

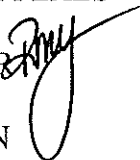
# City of Alexandria, Virginia

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## MEMORANDUM

**DATE:** MAY 16, 2012

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

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

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

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

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

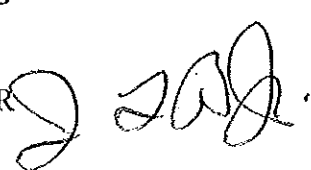
In the attached memorandum, the City Attorney has explained the legal reasons why the BZA does not require representation. Given the position of the BZA in this case and the advice from the City Attorney on this matter, the City does not intend to provide separate legal counsel to the Board of Zoning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

Attachment

cc: The Honorable Mayor and Members of City Council

## MEMORANDUM

TO: RASHAD M. YOUNG  
CITY MANAGER

FROM: JAMES L. BANKS, JR.   
CITY ATTORNEY

DATE: May 16, 2012

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

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

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

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

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

The General Assembly followed by addressing this issue in 2010 by adding language to State Code Section 15.2-2314 that specifically states that "Any review of a decision of the board shall not be considered an action against the board, and the board shall not be a party to the proceeding, however the board shall participate in the proceedings to the

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

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

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