**HB 1849:**

**Board of Zoning Appeals; granting of variance, ex parte communications, proceedings.**

Of the several land use-related bills introduced during the Virginia General Assembly's 2015 session, HB 1849 garnered the most attention from localities. By the time that it was approved by the General Assembly and signed by the Governor, the bill was significantly different from the version that was introduced. In the end, the bill establishes new procedural requirements for boards of zoning appeals ("BZA") on matters that they consider and a new definition and criteria for variances.

New procedural requirements on matters pending before the BZA

On any matter requiring a hearing before the BZA, the BZA must offer an equal amount of time to the applicant, the appellant, or person aggrieved and the locality's staff.

On any matter other than special use permits, neither the non-legal staff of the locality nor the applicant, landowner, or his agent or attorney may have ex parte communications with BZA members about the facts or law of a pending matter. If an ex parte communication is held, the party must inform the other party as soon as possible and explain the substance of the communication. Also on any matter other than a special use permit, the locality must share its staff report with the applicant, appellant, or person aggrieved, at no charge, at least 3 days after it is provided to the BZA.

On appeals to the BZA from an order, requirement, decision or determination ("decision") by the zoning administrator or other administrative officer, the administrative decision will be presumed to be correct and the appellant has the burden of proof by a preponderance of the evidence to show that the decision was incorrect. Some current case law had said that the administrative decision was not entitled to a presumption of correctness. A hearing on an appeal will begin with an explanation of the zoning administrator about the basis for her decision.

The definition of "variance" is amended

The key change to the definition of "variance" is the removal of the phrase that the strict application of the zoning ordinance would "result in unnecessary or unreasonable hardship." Although there are several elements that a BZA must consider with every variance application, almost every variance application comes down to the question of whether the applicant has demonstrated the requisite "hardship" within the meaning of the law of variances. Although the concept is removed from the definition of variance, it remains in the criteria that a BZA must consider.

The criteria for considering variances are amended

The prior law required an applicant to provide evidence that showed various qualities of the property and the effect of the zoning ordinance on that property, and then required the BZA to make certain findings if it decided to authorize a variance. One of those findings was that the strict application of the zoning ordinance would "produce undue hardship relating to the property." A curiosity of the prior law that what the applicant was required to "show" and what the BZA was required to "find" did not necessarily align with one another.

The new law states that the burden of proof is on the applicant to prove by a preponderance of the evidence that it satisfies all six criteria for granting a variance, all of which are carried over from the current law although the language has been revised in various degrees. The first criterion is a new "hardship" standard that no longer requires that the hardship be an "undue hardship." The relevant clause now reads "granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance." The effect of the change from "undue hardship" to "hardship" remains to be seen. Virginia case law reveals that most variance applications do not actually entail any true hardship within the meaning of the variance law, however "hardship" may be modified.