

Chapter 13

Variations

13-100 Introduction

A *variance* is a reasonable deviation from those provisions of a zoning ordinance regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure. *Virginia Code § 15.2-2201*; *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407 (2001).

13-200 The nature of variations

Because a facially valid zoning ordinance may prove to be unconstitutional in its application to a particular property, some device is needed to protect landowners' rights without destroying the viability of zoning ordinances. *Packer v. Hornsby*, 221 Va. 117 (1980). The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch," or "escape valve." *Packer, supra*. The variance process furnishes "elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional manner." *Gayton Triangle Land Co. v. Board of Supervisors of Henrico County*, 216 Va. 764 (1976).

Thus, a variance is simply an authorized deviation from certain zoning requirements because of the special characteristics of a property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404 (1994). A variance insures that a landowner does not suffer a severe hardship not generally shared by other property holders in the same district or vicinity. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57 (1981). A variance allows a property owner to do what is otherwise not allowed if the zoning ordinance was strictly applied. *Bell v. City Council of City of Charlottesville*, 224 Va. 490 (1982); *see, e.g., Horner v. Board of Zoning Appeals of Fairfax County*, 2007 Va. Cir. LEXIS 149 (2007) (variance is not required to expand a structure that is located within the otherwise applicable setbacks under a previously approved variance where the proposed expansion would not be located in the setbacks to which the variance pertained).

Five Key Principles to Know About Variations

- Variations should be granted only to achieve parity with other properties in the district; they should not be granted to allow the applicant to do what others in the zoning district may not do without a variance.
- Variations should be sparingly granted; a high number of variance applications on a recurring issue indicates problems with the zoning ordinance, and the solution is to amend the regulations, not to keep considering variance applications.
- Variations run with the land, and the consequences of a BZA's decision to grant a variance may last for years.
- Each variance must be considered on its own merits, not on prior variance decisions by the BZA; thus, although a BZA should be consistent in its decision-making within the limits of Virginia Code § 15.2-2309(2), it is not compelled to grant a variance because a prior BZA granted a similar variance in the same neighborhood.
- If there is an existing reasonable use of the property, an undue hardship does not exist and a variance may not be granted; applications for variations to expand an existing structure, or to add more structures to a parcel, should fail if the use of the existing structure is reasonable.

The grant of a variance cannot confer upon a landowner greater rights than could be afforded by the enactment of a zoning ordinance. *Snow, supra*. It also does not relieve the owner from having to comply with other aspects of the zoning ordinance that were not directly addressed by the approved variance. *Goyonaga v. Board of Zoning Appeals for the City of Falls Church*, 275 Va. 232 (2008) (grant of variance did not immunize the owners from the city's regulation that a nonconforming structure cannot be removed or demolished or damaged). In addition, a variance may not allow a change in use, which only may be accomplished by a rezoning or a conditional zoning. *Virginia Code § 15.2-2201*; *Tolman v. Richmond Board of Zoning Appeals*, 46

Va. Cir. 359 (1998) (where the variance allowed the expansion of a nonconforming property from three to seven apartments, the variance allowed an increase in the intensity and the number of dwellings but did not allow a change in use). Given the nature and purpose of variances, they should be granted only to elevate a property to parity with similarly situated properties, rather than to confer a special privilege over other property in the district.

Special rules apply to variances related to condominium conversions with nonconformities and variance applicants who are disabled or for facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act, and these are separately addressed in section 13-700.

13-300 The authority of a BZA to consider applications for variances

One of the powers expressly conferred on BZAs is the power to hear and decide applications for variances. *Virginia Code § 15.2-2309(2)*.

When considering an application for a variance, a BZA is acting in an administrative capacity and under applicable constitutional principles, it is empowered to act only in accordance with the standards prescribed by Virginia Code § 15.2-2309(2). *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004); *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

13-400 Procedure

The procedure for reviewing and acting on an application for a variance is governed by statute and ordinance, as follows.

13-410 The application and public hearing

Applications for variances may be made by any property owner, tenant, government official, department, board or bureau. *Virginia Code § 15.2-2310*. Applications are made to the zoning administrator. *Virginia Code § 15.2-2310*. If the variance application will be considered by the BZA, the application and accompanying maps, plans or other information must be transmitted to the secretary of the BZA who must place the matter on the docket. *Virginia Code § 15.2-2310*.

A variance may be considered by the BZA only after conducting a public hearing that has been advertised as required by Virginia Code § 15.2-2204 (advertised in a newspaper of general circulation once per week for two successive weeks and written notice to abutting landowners at least five days prior to the hearing). *Virginia Code § 15.2-2310*.

The BZA must fix a reasonable time for the hearing on the variance application and make its decision within 90 days after the application is filed. *Virginia Code § 15.2-2312*. This time period is directory, rather than mandatory, and the BZA does not lose its jurisdiction to act on a variance after the time period has passed. *See, Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654 (2000) (BZA did not lose jurisdiction to decide appeal after 550-day delay).

13-420 Quorum, voting and required findings

In order to conduct a hearing or to take an action, a quorum of at least the majority of all of the members of the BZA must be present. *Virginia Code § 15.2-2308(C)*.

The concurring vote of a majority of the membership of the BZA is necessary to grant a variance. *Virginia Code § 15.2-2312*. This means that a five-member BZA may grant a variance only if at least three members vote for granting the variance. Thus, if only three members of the BZA are present for the vote, all three must vote in favor of granting the variance.

In order to facilitate judicial review, the BZA is required to make findings that reasonably articulate the basis for its decision. *See, Packer v. Hornsby*, 221 Va. 117 (1980). The findings required to grant a variance are as follows:

- The strict application of the ordinance would produce *undue hardship* relating to the property;
- The *hardship is not shared generally* by other properties in the same zoning district and the same vicinity; and
- The authorization of the variance will *not be of substantial detriment to adjacent property* and that the *character of the district will not be changed* by the granting of the variance.

Undue Hardship: The Key Finding for Almost Every Variance Application

- Almost every variance application will turn on whether, when the zoning ordinance is applied to the property, the regulations will produce an undue hardship relating to the property.
- In other words, without a variance, do the zoning regulations interfere with all reasonable beneficial uses of the property, taken as a whole?

These findings are discussed at length in section 13-600. A BZA may not grant a variance if it fails to make these four findings. *Packer, supra; Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005). *See section 13-700 regarding special situations.*

13-500 Elements to establish a right to a variance

A variance may be granted if it “will not be contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship; provided that the spirit of the ordinance shall be observed and substantial justice done.” *Virginia Code § 15.2-2309*. Thus, an applicant must establish *special conditions* that would cause compliance with a zoning ordinance to result in an *unnecessary hardship*. *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48 (1993).

The three elements that must be shown by an applicant to establish the right to a variance are:

- The property was acquired in *good faith*;
- Because of a physical condition of the property, either the strict application of the ordinance will effectively *prohibit or unreasonably restrict the use* of a lot, or the granting of the variance will *alleviate a clearly demonstrable hardship approaching confiscation*; and
- The variance is in harmony with the intended spirit and purpose of the zoning ordinance.

Virginia Code § 15.2-2309(2). These elements are discussed in more detail below.

13-510 The first element: the property was acquired in good faith

Although there is no case law identifying what a good faith acquisition of property might be in the context of a variance, it appears that good faith may be shown if the variance is not sought to correct a violation of the zoning ordinance existing on the property when it was acquired by an owner who knew of the violation. An owner’s knowledge that the previous owner of the property had been denied a variance does not affect “good faith” status. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116 (1998).

The purchase price of the property is irrelevant to the consideration of whether an owner acted in good faith. *Spence, supra*.

13-520 The second element: an unreasonable restriction or a hardship approaching confiscation exists

If, because of a condition of the property, the strict application of a zoning ordinance would *effectively prohibit* or *unreasonably restrict* the use of the property, or if the granting of a variance would alleviate a *clearly demonstrable hardship approaching confiscation*, a variance may be granted. *Virginia Code § 15.2-2309(2)*. This element is the corollary to the finding of *undue hardship* the BZA must make in order to grant a variance. Almost every variance application will turn on whether this finding can be made. However, if the zoning regulation from which the variance is sought existed before the property was created (so as to be a lot of record), a variance may not be granted. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670 (2006) (“the applicant failed to show that the lots for which variances were sought were lots of record in 1988, when the Bay Act became effective. Because of the express language of the Bay Act and Code § 15.2-2309(2), that failure alone would have precluded variances based upon the shallowness of the lots.”).

A qualifying condition of the property must either arise from: (1) the property’s exceptional narrowness, shallowness, size or shape; (2) the property’s exceptional topographic conditions or other extraordinary situation or conditions; or (3) an extraordinary situation or condition of the property immediately adjacent. *Virginia Code § 15.2-2309(2)*. These conditions refer to the natural physical characteristics of the property itself, not to man-made objects placed on the property. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502 (1993) (rejecting argument that utility markers placed on the property were a situation or condition of the property). These conditions, in effect, define the *undue hardship* the BZA must find in order to grant a variance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116 (1998).

An owner need not demonstrate both an unreasonable restriction and a hardship approaching confiscation. *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451 (1986); *Board of Zoning Appeals v. Fowler*, 201 Va. 942 (1960).

13-530 The third element: the variance is in harmony with the intended spirit and purpose of the zoning ordinance

The deviation allowed by a variance must be in harmony with the intended spirit and purpose of the zoning ordinance. For example, a variance from the setback requirements in a residential zoning district might be considered to be in harmony with the intended spirit and purpose of the zoning ordinance where: (1) the zoning regulations state that their purpose is to promote the development of existing parcels in residential zoning districts with useful housing stock; (2) a variance is sought to allow a house to be constructed on a vacant lot with a minor setback encroachment; and (3) without a variance, the house could not be constructed.

As a contrary example, a variance to allow the location of a house in a floodway is not in harmony with the intended spirit and purpose of a zoning ordinance that prohibited development in the floodway. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).

13-600 The findings required to grant a variance

If the applicant establishes the three elements discussed in section 13-500 to justify a variance, a BZA must make each of the following four findings set forth in *Virginia Code § 15.2-2309(2)* in order to grant the variance:

- The strict application of the ordinance would produce *undue hardship* relating to the property;
- The *hardship is not shared generally* by other properties in the same zoning district and the same vicinity; and
- The authorization of the variance will *not be of substantial detriment to adjacent property* and that the *character of the district will not be changed* by the granting of the variance.

- The condition or situation of the property is not so general or of a recurring nature as to make a general regulation reasonably practicable.

These findings are considered in sections 13-610 through 13-640 below. See also section 13-700 for special situations.

The Critical Analysis for Almost Every Variance Application

- The undue hardship finding turns on whether, without a variance, the zoning regulations interfere with all reasonable beneficial uses of the property, taken as a whole.
- To determine whether the zoning regulations interfere with all reasonable beneficial uses of the property, evaluate the existing uses of the land, whether those uses are reasonable and beneficial, what other uses are allowed under the applicable zoning regulations, and whether those uses, if pursued, would be reasonable beneficial uses. If, despite the regulations, there are existing or other possible reasonable beneficial uses, an undue hardship has not been established.
- If you find that the regulations interfere with all reasonable beneficial uses of the property, you must also determine that the regulations interfere with those uses on the property *taken as a whole*, rather than only some portion of the property. If there are other areas of the property where a reasonable beneficial use could be located without the need for a variance, an undue hardship has not been established.

As noted above, a BZA is acting in an administrative capacity in accordance with the standards prescribed by Virginia Code § 15.2-2309(2) when it considers a variance application. *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). In making the findings required to grant a variance, the BZA must exercise its discretion with regard to the particular facts of an application, including the precise extent of the relief sought. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116 (1998). In the performance of this duty, the BZA is “clothed with discretionary power, and this power must be exercised intelligently, fairly and within the domain of reason, and not arbitrarily.” *Board of Zoning Appeals v. Fowler*, 201 Va. 942 (1960); *see also, Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471 (1959). A statement of findings is crucial for judicial review of the BZA’s decision. If the BZA fails to state its findings as required by Virginia Code § 15.2-2309 in granting or denying the variance, the parties cannot properly litigate, and the trial court cannot properly adjudicate, the issues on appeal. *Ames v. Town of Painter*, 239 Va. 343 (1990); *Packer v. Hornsby*, 221 Va. 117 (1980); *see also, Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).

Variations may not be approved for reasons other than those set forth in Virginia Code § 15.2-2309(2). *Cochran, supra; Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals of City of Virginia Beach*, 261 Va. 407 (2001) (BZA does not have the authority to grant a variance from a regulation prohibiting a nonconforming sign from being repaired at a cost in excess of 50% of its original cost because the regulation does not pertain to the size, area, bulk or location of a building or structure). Thus, for example, it is inappropriate for the BZA to grant a variance because a proposed design is superior or more attractive than what would be allowed without the variance. In addition, variances may not be approved solely because similar variances were previously approved. For example, although not mentioned in the court’s opinion in *Cochran*, the Fairfax County BZA had previously granted 20 to 25 variances in the neighborhood that was the center of the controversy in that case. One attorney involved in that case has suggested that the omission of this fact from the Virginia Supreme Court’s opinion suggests the irrelevance that prior variances should have on the merits of a variance application before the BZA.

In granting a variance, a BZA may impose conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. *Virginia Code § 15.2-2309(2)*. Property upon which a variance has been granted is treated as conforming for all purposes under state law and local ordinances; however, a structure permitted by a variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the zoning ordinance. *Virginia Code § 15.2-2309(2)*. Where the expansion is proposed within an

area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required. *Virginia Code § 15.2-2309(2)*.

13-610 The first required BZA finding: strict application of the ordinance would produce undue hardship relating to the property

The key finding a BZA must make in order to grant a variance is that the strict application of the ordinance would produce *undue hardship* relating to the property. *Virginia Code § 15.2-2309(2)*. *Undue hardship* exists where, because of a condition of the property or adjacent property: (1) strict application of the ordinance effectively prohibits or unreasonably restricts the use of the property; or (2) without a variance, there is a clearly demonstrable hardship approaching confiscation.

An undue hardship may not be self-inflicted. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502 (1993) (reliance on statement by homeowners' association, which told builder it could assume the property lines were indicated by certain utility markers, that in fact were not on the property lines, resulting in house being constructed 8 inches from property line, was a self-inflicted hardship). A self-inflicted hardship typically exists when an owner violates a provision of the zoning ordinance and then seeks a variance to provide relief from the unlawful act. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116 (1998). Purchasing property knowing that a variance will be required to allow the intended use of the property is not a self-inflicted hardship. *Spence, supra*.

The Virginia Supreme Court ruled on three consolidated appeals pertaining to variances in *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004). Because the nature of the variances sought, the underlying fact patterns, and the arguments raised by the applicants, are typical of those often seen by BZAs, each case is laid out in some detail. Likewise, the court's informative discussion of the controlling legal principles as to whether an undue hardship exists is set out at length.

13-611 The material facts in *Cochran, MacNeal and Pennington*

1. *Cochran v. Fairfax County Board of Zoning Appeals*

In *Cochran*, the owner of a 20,000 (approximately) square foot parcel, improved with a house occupied by the owner for eight years, desired to demolish his existing house and construct a much larger house. The parcel rose 42 feet from the front property line to the rear property line. Along the northern property line, the proposed house would come within 13 feet of the side yard property line along the entire length of the house. The zoning district in which the parcel was located required 15-foot side yard setbacks. Thus, a 2-foot variance was sought.

A variance would not have been necessary if the proposed house had been moved two feet to the south (plus some additional accommodations for proposed chimneys on the northern side of the house). This change would have required that the house's proposed side-load garage on the south side of the house be replaced with a front-load garage. The owner did not want a front-load garage because it would diminish the house's "curb appeal." The relocation of the house also would have resulted in a loss of 152 square feet of living area (the house was described as having a footprint of 71 feet by 76 feet (5,396 square feet), and being two stories in height). The 152 square feet lost by complying with the setback regulations could have been recaptured either in the front or back of the house, or by adding a third story. The owner rejected these options because he wanted to save the front area for a children's play area, the back area for an outdoor courtyard, and he opined that a third story would be aesthetically undesirable.

The BZA granted the variance, finding among other things, that "the lot suffers from severe topographical conditions which the applicant has worked hard to accommodate" and that "the requests are modest." Based on these findings, the BZA concluded that the physical conditions of the parcel were such that a strict interpretation of the zoning ordinance would result in an undue hardship that "would deprive the owner of

all reasonable use of the land and/or the buildings involved.” The circuit court affirmed the decision of the BZA.

2. **MacNeal v. Town of Pulaski Board of Zoning Appeals**

In *MacNeal*, the owners of a 0.6248-acre parcel bounded on three sides by public streets desired to construct a garage in the northeast corner of the parcel. There was no existing garage on the parcel, and the owners explained that the garage’s proposed location would provide the easiest access to a street. The topography of the parcel was described as “difficult.” The owners desired to construct the garage to the property line. The applicable setback regulations required a 15-foot setback. Thus, a 15-foot variance was sought.

A variance would not have been necessary if the proposed garage was constructed closer to the existing house, though this would have required construction of a ramp that would increase the cost of the project and weaken or destroy a five-foot tall stone retaining wall behind the house.

After four meetings, the BZA granted a modified variance permitting the garage to be constructed five feet from the northern property line and 15 feet from the eastern boundary line. The variance also included a condition that the construction not “alter or destroy the aesthetic looks of existing vegetation bordering the northern projected boundary” of the parcel. The circuit court affirmed the decision of the BZA.

3. **Board of Zoning Appeals of the City of Virginia Beach v. Pennington**

In *Pennington*, the owners of a 1.25-acre parcel desired to construct a storage building on their parcel. The parcel was already improved by the owners’ home and a nonconforming detached garage. The proposed storage shed would have been 288 square feet in size, and the existing detached garage was 528 square feet. The zoning district regulations limited the area of accessory structures to 500 square feet. Thus, the owners sought a variance of 28 square feet to bring the garage into conformity (which was not in issue in the case), and a variance of 288 square feet for the storage shed. The zoning district in which the parcel was located would have allowed four dwellings.

A variance for the storage shed would not have been necessary if it had been attached to the existing house. The owners’ representative claimed that the shed would be nearly invisible from the street, would have no impact on neighboring properties, and that the impact of a small additional outbuilding would be minimal and in keeping with the spirit of the zoning ordinance, particularly when compared to the four dwelling units allowed by the zoning district regulations.

The BZA denied the variance that would have allowed the storage shed. At trial in the circuit court, the owners raised a new claim of hardship – that the owners’ daughter had returned to live with them to care for an ailing parent, and that the storage shed was needed as a place to store her belongings. The circuit court ruled that a hardship existed, overruled the BZA, and granted the variance.

13-612 **The Cochran court’s discussion of the controlling legal principles and its holdings**

Concluding that the facts did not support the granting of a variance in any of the cases, the Virginia Supreme Court reversed all three circuit court judgments. The court’s analysis includes a discussion of the controlling legal principles applicable to variances authorized under Virginia Code § 15.2-2309(2). Following are three important excerpts from the *Cochran* court’s discussion of those principles:

[T]he BZA has authority to grant variances only to avoid an unconstitutional result.

The BZA, when considering an application for a variance, acts only in an administrative capacity. [citation omitted] Under fundamental constitutional principles, administrative

officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law. [citations omitted] The General Assembly has prescribed such standards regulating the authority of the BZA to grant variances by enacting Code § 15.2-2309(2) . . .

[W]e construe the statutory terms “effectively prohibit or unreasonably restrict the utilization of the property,” “unnecessary hardship” and “undue hardship” in that light and hold that the BZA has no authority to grant a variance unless the effect of the zoning ordinance, as applied to the piece of property under consideration, would, in the absence of a variance, “interfere with all reasonable beneficial uses of the property taken as a whole.”

The court concluded that under the facts of the three cases, without a variance “each of the properties retained substantial beneficial uses and substantial value.” In *Cochran*, the proposed house could have been reconfigured or moved two feet to the south, or the project could have been abandoned and the existing residential use continued in effect. In *MacNeal*, the proposed garage could have been moved to another location on the parcel or the project could have been abandoned. In *Pennington*, the storage shed could have been built as an addition to the existing house or the project could have been abandoned.

13-613 The Cochran court’s guidance on how to approach a variance application

The Virginia Supreme Court provided some useful guidance on how a BZA is to approach a variance application:

The threshold question for the BZA in considering an application for a variance . . . is whether the effect of the zoning ordinance upon the property under consideration, as it stands, interferes with “all reasonable beneficial uses of the property, taken as a whole.” If the answer is in the negative, the BZA has no authority to go further.

The court noted that the owners in the three cases had presented compelling reasons in favor of their applications, such as: their desires, supported by careful planning, to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support, of the application by neighbors; and a serious personal need for the proposed modification. The court held that these factors were not relevant to the issue of undue hardship, and were material to a variance application only if an undue hardship was properly found to exist. In such a case, these factors could then be considered in the discretion of the BZA to tailor “a variance that will alleviate ‘hardship’ while remaining ‘in harmony with the intended spirit and purpose of the ordinance.’”

13-614 Undue hardship found

Following are brief summaries of cases in which an undue hardship was found to exist. Before any case is relied upon, it needs to be re-examined in light of the Virginia Supreme Court’s analysis of the undue hardship standard in the *Cochran/MacNeal/Pennington* cases:

- Conversion of apartments: Prohibition of conversion of apartments to condominiums under the state Condominium Act with no changes in the land use constituted an unreasonable restriction. *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451 (1986).
- Expansion of sludge drying beds: Utility company needing a variance to expand sludge drying beds was a hardship approaching confiscation because without expansion, plant would violate water quality standards. *Tidewater Utilities Corp. v. City of Norfolk*, 208 Va. 705 (1968).

- Lot size and width: In a district where lots were required to contain at least 75,000 square feet and have a minimum width of 200 feet to be considered a “buildable lot,” and the lot in question contained 45,733 square feet and was 199.45 feet wide, undue hardship existed because the lot was unbuildable under existing zoning regulations and the variance would alleviate a clearly demonstrable hardship approaching confiscation. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 2001 Va. Cir. LEXIS 381 (2001).
- Setbacks: Undue hardship existed so as to justify a variance from 30-foot setback requirement where the property was located at the corner of two residential streets and was exceptionally narrow and exceptionally shallow, and had no 90 degree corners. Other facts supporting the undue hardship included: (1) the owners sought to construct a 34-foot-wide house (a typical house being built in the immediate vicinity was 40 feet wide); (2) a house any narrower than the 34-foot-wide house proposed would have been too narrow to accommodate interior rooms; (3) a house any smaller or narrower than the proposed 34-foot-wide house would not be economically viable in the relevant real estate market; (4) the proposed house could not be shifted back on the property because it would infringe on the side yard setback of 10 feet, necessitating another variance; and (5) the house could not be rotated on the property because rotation would result in the other front corner of the house infringing on the front yard setback, which would require another variance. *Brown v. Fairfax County Board of Zoning Appeals*, 2001 Va. Cir. LEXIS 49 (2001).
- Building height: Undue hardship existed so as to justify a height variance where parcel sloped on edges, making construction that complied with city’s tree preservation and protection regulations difficult or impossible; the terrain and the potential loss of additional large trees constituted the undue hardship. *McGhee v. Board of Zoning Appeals of the City of Roanoke*, 57 Va. Cir. 47 (2001).
- Lot width: Undue hardship was found so as to justify the granting of a variance to reduce the lot width requirement to divide property into three lots sharing a driveway where the property was an odd shape; to develop it appropriately without a variance required that an expensive road be constructed; and the construction of the road would require removal of mature trees, damage a vineyard, and encroach upon an historical house, three features which enhanced the pastoral character of the area. *McCoy v. Fairfax County Board of Zoning Appeals*, 48 Va. Cir. 227 (1999).

The two Virginia Supreme Court cases that found an undue hardship – *Natrella* and *Tidewater Utilities* – are atypical variance cases and most likely are limited to the unique situations they presented.

13-615 Undue hardship not found

Following are brief summaries of cases in which an undue hardship was not found to exist. The Virginia Supreme Court’s analysis in *Cochran/MacNeal/Pennington* will support a locality’s reliance on any of the cases below:

- Setback: Owner sought multiple variances from overlapping setbacks imposed by the county’s zoning ordinance (including those implementing the Chesapeake Bay Preservation Act) on 4 out of 5 lots in a 6.594 acre purported subdivision recorded soon after the owner purchased the property in 2004, and long after the setback regulations were imposed; without the variances the 4 lots were unbuildable; no undue hardship existed because the owner could have treated the property as a single 6.594 acre parcel and constructed a single residence on the property on that part of which was not subject to the overlapping setbacks. *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*, 271 Va. 670 (2006).
- Setback: Owner sought variance from setback to expand existing house closer to ocean; no hardship because expansion could be constructed on other side of house without violating the setback requirement. *Packer v. Hornsby*, 221 Va. 117 (1980) (“proximity to the ocean is doubtless a ‘privilege or convenience’ coveted by every homeowner along the beach”).

- Setback: Owner sought variance from setback so house could be constructed in position desired by owner; no hardship because house could be constructed without variance by shifting position of house. *Board of Zoning Appeals of City of Virginia Beach v. Nowak*, 227 Va. 201 (1984) (“to grant him a variance under these circumstances would bestow upon him a ‘special privilege or convenience’”).
- Setback: Owners sought variance from setback so that they could construct the house “they desired to have”; no hardship because there were other houses and configurations that would allow a reasonable use of the property. *Smith v. Spotsylvania County Board of Zoning Appeals*, 1989 WL 646478 (Va. Cir. Ct. 1989).
- Minimum lot width: Owner sought variance from minimum lot width requirements to allow existing lot to be subdivided into two lots, replacing existing house with new houses on each lot; lot had been illegally created in 1936. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 268 Va. 441 (2004) (owner did not experience undue hardship given that he had enjoyed the use of his home since 1964; his “inability to subdivide his property does not constitute a hardship under the facts of this case. The effect of the zoning ordinance does not interfere ‘with all reasonable beneficial uses of the property, taken as a whole’”).
- Develop to highest allowed density: Owner’s inability to develop land at its highest allowable density by requiring compliance with ordinance requirements was a limitation shared by all property owners and did not constitute an undue hardship. *Prince William County Board of Zoning Appeals v. Bond*, 225 Va. 177 (1983) (regulation restricting density to one dwelling unit per acre not an undue hardship where owner desired to add second dwelling on 1.01-acre parcel; the owner’s “application for a variance was, in effect, a request for a rezoning of their property”).
- Develop to highest allowed density: Owner sought variance from regulation that prohibited property from being developed to maximum density; inability to achieve maximum density not an undue hardship. *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993).
- Financial loss: Financial loss, standing alone, cannot establish a hardship justifying the granting of a variance. *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48 (1993); *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451 (1986). However, the value of the property is relevant to both the unreasonable restriction and the hardship approaching confiscation issues. *Natrella, supra*.
- Financial loss: Expenditure of more than \$ 20,000 toward construction of residence in floodway was not an undue hardship, even though the owners had been erroneously informed that the site was out of the floodway and obtained zoning and building permits. *Corinthia Enterprises, Ltd. v. Loudoun County Board of Zoning Appeals*, 22 Va. Cir. 545 (1988).
- Increased profitability: There is no undue hardship where the evidence shows only that the property owner would make more money if the connected town houses could be sold within the building to separate owners. Increased profitability is insufficient alone to justify a variance. *Leigh v. Board of Zoning Appeals of the Town of Woodstock*, 1982 WL 215189 (Va. Cir. Ct. 1982).
- Health and safety zoning regulations: Owners sought variances from several health and safety regulations applicable to uses allowed by right; no hardship found because the right to use property in a particular way is not absolute, but conditional, and to hold otherwise would render the requirements null and void. *Board of Zoning Appeals, City of Falls Church v. O’Malley*, 229 Va. 605 (1985).
- Commercial parking on residentially zoned property: Owner sought variance to allow commercial parking lot on residentially zoned land to serve business on other lot; no hardship justifying grant of variance because the lot was level and adequately suitable for the construction of improvements

permitted under the zoning classification and the only hardship was related to the business and the property upon which the owner conducted its business, not the property for which the variance was sought. *C. & C. Inc. v. Semple*, 207 Va. 438 (1966) (Note: the owner was seeking a use variance, not allowed in Virginia since 1988).

- Additional signage: Owners sought variance that would have allowed them to display two signs, rather than one; the only hardship was that two signs would better identify the property. *McCall v. Board of Zoning Appeals of the City of Richmond*, 1987 WL 488782 (Va. Cir. Ct. 1987).
- Structural height restriction: Owner sought a variance that would allow farm equipment dealership sign to be 20 feet in height, where zoning regulations permitted signs approximately no taller than 10 feet, and claimed that a sign 10 feet in height would be partially obscured by farm equipment from highway in one direction, and completely obscured from highway in the other direction; no undue hardship because the farm equipment dealership already existed on the property and other general commercial uses could also be located there. *Amherst County Board of Supervisors v. Amherst County Board of Zoning Appeals*, 70 Va. Cir. 91 (2005).
- Erroneously approved site plan and building permit: Owner sought variance from 8-foot setback where the approved site plan showed a 3-foot setback in violation of the zoning ordinance; no hardship justifying the granting of a variance because the only error was made by the city in the granting of the building permit, and the permit was void. *Dixon v. Zoning Appeals Board of Virginia Beach*, 50 Va. Cir. 424 (1999).
- Location of accessory structure: Owner sought a variance from regulation that required accessory structures to be located in the rear yard of a single family dwelling; location of new single family dwelling resulted in pre-existing barn being located in front sideyard, and locality refused to issue certificate of occupancy for the dwelling; no undue hardship because owner could dismantle the barn and eliminate the need for the variance. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005).

13-616 Self-inflicted hardship

As noted above, a self-inflicted hardship cannot be an undue hardship that justifies the granting of a variance. Following are some examples where the court considered whether a hardship was self-inflicted:

- To correct zoning violation; reliance on erroneous boundary markers: Hardship was self-inflicted where owners constructed house in violation of side yard setback requirements, although done inadvertently in reliance upon misplaced property line markers. *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502 (1993).
- To correct zoning violation: Hardship was self-inflicted where owner continued construction of apartment over existing garage in violation of the zoning ordinance after knowledge and warning of the likely consequences of her unlawful conduct. *Board of Zoning Appeals of Town of Abingdon v. Combs*, 200 Va. 471 (1959).
- Knowing need for variance: Hardship was not self-inflicted where owner purchased property knowing that he needed a variance to build a house, because a self-inflicted hardship must pertain to a violation of the zoning ordinance. *Spence v. Board of Zoning Appeals for City of Virginia Beach*, 255 Va. 116 (1998).

13-620 The second required BZA finding: the undue hardship must be unique

An undue hardship must be unique from conditions existing on other properties in the zoning district; a

hardship is not unique if it is shared by all other properties in the same zoning district. *Virginia Code § 15.2-2309(2)*; *Zickefoose v. Board of Zoning Appeals of the City of Winchester*, 1984 WL 276287 (Va. Cir. Ct. 1984) (keeping ponies is not a unique problem limited to the applicant's property because this limitation is shared by all the property owners in that district; the application for the variance was in effect a request for a rezoning of the property). If a hardship is not unique, it must be addressed by a zoning text amendment.

The mere fact that a property is adjacent to another zoning district or to adverse property does not constitute a unique condition. *Kirk v. Board of Zoning Appeals of the City of Winchester*, 4 Va. Cir. 326 (1985). Otherwise, every property adjoining another zoning district could claim uniqueness. *Kirk, supra*.

13-630 The third required BZA finding: the variance will not be a substantial detriment to adjacent property and the character of the district will not be changed

In deciding whether a strict application of a zoning regulation would cause an undue hardship, the BZA must weigh the hardship that strict application would impose upon an applicant against the potential detriment to the public interest and adjacent properties if the variance was granted. *Board of Zoning Appeals of City of Chesapeake v. Glasser Bros. Corp.*, 242 Va. 197 (1991). For example, in *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (1993), granting a variance would have required three adjacent lots to provide an additional 25 feet of front yard where they abutted a pipestem lot line or driveway pavement. The court concluded that the BZA failed to consider the potentially detrimental impact the granting of the variance would have on the future development of the three lots.

Although financial hardship alone is insufficient to establish an undue hardship, financial information is useful in helping the BZA find whether a variance would be of substantial detriment to adjacent property.

13-640 The fourth required BZA finding: the condition or situation of the property is not so general or of a recurring nature as to make a general regulation reasonably practicable

A high number of variance applications from a particular regulation may indicate that there is a problem with the zoning ordinance. The power to resolve recurring zoning problems shared generally by those in the same district is vested in the legislative arm of the locality's governing body. *Hendrix v. Board of Zoning Appeals of City of Virginia Beach*, 222 Va. 57 (1981). Thus, a variance may not be granted if the condition or situation of the property concerned is of a general or recurring nature so that the condition or situation can be addressed by a general zoning regulation. *Virginia Code § 15.2-2309(2)*.

Recurring requests for variances from specific provisions of the zoning ordinance must be dealt with legislatively – by amending the zoning ordinance – rather than piecemeal through the variance procedure. *Virginia Code § 15.2-2309(2)*. The piecemeal granting of variances may ultimately nullify a zoning regulation throughout a zoning district. *Packer v. Hornsby*, 221 Va. 117 (1980). Thus, an owner's showing that the special condition and the resulting undue hardship are non-recurring is of considerable importance in determining the propriety of the variance. *Board of Supervisors of Fairfax County v. Fairfax County Board of Zoning Appeals*, 1993 WL 945907 (Va. Cir. Ct. 1993).

13-700 Special situations: condominium conversions, the Americans with Disabilities Act, and the Fair Housing Act

The preceding analysis pertains to variances subject to and analyzed solely under Virginia Code § 15.2-2309(2). There are at least two special situations where rigid adherence to Virginia Code § 15.2-2309(2) is superseded.

13-710 Condominium conversions

Virginia Code § 55-79.43(E) provides in part that localities may provide by ordinance that proposed

conversion condominiums and the use thereof which are nonconforming obtain a variance (or special use permit) prior to the property becoming a conversion condominium. The variance “shall be granted if the applicant can demonstrate to the reasonable satisfaction of the local authority that the nonconformities are not likely to be adversely affected by the proposed conversion.” *Virginia Code § 55-79.43(E)*.

13-720 The Americans with Disabilities Act and the Fair Housing Act

Variance applications received from disabled persons or facilities that serve disabled persons protected by the Americans with Disabilities Act or the Fair Housing Act require special consideration. Under both of those Acts, the locality is required to make reasonable accommodations from its policies and rules (*e.g.*, its zoning regulations and the criteria for granting a variance in *Virginia Code § 15.2-2309(2)*) so as not to discriminate against disabled persons. These acts are discussed in more detail in sections 7-400 (Americans with Disabilities Act) and 7-900 (Fair Housing Act).

13-800 Modifications

In a 2006 bill that was introduced with the intention of being a legislative response to *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004) by amending the applicable criteria for the granting of a variance, the General Assembly ended up amending *Virginia Code § 15.2-2286(A)(4)*. This enabling authority allows localities to amend their zoning ordinance to authorize zoning administrators to review and approve *modifications* from zoning regulations. A *modification* is relief from any provision contained in the zoning ordinance with respect to the physical requirements on a lot or parcel of land, including but not limited to the size, height, location or features of or related to any building, structure, or improvements. *Virginia Code § 15.2-2286(A)(4)*. Under the prior law, localities were enabled to authorize their zoning administrators to grant *variances* from any *building setback requirement*. *Virginia Code § 15.2-2286(A)(4)*.

The findings required to grant a modification are similar to those for a variance. *Virginia Code § 15.2-2286(A)(4)*. The zoning administrator’s decision on a modification may be appealed to the BZA, and the BZA’s decision may be appealed to circuit court.