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HOUSE BILL NO. 1849

Offered January 14, 2015

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A BILL to amend and reenact §§ 15.2-2201, 15.2-2308, 15.2-2309, and 15.2-2314 of the Code of Virginia, relating to variances.

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Referred to Committee on Counties, Cities and Towns

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-2201, 15.2-2308, 15.2-2309, and 15.2-2314 of the Code of Virginia are amended and reenacted as follows:

§ 15.2-2201. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affordable housing" means, as a guideline, housing that is affordable to households with incomes at or below the area median income, provided that the occupant pays no more than thirty percent of his gross income for gross housing costs, including utilities. For the purpose of administering affordable dwelling unit ordinances authorized by this chapter, local governments may establish individual definitions of affordable housing and affordable dwelling units including determination of the appropriate percent of area median income and percent of gross income.

"Conditional zoning" means, as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance.

"Development" means a tract of land developed or to be developed as a unit under single ownership or unified control which is to be used for any business or industrial purpose or is to contain three or more residential dwelling units. The term "development" shall not be construed to include any tract of land which will be principally devoted to agricultural production.

"Historic area" means an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological or other features relating to the cultural or artistic heritage of the community, of such significance as to warrant conservation and preservation.

"Incentive zoning" means the use of bonuses in the form of increased project density or other benefits to a developer in return for the developer providing certain features, design elements, uses, services, or amenities desired by the locality, including but not limited to, site design incorporating principles of new urbanism and traditional neighborhood development, environmentally sustainable and energy-efficient building design, affordable housing creation and preservation, and historical preservation, as part of the development.

"Local planning commission" means a municipal planning commission or a county planning commission.

"Military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under jurisdiction of the U.S. Department of Defense, including any leased facility, or any land or interest in land owned by the Commonwealth and administered by the Adjutant General of Virginia or the Virginia Department of Military Affairs. "Military installation" does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

"Mixed use development" means property that incorporates two or more different uses, and may include a variety of housing types, within a single development.

"Official map" means a map of legally established and proposed public streets, waterways, and public areas adopted by a locality in accordance with the provisions of Article 4 (§ 15.2-2233 et seq.) hereof.

"Planned unit development" means a form of development characterized by unified site design for a variety of housing types and densities, clustering of buildings, common open space, and a mix of building types and land uses in which project planning and density calculation are performed for the entire development rather than on an individual lot basis.

"Planning district commission" means a regional planning agency chartered under the provisions of Chapter 42 (§ 15.2-4200 et seq.) of this title.

"Plat" or "plat of subdivision" means the schematic representation of land divided or to be divided and information in accordance with the provisions of §§ 15.2-2241, 15.2-2242, 15.2-2258, 15.2-2262, and 15.2-2264, and other applicable statutes.

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59 "Preliminary subdivision plat" means the proposed schematic representation of development or
60 subdivision that establishes how the provisions of §§ 15.2-2241 and 15.2-2242, and other applicable
61 statutes will be achieved.

62 "Resident curator" means a person, firm, or corporation that leases or otherwise contracts to manage,
63 preserve, maintain, operate, or reside in a historic property in accordance with the provisions of
64 § 15.2-2306 and other applicable statutes.

65 "Site plan" means the proposal for a development or a subdivision including all covenants, grants or
66 easements and other conditions relating to use, location and bulk of buildings, density of development,
67 common open space, public facilities and such other information as required by the subdivision
68 ordinance to which the proposed development or subdivision is subject.

69 "Special exception" means a special use, that is a use not permitted in a particular district except by
70 a special use permit granted under the provisions of this chapter and any zoning ordinances adopted
71 herewith.

72 "Street" means highway, street, avenue, boulevard, road, lane, alley, or any public way.

73 "Subdivision," unless otherwise defined in an ordinance adopted pursuant to § 15.2-2240, means the
74 division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose
75 of transfer of ownership or building development, or, if a new street is involved in such division, any
76 division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall
77 relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation
78 of any single division of land into two lots or parcels, a plat of such division shall be submitted for
79 approval in accordance with § 15.2-2258.

80 "Variance" means, in the application of a zoning ordinance, a reasonable deviation from those
81 provisions regulating the *shape*, size, or area of a lot or parcel of land; or the size, *height*, area, bulk, or
82 location of a building or structure when the strict application of the ordinance would ~~result in~~
83 ~~unnecessary or unreasonable hardship to the property owner~~ *unreasonably restrict the utilization of the*
84 *property*, and such need for a variance would not be shared generally by other properties, and provided
85 such variance is not contrary to the ~~intended spirit and purpose of the ordinance; and would result in~~
86 ~~substantial justice being done~~. It shall not include a change in use, which change shall be accomplished
87 by a rezoning or by a conditional zoning.

88 "Zoning" or "to zone" means the process of classifying land within a locality into areas and districts,
89 such areas and districts being generally referred to as "zones," by legislative action and the prescribing
90 and application in each area and district of regulations concerning building and structure designs,
91 building and structure placement and uses to which land, buildings and structures within such designated
92 areas and districts may be put.

93 **§ 15.2-2308. Boards of zoning appeals to be created; membership, organization, etc.**

94 A. Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior
95 enabling laws, shall establish a board of zoning appeals that shall consist of either five or seven
96 residents of the locality, appointed by the circuit court for the locality. Boards of zoning appeals for a
97 locality within the fifteenth or nineteenth judicial circuit may be appointed by the chief judge or his
98 designated judge or judges in their respective circuit, upon concurrence of such locality. Their terms of
99 office shall be for five years each except that original appointments shall be made for such terms that
100 the term of one member shall expire each year. The secretary of the board shall notify the court at least
101 thirty days in advance of the expiration of any term of office, and shall also notify the court promptly if
102 any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term.
103 Members may be reappointed to succeed themselves. Members of the board shall hold no other public
104 office in the locality except that one may be a member of the local planning commission. A member
105 whose term expires shall continue to serve until his successor is appointed and qualifies. The circuit
106 court for the City of Chesapeake and the Circuit Court for the City of Hampton shall appoint at least
107 one but not more than three alternates to the board of zoning appeals. At the request of the local
108 governing body, the circuit court for any other locality may appoint not more than three alternates to the
109 board of zoning appeals. The qualifications, terms and compensation of alternate members shall be the
110 same as those of regular members. A regular member when he knows he will be absent from or will
111 have to abstain from any application at a meeting shall notify the chairman twenty-four hours prior to
112 the meeting of such fact. The chairman shall select an alternate to serve in the absent or abstaining
113 member's place and the records of the board shall so note. Such alternate member may vote on any
114 application in which a regular member abstains.

115 B. Localities may, by ordinances enacted in each jurisdiction, create a joint board of zoning appeals
116 that shall consist of two members appointed from among the residents of each participating jurisdiction
117 by the circuit court for each county or city, plus one member from the area at large to be appointed by
118 the circuit court or jointly by such courts if more than one, having jurisdiction in the area. The term of
119 office of each member shall be five years except that of the two members first appointed from each
120 jurisdiction, the term of one shall be for two years and of the other, four years. Vacancies shall be filled

for the unexpired terms. In other respects, joint boards of zoning appeals shall be governed by all other provisions of this article.

C. With the exception of its secretary and the alternates, the board shall elect from its own membership its officers who shall serve annual terms as such and may succeed themselves. The board may elect as its secretary either one of its members or a qualified individual who is not a member of the board, excluding the alternate members. A secretary who is not a member of the board shall not be entitled to vote on matters before the board. ~~For Notwithstanding any other provision of law, general or special, for the conduct of any hearing, (i) a quorum shall be not less than a majority of all the members of the board; (ii) the members of the board shall have no ex parte communications with the staff of the governing body, including but not limited to the planning staff and the local government attorney; and (iii) the board shall not permit the staff of the local governing body more time to present its arguments and evidence than is allowed for the petitioner.~~ Except for matters governed by § 15.2-2312, no action of the board shall be valid unless authorized by a majority vote of those present and voting. The board may make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth. The board shall keep a full public record of its proceedings and shall submit a report of its activities to the governing body or bodies at least once each year.

D. Within the limits of funds appropriated by the governing body, the board may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services. Members of the board may receive such compensation as may be authorized by the respective governing bodies. Any board member or alternate may be removed for malfeasance, misfeasance or nonfeasance in office, or for other just cause, by the court that appointed him, after a hearing held after at least fifteen days' notice.

E. Notwithstanding any contrary provisions of this section, in the City of Virginia Beach, members of the board shall be appointed by the governing body. The governing body of such city shall also appoint at least one but not more than three alternates to the board.

§ 15.2-2309. Powers and duties of boards of zoning appeals.

Boards of zoning appeals shall have the following powers and duties:

1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct, ~~and the burden of proof shall be on the administrative officer to prove by a preponderance of the evidence that his decision was correct.~~ The board shall consider the purpose and intent of any applicable ordinances, laws, and regulations in making its decision.

2. ~~To Notwithstanding any other provision of law, general or special, to authorize upon appeal or original application in specific cases such a variance as defined in § 15.2-2201 from the terms of the ordinance as 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, as follows: the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.~~

~~When a property owner can show that his~~ *Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that (i) the property interest for which the variance is being requested was acquired in good faith and where by reason of the exceptional; (ii) there exists a narrowness, shallowness, size, or shape of a specific piece of property at the time of the effective date of the ordinance; or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property; or of the condition, situation, or development of property immediately adjacent thereto; and (iii) the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship; as distinguished from a special privilege or convenience sought by the applicant; provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.*

No such variance shall be authorized by the board unless it finds:

a. That the strict application of the ordinance would produce undue hardship relating to the property;
b. That the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and

c. That 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.

No variance shall be authorized ~~granted~~ except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the board may

182 give such notice by first-class mail rather than by registered or certified mail.

183 No variance shall be authorized unless the board finds that the condition or situation of the property
184 concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of
185 a general regulation to be adopted as an amendment to the ordinance.

186 In authorizing granting a variance, the board may impose such conditions regarding the location,
187 character, and other features of the proposed structure or use as it may deem necessary in the public
188 interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will
189 continue to be complied with. Notwithstanding any other provision of law, the property upon which a
190 property owner has been granted a variance shall be treated as conforming for all purposes under state
191 law and local ordinance; however, the structure permitted by the variance may not be expanded unless
192 the expansion is within an area of the site or part of the structure for which no variance is required
193 under the ordinance. Where the expansion is proposed within an area of the site or part of the structure
194 for which a variance is required, the approval of an additional variance shall be required.

195 3. To hear and decide appeals from the decision of the zoning administrator after notice and hearing
196 as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or
197 the occupants of abutting property and property immediately across the street or road from the property
198 affected, the board may give such notice by first-class mail rather than by registered or certified mail.

199 4. To hear and decide applications for interpretation of the district map where there is any
200 uncertainty as to the location of a district boundary. After notice to the owners of the property affected
201 by the question, and after public hearing with notice as required by § 15.2-2204, the board may interpret
202 the map in such way as to carry out the intent and purpose of the ordinance for the particular section or
203 district in question. However, when giving any required notice to the owners, their agents or the
204 occupants of abutting property and property immediately across the street or road from the property
205 affected, the board may give such notice by first-class mail rather than by registered or certified mail.
206 The board shall not have the power to change substantially the locations of district boundaries as
207 established by ordinance.

208 5. No provision of this section shall be construed as granting any board the power to rezone property
209 or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by
210 the governing body.

211 6. To hear and decide applications for special exceptions as may be authorized in the ordinance. The
212 board may impose such conditions relating to the use for which a permit is granted as it may deem
213 necessary in the public interest, including limiting the duration of a permit, and may require a guarantee
214 or bond to ensure that the conditions imposed are being and will continue to be complied with.

215 No special exception may be granted except after notice and hearing as provided by § 15.2-2204.
216 However, when giving any required notice to the owners, their agents or the occupants of abutting
217 property and property immediately across the street or road from the property affected, the board may
218 give such notice by first-class mail rather than by registered or certified mail.

219 7. To revoke a special exception previously granted by the board of zoning appeals if the board
220 determines that there has not been compliance with the terms or conditions of the permit. No special
221 exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when
222 giving any required notice to the owners, their agents or the occupants of abutting property and property
223 immediately across the street or road from the property affected, the board may give such notice by
224 first-class mail rather than by registered or certified mail. If a governing body reserves unto itself the
225 right to issue special exceptions pursuant to § 15.2-2286, and, if the governing body determines that
226 there has not been compliance with the terms and conditions of the permit, then it may also revoke
227 special exceptions in the manner provided by this subdivision.

228 8. The board by resolution may fix a schedule of regular meetings, and may also fix the day or days
229 to which any meeting shall be continued if the chairman, or vice-chairman if the chairman is unable to
230 act, finds and declares that weather or other conditions are such that it is hazardous for members to
231 attend the meeting. Such finding shall be communicated to the members and the press as promptly as
232 possible. All hearings and other matters previously advertised for such meeting in accordance with
233 § 15.2-2312 shall be conducted at the continued meeting and no further advertisement is required.

234 **§ 15.2-2314. Certiorari to review decision of board.**

235 Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals,
236 or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the
237 clerk of the circuit court for the county or city a petition that shall be styled "In Re: [date] Decision of
238 the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30
239 days after the final decision of the board.

240 Upon the presentation of such petition, the court shall allow a writ of certiorari to review the
241 decision of the board of zoning appeals and shall prescribe therein the time within which a return
242 thereto must be made and served upon the secretary of the board of zoning appeals or, if no secretary
243 exists, the chair of the board of zoning appeals, which shall not be less than 10 days and may be

extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

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 proceedings; however, the board shall participate in the proceedings to the extent required by this section. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings *in the circuit court*. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.

The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a commissioner to take evidence as it may direct and report the evidence to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. *In the case of an appeal from the board of zoning appeals to the circuit court of a decision to grant or deny a variance or a special exception, any party may introduce evidence in the proceedings in the court.* The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo.

In the case of an appeal by a person of any decision of the board of zoning appeals that denied or granted an application for a variance, or application for a special exception, the decision of the board of zoning appeals shall be presumed to be correct. The petitioner may rebut that presumption by ~~showing~~ to the satisfaction of the court that the board of zoning appeals applied erroneous principles of law, or where the discretion of the board of zoning appeals is involved, the decision of the board of zoning appeals was plainly wrong and in violation of the purpose and intent of the zoning ordinance *proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision.*

Costs shall not be allowed against the locality, unless it shall appear to the court that it acted in bad faith or with malice. In the event the decision of the board is affirmed and the court finds that the appeal was frivolous, the court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the locality may request that the court hear the matter on the question of whether the appeal was frivolous.