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Virginia Local Government Law

Virginia BZAs Get "Off the Hook" on Appeal

By: Andrew McRoberts. ***This was posted Monday, July 12th, 2010***

The 2010 Virginia General Assembly adopted HB 1063, which is a helpful simplification of the process by which BZA decisions are appealed to circuit court. It is effective July 1, 2010.

Need for the Bill

This bill was much needed. Prior to this bill, a BZA has been held to be a necessary party in an appeal. Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 225 Va. 235, 238, 302 S.E.2d 19 (1983) ("[U]ntil return on the writ of certiorari is made by the board of zoning appeals, the only necessary parties to a proceeding under [the predecessor statute to Virginia Code § 15.2-2314] are the aggrieved person and the board.")

Being named as a party (and its chair often being served with process by the local sheriff) often resulted in angst on the part of the BZAs. BZAs felt they were "being sued," and this was often reported in the local media. Localities and their BZAs argued over whether the BZA is a "real" party on appeal, which needs counsel, or merely named so it can produce its record for consideration by the circuit court. Being named as a party lead many BZAs to ask their localities for counsel, and in some instances, to sue for it. See Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 666 S.E.2d 315 (2008).

HB 1063 largely resolves these problems.

Significant Changes in HB 1063

First, service of the petition for writ of certiorari will be served upon the "secretary of the board of zoning appeals or, if no secretary exists, the chair of the board of zoning appeals." This will allow the BZA to designate a person not on the board as secretary, such as a staff member more likely to have the record as a practical matter. This would avoid service on any member of the BZA, at the option of the local BZA.

Second, and perhaps most significantly, an appeal from a decision of the BZA no longer will name the BZA. Rather, a petition for writ of certiorari to circuit court will be styled, "In Re: [date] Decision of the Board of

Zoning Appeals of [locality name].” The BZA is no longer a necessary or even an appropriate party. Rather, the BZA is instructed to “participate in the proceedings to the extent required by this section.” The section’s only apparent requirement for the BZA, which is unamended by the bill, requires the BZA to provide its record to the circuit court.

Another, arguably unrelated change clarifies who is a “necessary party.” The bill expressly lists “governing body, the landowner, and the applicant before the board of zoning appeals.” This listing is helpful to the appellant, and eliminates arguments on this issue on appeal. This provision guarantees the governing body a say on appeal, if so desired. However, this amendment requires that the governing body be involved on some level. In the past, a governing body was able to have no involvement in cases in which it had no interest – a variance dispute between two neighbors, for example. Now, the governing body is required to be named. Presumably, the local government attorney representing the governing body can defer to the other parties, or simply default if the governing body has no interest in the case.

Lastly, the bill requires that the written notice of appeal required for a zoning administrator determination to be final under Virginia Code § 15.2-2311(A) to include the cost of appeal and reference to where additional information may be obtained regarding filing an appeal. This is helpful information to prospective appellants and is easily given. By statute, failure to provide this additional information means the zoning administrator’s determination is not final.

Lessons from HB 1063

One result of this bill is that BZAs will not longer be able to defend their decisions on appeal, even if they wish to. But this makes sense. BZAs are quasi-judicial bodies, in almost all cases. They should act like courts in making their determinations. BZAs are not proper parties on appeal, any more than courts or their judges are parties on appeal of their decisions.

Without a role for the BZA as a party on appeal, the BZA’s decision must speak for itself. BZAs, appellants and zoning staff involved in their cases should be aware of the importance of the determination of the BZA in case of appeal. The decision should be clear.

Also, although unrelated to HB 1063, on appeal to circuit court of BZA decisions on zoning administrator determinations, the “plainly wrong” standard for review not longer applies. Instead, BZAs get a rebuttable presumption of correctness for their factual findings, but no presumption in favor of their legal determinations, which are reviewed de novo (“as if new”) on appeal. See Virginia Code § 15.2-2314. Therefore, parties and BZAs should consider the importance of factual findings in these cases.

Conclusion

HB 1063 is a helpful simplification of the procedure for appeals of BZA decisions. While not making cases before BZAs any simpler, this bill clarifies that on appeal – as with a court – it is the BZA’s decision that must stand or fall. The BZA is not a party and has no role beyond providing the record. In response, BZAs should ensure that the record is complete and that the reasoning for their decisions are clear in that record.