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Virginia Local Government Law

HB 1063: BZAs No Longer Defendants on Appeal

By: Andrew McRoberts. ***This was posted Monday, March 22nd, 2010***

The "long overdue award" for the 2010 General Assembly session goes to HB 1063, which *finally* provides that a board of zoning appeals will not be a party on appeal of its decisions to circuit court.

Interestingly, the long-standing requirement to name the BZA was not statutory, but based upon the determination in a Virginia Supreme Court case, *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 225 Va. 235, 238, 302 S.E.2d 19, 21 (1983) ("Considering these factors, we believe it is clear that, until return on the writ of certiorari is made by the board of zoning appeals, the only necessary parties to a proceeding under Code § 15.1-497 are the aggrieved person and the board [of zoning appeals]."). The real issue in this case was whether the petition for certiorari was filed in a timely manner. However, this unfortunate ruling was apparently justified because of the statutory requirement that the BZA produce the record of the proceeding below to the circuit court upon the filing of a petition for writ of certiorari.

I say "unfortunate" because a BZA typically acts in a quasi-judicial manner, and naming them as a defendant amounted to a lower court being named as a party in the appellate proceedings. In addition, the naming of the BZA as a defendant has had negative results. BZAs have (perhaps understandably) felt that they were "sued" when the suit papers on appeal named the BZA as a defendant. The poor BZA chair (or an unlucky spouse) often were served with the suit papers by the sheriff. Being named as a defendant on appeal lead many BZAs to request counsel on appeal to represent them (since they had been "sued").

Local government attorneys have told BZAs over the years that they acted quasi-judicially, were only named because of the obligation to produce the record (which the staff typically handled anyway), and need not defend their decision. In fact, the real parties in interest were the applicant/appellant, the locality, and/or perhaps an aggrieved neighbor or two.

Despite this, some BZAs have requested, demanded and even sued to get counsel for appeals naming them as a defendant. In Fairfax County, demands lead to years of litigation and a series of appeals to the Virginia Supreme Court, cuminating in *Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County*, 276 Va. 550, 666 S.E.2d 315 (2008) (BZAs cannot sue in their name).

So now, at last, the General Assembly has acted to remove the BZAs from the fray on appeal. Credit goes to James City County and to Warren County for requesting the bills that were consolidated into HB 1063, and to their patrons. See legislative history here.

HB 1063 makes several changes and technical amendments, but the portions relevant to this article provide that (i) the petition for writ of certiorari "shall be styled "In Re: [date] Decision of the Board of Zoning Appeals of [locality name]," (ii) service of process will be upon the secretary to the board (often a staff member), and (iii) specifically addresses the "BZA as party" issue as follows:

"Any review of a decision of the board shall not be considered an action against the board [of zoning appeals] 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 [i.e., file the record with the circuit court]."

Interestingly, the bill goes on to state that "[t]he governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings." In my experience, there are some appeals from decisions of the BZA that the governing body and, in some cases, even the landowner does not wish to be involved. Examples of the former include some variances, and examples of the latter might include a zoning administrator determination case in which the party in interest is a contract owner. This sentence may need further amendment in the future if unwilling parties are (again) required to be named in these appeals.

All in all, however, HB 1063 is a step in the right direction which answers the questions of how to style these appeals, who gets served with the petition, who should (and should not) be made a party.