanted further discussion, there could be a vote as to whether the vote should be taken then or deferred to a later time.

Mr. Bowerman noted that they had not followed this exactly.

Mr. Robb said he was not sure the issue had presented itself previously.

Mr. Robb stated that on page 4, regarding the language that states "when considering a request for deferral of a hearing to an appeal or an application for a variance pertaining to a zoning violation, the BZA should," he would suggest changing "should" to "must" consider the reasons for the deferral "if the request is submitted by the appellant or applicant, or a member of the BZA, or the recommendation of staff" so that it must applied to everyone.

Mr. Shepherd agreed with that recommendation.

Mr. Robb said that he would suggest scratching the language related to comments from "any member of the public," and confirmed for Mr. Bowerman that "shall" was a better language choice than "should." He stated that "shall" should also replace "should" in the language, "making its decision to grant or deny a request, the BZA should consider the following factors.

Mr. Shepherd asked if there was any opposition to those suggestions, and there was none.

Mr. Robb stated that regarding the language pertaining to adjourning a meeting from day to day and time to time, he would recommend using "may" instead of "shall" in the text, "not be adjourned to a date and time beyond the date fixed for the regular meeting." He said that there may be an administrative reason for that.

Mr. Shepherd noted that it could just be dealt with under the rules of deferral if it was called for.

No one objected to the wording change.

Mr. Robb stated that he felt there was a conflict between one and two in voting procedures, “variances, special use permits, and other matters,” and “to decide in favor of an applicant or any other matter upon which the BZA is required to act under the zoning ordinance.” He said that there was also language that said “at least three affirmative votes,” and he would add, “with a five-member board” because state code talks about “the concurrence of a majority.” He explained that he wanted it to stipulate that “at least a majority vote with a five-member board shall be required to reverse any appeal from an order, requirement, decision, or determination of administration officer,” which would be consistent with state code.

Mr. Rinehart said that this was contradictory to what Mr. Herrick talked about earlier in terms of it needing to be three upon appeal.

Mr. Robb responded that this was where conflict between the two arose, as “at least three affirmative votes shall be required” should be kept consistent.

Mr. Bowerman stated that the other one should be three also, and his understanding was that a majority of the Board was three votes. He thought if there were three members present, all members had to agree for that to happen and it couldn't be a two to one vote.

Mr. Shepherd said that it was clear to talk about the number three rather than a majority when there were five members, but if it changed to be a seven- or nine-member Board, the Rules of Procedure could be changed with a number specified. He emphasized that it was much clearer to the public if the number were spelled out, as it minimized confusion about whether it meant majority of a full Board, those who were present, etc.

Mr. Robb noted that if there were only three members present, the vote would need to be unanimous, and he liked the state code that said “majority.”

Mr. Shepherd clarified that the majority of the five-member board was three.

Mr. Bowerman said that he liked that clarity.

Mr. Robb asked what would happen if there were only three members present.

Mr. Shepherd responded that all three would have to vote to carry an action.

Mr. Rinehart said that he had noted on his copy that Ms. McCulley wanted to change the “e” to “d.”

Ms. McCulley confirmed this, noting that they had a marked-up copy from Mr. Herrick and she thought they had corrected that at the last meeting.

Mr. Rinehart asked which letter was correct.

Ms. McCulley responded that it was “e.”

Ms. Alley stated that the Rules of Procedure adopted at the last meeting were included in their packets, and page 7 showed the last amended date as February 5, 2019. She said that would be in addition to the information that Mr. Herrick provided.

Mr. Robb said that regarding the language for a tie vote, “a tie vote shall defeat the motion voted upon,” he would like to add, “except regarding 5.A.2 above.”

Mr. Shepherd asked if he meant appeals.

Mr. Robb responded that it related to the subject they had been discussing regarding the five votes, and the Board did not seem to accept his concurrence of a majority.

Mr. Shepherd commented that they would fix those problems in the future by good, solid wording of their motions.

Mr. Robb noted that “the motion to amend a motion before the BZA shall be discussed and voted by the BZA before any vote is taken” was covered by what they had already discussed. He said that the language “if approved by a 2/3 majority of those voting, discussion of any motion shall be terminated by any member moving the previous question” was a bit confusing. It seemed that a lot of this had to do with understanding and following the procedures.

Mr. Bowerman said that this said a second was necessary, which had been unclear before. He noted that there were some things that they could not change.

Mr. Robb said that regarding suspension of the Rules of Procedure, “the Constitution of Virginia or any other applicable law,” he would add, “including the Albemarle County Zoning Ordinance” to be more specific.

BZA members agreed.

Mr. Bowerman expressed his appreciation to Mr. Robb for being very thorough.

Mr. Rinehart and Mr. Shepherd also expressed their appreciation.

Mr. Bowerman asked if they could get a recap of their recommendations.

Mr. Svoboda suggested that staff put it together to get another look at it, as there was a lot of information, rather than to try to do it as amended. He agreed to provide these as tracked changes.

Mr. Shepherd offered to share his notes, and Mr. Svoboda agreed that it would be helpful.

Mr. Rinehart asked if staff had additional suggested changes.

Mr. Svoboda responded that after they compiled the changes, staff would look at the state code sections to ensure they were remaining compliant.

Ms. McCulley pointed out the state code section related to appeals, and it was the majority of the membership of the Board as opposed to those present. So, the BZA really did not have the ability to reduce it below the state-mandated threshold.

## **B. Work Session: BZA Legal Representation**

Mr. Shepherd stated that the BZA had received emails regarding the meeting Ms. McCulley and county HR staff had held related to this issue. He noted that they had also done a draft of the job posting to be advertised. He said that the hiring of this attorney would be the responsibility of the BZA. The four current members



would be involved in the final approval of the job description and criteria sought, screening applications that came in, interviewing, and choosing the person. He stated that this was a big job and there were some time constraints around it, noting that there were different ways they could accomplish this. He said that they should be thinking about how much involvement they wanted in the process.

Mr. Shepherd said that regarding the terms of employment for this person, there were two choices per his understanding: the person could work on a salary, and the way it was currently structured, the BZA was allocated \$2,000 for representation for the remainder of the year, regardless of how many hours the 1099 contractor worked; or they could hire a temporary worker at an hourly rate, with the income reported on a W-2. He stated that with an independent contractor, there were no concerns about the bill being run up – and the BZA would be relying on them to the extent they felt was appropriate. Mr. Shepherd said that if they were hired as a temporary worker, it would be an estimated \$250 per hour charge. He stated that his idea was that this employee would be an independent contractor with a fixed amount so they didn't have to keep up with hours and pay, and this seemed the preferable approach.

Mr. Bowerman stated that this seemed to be the best structure, as it gestured to the job applicants that the BZA was looking for someone to represent them, but there was also some civic responsibility to it in helping the Board make decisions.

Mr. Shepherd asked County staff if they saw any issues with this.

Mr. Herrick responded that he had not spoken with HR about this but would be surprised that the person would ever be considered a county employee, so the decision would mostly relate to whether this person's rate was hourly or fixed, noting that the best of both worlds would be an hourly rate capped at a certain amount. He commented that this decision could be subject to negotiations with the ultimate candidate, but it was not an either/or decision and could be an hourly rate capped at the \$2,000 an hour so if they wound up spending the whole amount, the County would get a benefit.

Mr. Shepherd said that the part that was important to him was that they not be as concerned about the budget as they were about using the attorney's time, although they would be mindful of it, and the relationship with the attorney would be respected.

Mr. Herrick stated that the appropriation would be whatever it was, and the attorney and BZA could not outspend what the Board of Supervisors appropriated for the position. He added that the candidate should be made aware of that.

Mr. Shepherd responded that he wanted to shift the risk to the candidate.

Mr. Herrick said the way to do that would be to say an hourly rate but capped at a maximum of what the Board's appropriation was.

Mr. Shepherd stated that he hoped they could go in that direction.

Mr. Robb commented that this was not an adversarial situation. They were not for or against the county; they were as objective as possible. He asked why they couldn't have a different person in the County Attorney's Office advise the BZA on legal matters.

Mr. Herrick responded that there were limits of anyone in the County Attorney's Office to provide counsel, and that was because when the Board of Supervisors' appointee appeared before the BZA, it was their position to represent the County's position and the BZA's position to judge the merits of both sides. He added that it would

be a conflict of interest for them to be representing County staff on the one hand and to be representing the Board of Zoning Appeals. He said they could advocate the County's position before the BZA but could not simultaneously represent both County staff and the BZA, and that would hold true for any attorney in their office.

Mr. Robb commented that it sounded like an adversarial role.

Mr. Herrick said that it was a way to avoid conflict of interest. Experience was borne out that in most occasions, the BZA's ultimate decisions concurred with staff's decisions, so it was not taken personally or adversarially at all but was related to the fact that rules of legal ethics prevent their office from simultaneously representing parties that may be on occasion adverse. He added that as recently as 10 years ago, it was commonplace for attorneys in localities to represent Boards of Zoning Appeals. He added that a legal ethics opinion came out recently that said County Attorneys could not do that and if they attempted to do so, the County Attorney's Office would be disqualified from representing the County's position down the road. He emphasized that they were trying to avoid a position whereby any decision of the BZA's was appealed up to Circuit Court or beyond, they wanted to be able to preserve County staff as the case was appealed on. Mr. Herrick added that if they attempted to represent both County staff and the BZA, they would likely be disqualified from representing the County if the case were appealed further.

Mr. Rinehart said that in the case of a variance appealed all the way up the legal chain, he was always under the impression that the County Attorney's Office was representing both the County and the BZA because of the decision made on that variance.

Mr. Herrick clarified that the County Attorney's Office did not represent the BZA in any manner and had not in the last decade. He explained that the role of the BZA was similar to that of a Lower Court Judge. He explained that in the courthouse, there was a District Court and a Circuit Court and the decisions of the District Court could be appealed up to the Circuit Court. Mr. Herrick stated that in some respects, the BZA was like the District Court with decisions that could be appealed to a higher Court. When the Lower Court Judge's decisions were appealed to the higher Court, the Lower Court Judge did not get an attorney to say why his opinion was right; the decision was just appealed, and the Lower Court Judge's only role was to transmit his decision onto the next level and let the higher court decide it. He added that there was no need for the Lower Court Judge in that scenario to defend itself or its position, and in many respects the BZA functioned like that judge.

Mr. Shepherd said it would help their deliberations in the future, particularly with complicated appeals and various legal theories that could be applied to it to not put them in the position of strongly defending but recognizing the validity of a counter proposal. He stated that it was clean for them and clean for the Board of Supervisors, because sometimes the different points of view were adversarial and their decisions would be stronger with independent representation. He commented that there would be a process whereby they were putting out the advertisement, reviewing the applications, and interviewing and choosing the person.

Mr. Rinehart stated that this all assumed they would get applications for the position, and he was unclear as to why an attorney would take a contract position that didn't offer them much in return.

Mr. Shepherd said for the time being, they should just assume it should happen. He mentioned that he would be gone from March 9<sup>th</sup> to the 24<sup>th</sup>, as well as April 14<sup>th</sup> to June 2<sup>nd</sup>. It would be possible for the BZA to review the job descriptions and screening criteria and have this advertised very soon, with candidates selected between March 25<sup>th</sup> and March 29<sup>th</sup>, and from April 4<sup>th</sup> to April 7<sup>th</sup>. He said that if they did it before he left, they could do interviews and try to make a selection after that, if he were to be a part of the process. He noted that the entire Board did not have to be involved with all of this, and he welcomed any help with it.

Mr. Rinehart stated that they did not have to call the meeting unless there were two of them.

Mr. Shepherd said that he saw conflicting information as to where this applied, but if the BZA appointed a subcommittee of two, they could work on this without calling an open meeting and report back to the full Board.

Mr. Herrick confirmed that the Freedom of Information Act (FOIA) only applied to meetings of more than two, and to the extent there was a committee of two or fewer, it would not constitute a public meeting for FOIA purposes. He added that the BZA's final decision would need to be something done in a formal, open meeting, and any action taken by three members or more would need to be in open session unless the proper closed session procedures were followed. That would be for the consideration of specific candidates rather than job descriptions in general.

Mr. Shepherd said that the committee could handle the mechanics for this and make recommendations about candidates, with the entire BZA interviewing all candidates in a closed session in a public hearing.

Mr. Herrick confirmed this, stating that in the event it was decided the entire Board wanted to either interview or deliberate on specific candidates, the procedure would be to convene in open session, follow the procedures for calling a closed session, then operating in closed session to interview and deliberate on specific candidates. He added that the closed session topic would be limited to consideration of specific candidates rather than job description as general matters. He said they would then come back out into open session to certify the closed session and take formal action in open public session.

Mr. Rinehart suggested that the committee be comprised of Mr. Robb and Mr. Shepherd. Other BZA members agreed.

Mr. Shepherd said they would work on each step along the way, with county HR being helpful in this regard and procedural questions to be asked of Ms. McCulley and Mr. Herrick. He commented that he appreciated the BZA's responsibility in hiring the attorney but hoped he could look forward to relying on some help along the way and the mechanics of it, noting that there were a lot of steps in dealing with this.

Mr. Robb asked how much influence the Board of Supervisors would have over this particular issue and the naming of the next member.

Ms. McCulley responded that the Board of Supervisors had no influence or participation in choosing another BZA member, but Judge Higgins has allowed them to utilize the County's website which goes through the Board of Supervisors web page in listing vacancies. Ms. McCulley said that Judge Higgins has very clearly said that she doesn't ask for any vetting, recommendations, or filtering/screening of any sort of the applications and just asks that the County provide notice and a collection point, then send the submittals on to her. Ms. McCulley said that Judge Higgins has said she was willing to consider applications even in the case of a reappointment, and staff did not know what actions she would take on that but currently the deadline was March 8<sup>th</sup> which listed both Mr. Wood's position and the position that was up for reappointment. Ms. McCulley commented that she did not know if Judge Higgins would look at reappointments in the future any differently than in the past, as she has just said she would look at applications for them.

Mr. Robb said that his question was what the Board of Supervisors was going to do about the selection process.

Ms. McCulley replied that they were just a funding body and were not participating in any way in vetting or choosing the BZA's attorney.

Mr. Shepherd added that it would be considered inappropriate if they attempted to influence the selection.

Mr. Robb stated that he did not want to get a phone call from someone who was recommending candidates and that they needed to be careful not to end up in that kind of situation.

Mr. Shepherd said that he would like to know how much the BZA wanted to see from him and Mr. Robb as to what went into their recommendations. He noted that he was an inclusive person but was also cognizant of avoiding meeting rules, so perhaps operating in a silo was safer, better, and more appropriate.

Mr. Rinehart agreed.

Mr. Herrick asked if the BZA wanted to establish next steps for the subcommittee and a timeframe for them to report back.

Mr. Bowerman asked Mr. Shepherd what his timeframe was.

Mr. Shepherd explained that he was gone from March 9<sup>th</sup>–24<sup>th</sup>, would be here from March 25<sup>th</sup>–April 12<sup>th</sup>, and then would be gone until early June. He said he wasn't sure how long it would take for them to get comments to HR on the job posting, and the advertising would likely run for two weeks. He stated that they did not get to the point of putting this on the Virginia Bar Association list-serves. He wasn't sure if this was something they would put in the *Daily Progress*, *Cville Weekly*, etc.

Ms. McCulley responded that the only implication was cost, and since it wasn't currently budgeted, they would need to find funding for it. She said that they typically advertised for 21 days, but it was not uncommon to post "open until filled," especially in the event of positions that were difficult to fill.

Mr. Shepherd expressed concern that it would drift later into April and May, and he asked what the implications would be of getting started on this but finishing in June or July.

Mr. Bowerman said that there would not be a lot gleaned from Mr. Shepherd until he was available in April.

Mr. Shepherd stated that it was possible for the advertising to be done by then, and they might have time to have some applicants before the middle of April. He said that interviewing, selecting and negotiating the position for an offer might be impossible in that timeframe.

Mr. Bowerman commented that it should be done whenever it's done, and he saw nothing that the BZA was imposing on this.

Mr. Shepherd suggested that they come on April 2<sup>nd</sup> with as much done as possible, and at that point they would have a good sense of the response to the advertisement.

Mr. Svoboda noted that this would also give staff an opportunity to bring back the Rules of Procedure.

Mr. Shepherd asked Ms. McCulley if that was enough time, given her experience in the normal advertising and working with HR.

Mr. Svoboda said that the approval of the job description may be the lengthiest piece, and they would then have to work their way backwards for a timeframe.

Mr. Shepherd commented that writing the ad would take a few days.

Mr. Svoboda wondered if it would be better to do the ad and the description and discuss it at the April meeting.

Mr. Shepherd said they could do a job description and submit it to HR in a short timeframe, as they had done most of it already, and resolve the employment status as part of that process. He said he would like to think that the ad would be running while he was gone, and perhaps they needed to come back on April 2<sup>nd</sup> only if there was a reason to come back.

Mr. Svoboda reminded him of the Rules of Procedure.

Mr. Shepherd said they would keep the meeting and get as much done as possible before then, adding that he hoped to recruit the attorney in a routine, systematic way that resulted in getting a good person and a good outcome. He added that he did not want to have time pressures jeopardize that process.

Mr. Rinehart stated that he didn't realize they would be asking the attorney to come to every BZA meeting, which was how the job description read and that he thought it was on an as-needed basis. He added that the \$2,000 would be used up very quickly.

Ms. McCulley clarified that the \$2K was for the current fiscal year, and \$5K was requested for the following fiscal year, starting July 1, 2019. She commented that his point was valid, in that, hourly rate and billable hours were going to get used up quickly which at the going rate of \$250 per hour was just eight hours so that person would want to have to do public service.

Mr. Robb said he didn't feel they could answer the question until they did the job description, and he had not seen many situations in which the BZA needed them.

Mr. Rinehart responded that he did not dispute the need to have them on call, but it seemed fruitless to have them at every meeting. He added that he agreed with Mr. Svoboda to let the process play out, but he was frustrated at the possibility of having an attorney at every meeting. Mr. Rinehart emphasized that he had great respect for the staff people who were already attending the meetings.

Mr. Svoboda said they could start with the job description and take it from there.

Mr. Shepherd commented that this would be a work in progress, and if they thought of all the questions they asked of County Attorneys, it would remove Mr. Herrick from the position of having to essentially provide counsel to the BZA. He said that there were moments when it was awkward to have to answer questions about an appellant's position, and they should try to be reasonable in their approach with the possibility that a phone call for information would suffice. He stated that with a consulting attorney, they could get deep into an issue, with that person while not undermining Mr. Herrick's case.

Mr. Rinehart stated that he hoped that the BZA would authorize the Chair to be the sole person contacting the attorney outside of this body, and he did not want to see them individually calling an attorney.

Other BZA members agreed with this suggestion.

Mr. Shepherd commented that he had great respect for Mr. Herrick, Ms. McCulley, and Mr. Svoboda, as well as the process by which decisions were made.

**6. New Business**

A. BZA 2018 Annual Report

Mr. Shepherd asked if there had been a trend for more or fewer cases.

Ms. McCulley responded that the previous year, they had resolved more variances and appeals than the typical staff because a lot of them were resolved without coming before the BZA. She said that the number of meetings they had a year was barely increasing from three to five, and they would likely have more this year as they were doing some business and training at some of their meetings. She added that the Annual Report had been voted on because it was used as the report to the Board of Supervisors.

**MOTION:** Mr. Rinehart moved to approve the BZA's 2018 Annual Report. Mr. Bowerman seconded the motion, which passed unanimously (4-0).

Mr. Shepherd confirmed that they would meet on April 2<sup>nd</sup>, at which time they would review progress in recruiting an attorney and would revisit the Rules of Procedure.

Ms. McCulley noted that they had an appeal agenda item on May 7<sup>th</sup>.

Mr. Rinehart asked if the January appeal had not advanced.

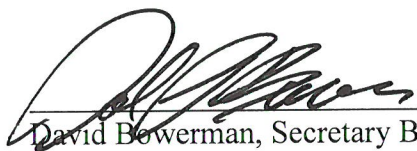
Ms. McCulley responded that staff had not heard anything further on it.

**7. Adjournment**

At 3:54 p.m., Mr. Rinehart moved to adjourn the meeting. Mr. Bowerman seconded the motion, which passed unanimously (4-0).

(Recorded by Marsha Alley and transcribed by Beth Golden)

Respectfully Submitted,



---

David Bowerman, Secretary Board of Zoning Appeals