Albemarle County Planning Commission
May 12, 2015

The Albemarle County Planning Commission held a public hearing on Tuesday, May 12, 2015, at 6:00 p.m., at the County Office Building, Auditorium, Second Floor, 401 McIntire Road, Charlottesville, Virginia.

Members attending were Bruce Dotson, Tim Keller, Mac Lafferty, Vice Chair; Thomas Loach, Cal Morris, Chair; and Richard Randolph. Absent was Karen Firehock. Julia Monteith, AICP, Senior Land Use Planner for the University of Virginia was absent.

Staff present was Amanda Burbage, Senior Planner; Amelia McCulley, Director of Zoning/Zoning Administrator; Wayne Cilimberg, Director of Planning; Sharon Taylor, Clerk to Planning Commission and Greg Kamptner, Deputy County Attorney. Mr. Cilimberg left the meeting at 6:20 p.m.

Call to Order and Establish Quorum:

Mr. Morris, Chair, called the regular meeting to order at 6:00 p.m. and established a quorum.

Work Session:

ZTA-2015-00003 BZA/Variances
To address State Code Requirements for BZA Process and for Minor Technical Changes (Amelia McCulley)

Amelia McCulley presented a PowerPoint presentation and summarized the executive summary regarding ZTA-2015-00003 BZA/Variances.

ZTA Background:
The primary purpose of this ordinance amendment relates to House Bill 1849 that becomes State law on July 1, 2015 and relates to Board of Zoning Appeals proceedings, variances and appeals. Of course, they are seizing this opportunity to provide other housekeeping and technical updates.

- HB 1849 will become State law July 1, 2015.
  - Revises criteria for variances and appeals;
  - Revises proceedings before Board of Zoning Appeals (BZA)
  - Opportunity for other technical updates and clarifications

The Board of Zoning Appeals is a board that does not have a whole lot of interaction with other boards and are independent in many regards.

Board of Zoning Appeals (BZA)

- Powers and duties include:

- Hear (and decide) appeals of decisions by administrative officers (including the Zoning Administrator) in the administration and enforcement of the zoning ordinance;
- Hear variances;
- Hear special use permits; and
- Interpret the zoning district map

In Albemarle, the special use permits that are heard by the Board of Zoning Appeals (BZA) are limited to signs (off-site, electronic message signs). In some localities all special use permits are heard by the Board of Zoning Appeals as opposed to the governing body of the Board of Supervisors. In Albemarle they issue a fairly high number of official determinations of zoning violations which are the majority of all the zoning determinations that are made in a given year. Therefore, they end up being a majority of the zoning appeals that the Board of Zoning Appeals hears. In the past 25 years, we have had no applications for the BZA to be involved in interpreting the zoning district map.

Regarding background information when she first started as zoning administrator a long time ago they had a lot of variances. One of the things the State Code tells you is if you have reoccurring variances you have a problem with your ordinance and they should examine that. Therefore, they have done that over time and made a lot of ordinance amendments.

BZA Annual Report Information:

These factors from our annual report may shock you.

- In 2014 there were no variances and no appeals. There was one (1) special use permit for an off-site sign.

- In 2013 there were no variances, no sign special use permits and three (3) appeals. Six (6) appeals were submitted, but only three (3) were heard.

Staff strongly urge applicants to avoid variances because it is a last resort and there are many other options. Often it is self-imposed and staff will tell people up front this is something they have created and they have other options, such as boundary line adjustments to change setbacks, to exhaust all possible remedies to avoid variances. The Board of Zoning Appeals review of variances involves discretionary administrative review. The special use permits for the signs the BZA hears are legislative actions. Appeals of determinations are a quasi-judicial process. She would now turn this over to Mr. Kamptner to teach us about the House Bill and what it does.

Mr. Greg Kamptner said he would briefly explain House Bill 1849. In the procedures that deal with the various Board of Zoning Appeals (BZA) proceedings the General Assembly has really created a procedural minefield. The BZA consider generally three application types: the special exceptions, variances and appeals. And there are subtle procedural differences in each of the three types of hearings. In fashioning our regulations, that is why each type of application now is laid out separately so that staff,

the public and the BZA know exactly what is required for each of the different types of proceedings. It makes the ordinance a little bit longer, but it also makes it a lot easier to follow.

In House Bill 1849 they have three (3) new procedural requirements, which are kind of head scratchers when you think about it. When they were getting the draft bills to comment on, they were constantly asking why we need a statute to deal with this. However, there are three new requirements. One is no ex-parte communications between the locality's staff and the BZA members about the facts or the law pertaining to a particular appeal or variance. The same holds true for the applicant because they are the appellant and cannot have these one-on-one communications. They should not be taking place anyway because BZA decisions need to be made based on the record that shows up that is created at the hearing. So this type of back door lobbying never should have been taking place anyway. However, they now have that in the ordinance. That provision does not apply to special exceptions or special use permits because they are legislative in nature and the decision makers can rely on anything to support their decision.

Mr. Dotson asked if it was only for the quasi-judicial functions.

Mr. Kamptner replied it was easier to think about it as non-legislative because it is the legislative decisions for all types of bodies that the decision makers can rely on anything to support their decisions. The next new requirement is that the BZA has to offer an equal amount of time for the applicant, the appellant and the county or locality staff. The third new requirement is that the staff report has to be provided to the interested parties at least three (3) days after it has been given to the BZA members free of charge. He asked somebody while this bill was going through why we have this. Apparently there were some localities where they were either not providing the staff reports to the applicant or the appellants prior to the BZA hearing and they were charging. Therefore, they have legislation to deal with that.

Ms. McCulley asked Mr. Kamptner if he wanted to talk about the variances.

Mr. Kamptner explained that the variance definition is being amended. What they see from over the last 11 years is a reaction by the General Assembly from a 2004 Virginia Supreme Court case. It really did not break new grounds because the Court was just restating the laws. They had a standard up until 2009 where the applicant had to show an undue hardship approaching confiscation in order to be entitled to a variance. That really goes to the heart of the purpose for variances - that they are the last resort safety valve remedy for an applicant who because of the unique circumstances of their parcel can't do what everybody else in the zoning district can do. If the applicants are bounded by street frontage on two sides, a river in the back, and a steep slope on the side so the building site is miniscule and they can't do anything on their parcel, then that is where the variance is appropriate.

Mr. Kamptner explained after 2009 the standard was reduced to an undue hardship. In this bill, hardship is being removed from the definition entirely and it is one of two alternative criteria that the BZA has to consider when they are making their decision.

What that means in reality is that the BZAs that are respectful of their zoning ordinance and the standards that they are supposed to be applying is they probably will continue to make the same decisions that they have. It is hard to quantify the difference between an undue hardship and a hardship. The BZAs that hand out variances like special privileges will probably continue to ignore it. The change in the law probably makes it easier for those decisions to be upheld, although he thinks there is still a very high standard for variances even though hardship plays a less important role than it has historically.

Mr. Lafferty said the way that sentence reads it replaces the requirement that the ordinance must not unreasonably restrict. It appears that you have to have an ordinance that must unreasonably restrict.

Ms. McCulley asked to qualify as a variance she thinks that is the language.

Mr. Lafferty said the first part of it makes sense to me.

Mr. Kamptner agreed and noted in the second clause in the middle bullet definition of variance it says the variance is available when the ordinance unreasonably restricts the use of the property. So the applicant has to make that showing and the BZA actually has to make that finding. The BZA has to find an unreasonable restriction. That is where he thinks the General Assembly kind of faltered, since he thinks the intention all along was to lower the standard. However, to find an unreasonable restriction is still a pretty high bar for an applicant to establish.

Mr. Keller noted the old hardship clause that they all learned in our basic planning is still there, but not in the same words.

Mr. Kamptner agreed. A lot of the opposition mainly by local governments was they have a well-developed body of law going back 70 years or so in Virginia applying the standard - and they are just throwing it out. The one thing that he would say though is that there might be one single variance case at both the appellant and the trial court level in Virginia that resulted in a published opinion where there actually was even a hardship. The typical variance application is the family in the house and they want to put a deck that is going to encroach into the setbacks; they want to convert the garage into a family room; or they want to build a new room onto the side yard setback. That is the typical request. If the BZA is doing its job it still is not going to qualify for a variance.

Mr. Randolph noted he thought they had one here in the last 3½ years that involved an effort out in Crozet where the applicant wanted to put the grandparents in the back. He asked if that rang a bell for anybody.

Mr. Morris replied yes, but it was in Ivy.

Mr. Keller pointed out there is legislation in Virginia that allows you to put a temporary unit in any yard for health reasons.

Mr. Kamptner said there are also circumstances where the ADA and the Fair Housing Act will trump the State variance standards because under the ADA and the Fair Housing Act they have to make reasonable accommodations under our zoning regulations. However, it has been waived in prior iterations and certainly not the current iteration of the ADA. Very early on in his time here, they had an application that he believed the variance was granted. However, it was not even being looked at under the ADA grounds for an elderly person to be able to live in the home since they needed a covered walkway that encroached into the front setback. It has been years, though, since they have had one.

Ms. McCulley pointed out next they would move on from the codification of the new State law that relates to BZA and their proceedings into housekeeping items.

Variation or Exception for Site Plan Improvement Requirements

- *Sinclair* case holding that general waivers/modifications of zoning regulations are legislative in nature. Holding does not relate to development requirements whose origin is in Subdivision or Site Plan enabling authority. Draft Section 32.3.5 clarifies the variation and exception process for site plan improvements.
- Administrative review of the waiver/modification with appeal to the Commission and then to the Board.

This one in particular is probably more along the lines of what the Planning Commission deals with. As a result of the Sinclair case, many waivers and modifications that were previously reviewed by staff and/or the Commission, are instead special exceptions that are heard and decided by the Board of Supervisors. An exception to that are site plans and subdivisions (and associated improvement requirements). They originate from a different statutory framework and do not involve policy or law, but instead are the application of technical requirements to a particular case/application. Examples of improvement requirements are parking, travelway and landscaping requirements. A more specific example is the requirement for curb and gutter or the minimum width requirement for a travelway, which are technical requirements with specific criteria to vary from the default. Those are reviewed by the agent for the site plan or the county engineer in the case of a lot of the parking, travelway and drainage things. The revisions that are in the draft ordinance attached to the report just better reflect the process. Other revisions within the site plan regulations, Section 32.0, include updates to better interact and be consistent with the revisions to the Water Protection Ordinance (WPO) to update to be consistent with the State storm water management requirements.

The Architectural Review Board (ARB) regulations are revised for reformatting for clarity and consistency. One of the most substantive changes is to codify the process that relates to Design Guidelines. It may have been a bit mysterious before and this just makes it clearer. The State law also makes it clear that there is a requirement for advertising notice for the adoption of ARB Design Guidelines. Then there is also a requirement after the ARB approval that the Board of Supervisors ratify the Design Guidelines before they become final and can be used for review of development. That is clarified in the revisions under that section.

Violations (Section 36)

Under Section 36, which are violations, updates include clarification as well as consistency with the State Code. Practical updates include things such as the notice of a violation must state the applicable appeal fee and where information may be obtained regarding filing an appeal.

One thing she forgot to mention, which was not in the attached draft ordinance, is a very common violation - a site plan violation. Therefore, they want the site plan ordinance to more clearly state that you need to maintain your site consistent with your site plan or else that is a violation. If you add new parking areas, new buildings and things like that, that is a violation of your site plan. Therefore, in the draft that goes through public hearing, staff will be adding that. She asked for input from the Planning Commission.

Mr. Randolph noted he had several questions. On page 10 under Section 32.7.4.1 he noted with interest that erosion and sediment control and other water regulations were struck out. He asked Ms. McCulley to remind him the reason why they were excluded. He asked has that been superseded by another Code aspect in here that he did not catch. However, he understands the focus on storm water management.

Mr. Kamptner asked what section he was referring to.

Mr. Randolph replied on page 10 under Section 32.7.4.1 at the top where erosion and sediment control and other water regulations were deleted. The whole section focuses on storm water management, water pollution and soil characteristics and he was just curious why that language was struck.

Mr. Kamptner replied it was really to keep up with the Water Protection Ordinance because under the new Water Protection Ordinance in State Law, storm water management is the overarching item.

Mr. Randolph said that is what he thought, but just wanted to double check. He asked on page 12 under d) at the bottom it states that except one member may be a member of the commission. He asked which commission they are referring to here.

Mr. Kamptner replied it is defined in the zoning ordinance to mean the planning commission, which is right out of the state enabling authority.

Mr. Randolph said the next question is on page 30 comment 2, notice of the hearing, which may be better directed to Mr. Kamptner. Why is there no time period attached to the notice. He reads that section and it does not say that there has to be a certain period of time when adjoining, adjacent and abutting property owners are notified prior to a hearing. Is that covered in another aspect of the statute?

Mr. Kamptner replied it is covered in the State Code section that is referenced there and five (5) days is the minimum notice required for abutting owners.

Ms. McCulley asked if he was talking about the State Code provision 2204, and Mr. Kamptner replied yes.

Ms. McCulley referred the question to Mr. Kamptner since he knows that section better.

Mr. Kamptner noted that Bill Fritz and he have been working on the resolution of intent that was adopted to expand the notice given for certain wireless applications. However, Mr. Fritz may be going back to the Board to get some further direction about being consistent across the board with respect to the advance in the type of written notice that is given to abutting owners or even extending beyond. However, right now all of our regulations that require notice under this State statute refer to that state statute. Five days is the minimum written notice. However, he thinks what staff would tell us is that even though that is the minimum that the written notice typically goes out 10 to 15 days ahead of time. He asked Ms. McCulley if that is correct.

Ms. McCulley agreed that she thinks that is right.

Mr. Randolph said that is great; however, five days just seems entirely too short given the way people live their lives and oftentimes they don't open their mail for a couple of days.

Mr. Morris invited other questions.

Mr. Dotson noted he had one question on page 21 of the staff report where it is talking about the criteria for variances that may come straight out of the new State Code. It strikes him that the language here sort of turns things on their head from what he is accustomed to because it talks about criteria to establish the "right" to a variance as opposed to the "basis" for a variance.

Mr. Kamptner replied the language in the State's new law is that the BZA shall grant a variance if these criteria are met. The current law said that variances are authorized if the BZA finds so the General Assembly has flipped it.

Mr. Dotson asked do we have to use the word "rights" to a variance. He would be more comfortable with "basis" for a variance.

Mr. Randolph suggested if they hear a right that might not be constitutionally sustainable.

Mr. Dotson said the turning on its head and the word "rights" are the things he wanted to mention.

Mr. Keller said he had a question about the Board of Architectural Review. If he understands it, staff is working on updating areas or suggesting other areas for that. There is something the Commission has heard from Mr. Cilimberg that staff is working on.

Mr. Kamptner replied that he thinks Ms. Maliszewski is working on that project, but he is not working directly with that project yet. However, the objective is to have corridor specific guidelines.

Mr. Keller asked if this is basically the enabling piece or umbrella piece that all of those will fall under?

Mr. Kamptner replied this lays out the process for that. There is a process in the current regulations; however, it is just kind of confusingly written. That language has not been revised since 1991 or so and they are taking this opportunity to do that.

Mr. Keller said after updating this if there are five new corridors added would it come back to the Commission just like if there was a new land use district and it get added into the list.

Ms. McCulley pointed out if they actually add new corridors it would be a zoning text amendment and a zoning map amendment because it is an overlay district. If they adopt the corridor specific design guidelines for those, let's say those five corridors that already exist, then this outlines the process that would be followed.

Mr. Kamptner noted that is a process between the Architectural Review Board (ARB) and the Board of Supervisors. However, there is no reason why it could not come through the Planning Commission for input like when the Water Protection Ordinance was first adopted. He thinks a couple of the other significant amendments have come through the Commission as well. However, he did not think last year's amendments did just because they were under such a time crunch.

There being no other suggestions, Mr. Morris asked if the Commission was ready to ask staff to schedule the zoning text amendment for public hearing.

Motion: Mr. Randolph moved and Mr. Lafferty seconded to request staff to schedule ZTA-2015-00003 BZA/Variances for public hearing.

The motion passed by a vote of (6:0). (Firehock absent)

Mr. Morris noted that staff would schedule ZTA-2015-00003 BZA/Variances for public hearing.

(Recorded and transcribed by Sharon C. Taylor, Clerk to Planning Commission & Planning)