

# City of Alexandria, Virginia

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## MEMORANDUM

**DATE:** MAY 16, 2012

**TO:** CHAIRMAN AND MEMBERS  
ALEXANDRIA BOARD OF ZONING APPEALS

**FROM:** RASHAD M. YOUNG, CITY MANAGER 

**SUBJECT:** APPEAL OF APRIL 12, 2012, DECISION

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As you know, we are in the unfortunate position of having to appeal a decision made by the Board of Zoning Appeals (BZA) last month regarding how the protest provisions in the Zoning Ordinance apply to the W-1 text amendment and to all text amendments generally. We very much respect the work of the BZA, however, this decision has put the City in a position in which it cannot move forward on a broad range of land use matters. If the City were to implement the decision of the BZA, the City is in jeopardy of being in a continual cycle of appeals to the BZA as the Director of Planning and Zoning attempts to make interpretations to apply a provision to text amendments that only contains a mechanism to apply to map amendments. Additionally, we have been advised by the City Attorney's office that to apply this provision to text amendments appears to be a clear violation of the Dillon Rule and should not be enforced unless a Court rules otherwise.

However, it is important to note that this case is not against the BZA, this case is an appeal of a decision made by the BZA. The only role for the BZA in the lawsuit is to produce the record of its proceeding to the Court. That function will be performed by the staff for the BZA. It is for this reason that we do not believe the BZA is required to be represented in this matter. The City Council in requesting a review of the decision does not in any way require the BZA to answer for its decision other than to provide the record.

In the attached memorandum, the City Attorney has explained the legal reasons why the BZA does not require representation. Given the position of the BZA in this case and the advice from the City Attorney on this matter, the City does not intend to provide separate legal counsel to the Board of Zoning Appeals for this matter.

Attachment

cc: The Honorable Mayor and Members of City Council

## MEMORANDUM

TO: RASHAD M. YOUNG  
CITY MANAGER

FROM: JAMES L. BANKS, JR.   
CITY ATTORNEY

DATE: May 16, 2012

SUBJECT: ROLE OF THE BOARD OF ZONING APPEALS IN APPEALS OF ITS  
DECISIONS TO THE CIRCUIT COURT

Recently questions have risen regarding the role of the Board of Zoning Appeals ("BZA") in an appeal of its decision to the Circuit Court and whether it is required to have representation in such a case. The BZA is not considered a party to an appeal case, as the state code has recently clarified, and therefore, it is not required to be represented.

The BZA is acting in a quasi-judicial function when reviewing the decision of the Director of Planning and Zoning. Its role is to review the decision and make a ruling about whether the decision was a reasonable and correct interpretation of the zoning ordinance. As such, the BZA's role is similar to that of a lower court judge. When a matter is appealed from a lower court to a higher court, the judge in the lower court is not a party in the case. Similarly, when the BZA's ruling is appealed it is not a party to the case except to the extent that the BZA is required to provide the record.

The law on this matter has been evolving over the years. Traditionally, the BZA has always been a named party in an appeal of its decision and while the BZA does not take an active role in the case, the locality answered the appeal on behalf of the locality and the BZA.

In 2008, the Virginia Supreme Court weighed in on this question when the Fairfax County Board of Zoning Appeals filed a Declaratory Judgment action against the County requesting that the County be required to provide the BZA with counsel. The Virginia Supreme Court found that the BZA is created by statute and is limited to the powers that are expressly granted in such statute and that such powers do not include the ability to institute litigation on its own behalf. BZA of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550 (2008). The result of this ruling is to clarify that the BZA is not a legal entity that can sue; therefore, it also cannot be sued, cannot be subjected to a default judgment, and cannot have any remedy levied against it. The only role the BZA should have in an appeal is to provide the record of the matter that was before it.

The General Assembly followed by addressing this issue in 2010 by adding language to State Code Section 15.2-2314 that specifically states that "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 proceeding, however the board shall participate in the proceedings to the

extent required by this section.” Virginia Code § 15.2-2314. The statute goes on to allow the court to serve a return on the BZA to require the return of the record. While the City is governed by the City Charter, not the State Code, this language is informative in understanding the intent of the roles of the parties in a proceeding appealing a BZA decision.

In order to ensure that it is clear on the face of the pleading that the BZA is not a party to the action, I have recently directed outside counsel to file an amended pleading that is styled: “In re: April 12, 2012 Decision of the Board of Zoning Appeals for the City of Alexandria” and to add language clarifying that the BZA is only a party to the extent that it is required to return the record.

Therefore, the BZA is not considered to be a party to appeals in general, and this appeal in particular has been amended to clarify that the BZA’s only role is to provide the record. For that reason, we believe that the BZA is not required to have representation in this case because it is not a party to the proceeding. We have clarified by the amended pleading that the BZA is not a named party in the appeal. In fact, the only role for the BZA in the appeal is to provide the record that was before it when the decision was made. This is an administrative act that does not include any discretion and will be performed by the staff for the Board of Zoning Appeals.

LAW OFFICES

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MARK S. ALLEN

May 21, 2012

Hon. William D. Euille and Members  
of the Alexandria City Council  
City Hall  
301 King Street  
Alexandria, Virginia 22314

VIA HAND DELIVERY

*Re: In Re: April 12, 2012 Decision of the Board of  
Zoning Appeals for the City of Alexandria  
Case No. CL 12002769, Alexandria Circuit Court*

Dear Mr. Mayor and Members of Council:

As Chairman of the Alexandria Board of Zoning Appeals, I write to forward to you the Board's request that the City Council direct the appointment of outside counsel to represent and assist the Board in fulfilling its duties as a respondent in the above-referenced matter.

This request is made as a result of extensive discussions held during the Board's work session on May 18, 2012, which included the Board's members, City staff, the City Attorney, and outside counsel that has been retained to assist the City Attorney in this case. The request was supported by a vote of 6-1 and is made consistent with the provisions set forth in Section 15.2-2308(D) of the Code of Virginia, which authorizes a Board of Zoning Appeals to hire legal counsel to be paid for by the applicable City or County authority.

Please feel free to contact me or other Board members if you have questions. We thank you for your consideration and look forward to hearing your response as quickly as possible.

Sincerely,

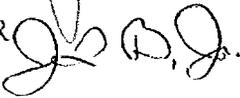


Mark S. Allen

MEMORANDUM

TO: THE HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: RASHAD M. YOUNG   
CITY MANAGER

JAMES L. BANKS, JR.   
CITY ATTORNEY

DATE: May 22, 2012

SUBJECT: IN RE APRIL 12, 2012 DECISION OF THE BOARD OF ZONING APPEALS FOR THE CITY OF ALEXANDRIA; QUESTIONS REGARDING THE BZA'S ROLE

As you know, we are in the unfortunate position of having to appeal a decision made by the Board of Zoning Appeals (BZA) last month regarding how the protest provisions in the Zoning Ordinance apply to the W-1 text amendment and to all text amendments generally. Being in this position has raised a number of questions about how the process of an appeal works when the appeal is brought by the City rather than an outside appellant. To address these questions, the City Attorney provided a memo to the City Manager regarding the legal questions about the process. The City Manager, then taking that advice into consideration, sent a memo to the Board of Zoning Appeals, copying the City Council (dated May 16, 2012) explaining that because the BZA is not a party to this proceeding, there is no need for additional counsel to be brought on to represent the BZA. On Friday, May 18, 2012 the BZA held a worksession to discuss the matter among themselves; at that time, staff, including the City Attorney, was available to answer questions that the BZA had about this matter. During that worksession, staff, the City Attorney, and outside counsel retained by the City Attorney answered the questions of the BZA members with specific citation to case and statutory law.

Below we have provided information regarding 1) why the BZA is not considered a party in this case and does not require outside counsel; 2) what the responsibility of the BZA is in this case and how it will be fulfilled; and 3) how the BZA will be represented if the need arises.

- 1) **The BZA is not considered a party to this case and does not require independent counsel because the State Law has clarified the role of a BZA in an appeal of their decision.**

The BZA is acting in a quasi-judicial function when reviewing the decision of the Director of Planning and Zoning. Its role is to review the decision and make a ruling

about whether the decision was a reasonable and correct interpretation of the zoning ordinance. As such, the BZA's role is similar to that of a lower court judge. When a matter is appealed from a lower court to a higher court, the judge in the lower court is not a party in the case. Similarly, when the BZA's ruling is appealed it is not a party to the case except to the extent that the BZA is required to provide the record.

The law on this matter has been evolving over the years. Traditionally, the BZA has always been a named party in an appeal of its decision and while the BZA does not take an active role in the case, the locality answered the appeal on behalf of the locality and the BZA.

In 2008, the Virginia Supreme Court weighed in on this question when the Fairfax County Board of Zoning Appeals filed a Declaratory Judgment action against the County requesting that the County be required to provide the BZA with counsel. The Virginia Supreme Court found that the BZA is created by statute and is limited to the powers that are expressly granted in such statute and that such powers do not include the ability to institute litigation on its own behalf. BZA of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550 (2008). The result of this ruling is to clarify that the BZA is not a legal entity that can sue; therefore, it also cannot be sued, cannot be subjected to a default judgment, and cannot have any remedy levied against it. The only role the BZA has in an appeal is to provide the record of the matter that was before it.

The General Assembly followed by addressing this issue in 2010 by adding language to State Code Section 15.2-2314 that specifically states that "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 proceeding, however the board shall participate in the proceedings to the extent required by this section." Virginia Code § 15.2-2314. The statute goes on to allow the court to serve a return on the BZA to require the return of the record. While the City is governed primarily by the City Charter, not exclusively by the State Code (as is the case with counties), this language is informative in understanding the intent of the roles of the parties in a proceeding appealing a BZA decision.

Therefore, for all the reasons stated above, there is no legal reason for the City to retain additional counsel for the BZA and no reason to justify the expenditures related to additional counsel.

**2) The BZA's role in the current pending case, In Re April 12, 2012 decision of the Board of Zoning Appeals for the City of Alexandria is limited to providing the record.**

In the recent appeal filed by the City the BZA is listed as a respondent with the limited responsibility of providing the record to the Court. The complaint specifically states: "Respondent BZA is named herein as a party for the purpose of providing the record on

appeal.” Therefore, the case has been specifically filed to make it clear that it is not a proceeding against the BZA but instead it is strictly a review of the BZA’s decision.

As such, the BZA’s responsibility is limited to providing the record which is an administrative function performed by staff for the BZA. Specifically, the following actions will be taken to comply with this responsibility:

- The staff for the BZA will compile the documents that make up the record in this case. The record consists of every document that was before the BZA when it made its decision, the transcript of the proceeding, and the findings of fact and conclusions of law that were ultimately approved by the BZA. The staff will then certify that these are true copies of the documents that make up the record.
- The staff will directly submit that certification and the documents to the Circuit Court (please note that staff has submitted the record of BZA actions to the Circuit Court in numerous other appeals without involvement of outside counsel for the BZA).
- The staff will report to the BZA at the BZA’s next hearing that this record has been submitted and what was included in the record.

This is the extent of the BZA’s responsibility and once this is completed, the BZA will have complied with any requirement of the appeal.

**3) The City Attorney is the legal advisor for the BZA and will retain outside counsel if the need arises.**

Pursuant to Section 11.02 of the City Charter, the City Attorney is the “...legal advisor of the city council, the city manager, and all departments, boards, commissions and agencies of the city...in all matters affecting the interest of the city...” As such, the City Attorney is the legal advisor for the BZA. There is no conflict of interest in this current case because the appeal as filed is not adverse to the BZA. The BZA is not a party and is only involved in the case to provide the record.

We are not aware of any other case where the BZA as a board, or any individual member was called upon to be a fact witness or to provide additional information in the case. However, if the BZA or any of its individual members were required to provide additional information in the case, additional evidence, or to testify in the Circuit Court appeal, the BZA and/or its individual members would need further advice about how to respond. At that time, the City Attorney would retain and the City Manager would authorize the necessary funds for separate outside counsel for the BZA and/or its individual members.