



COMMONWEALTH of VIRGINIA

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The Honorable Anne Ferrell Tata
Member, Virginia House of Delegates
Post Office Box 1442
Virginia Beach, Virginia 23451

Dear Delegate Tata:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You pose two questions regarding the powers and limitations of a local Board of Zoning Appeals (“BZA”). In your first question, you ask if a BZA has authority to deviate from procedural rules found within an applicable local zoning ordinance. You specifically ask whether a BZA may retain a case for hearing/voting even if the applicable zoning ordinance “clearly states that the case in question has circumstances requiring it to be heard/voted at the level of City Council instead.”

In your second question, you ask whether it is legal for a BZA to discreetly (i.e., non-publicly) disclose the existence of a possible “reconsideration” option, only to a limited and subjective roster of denied BZA applicants without any written or verbal public disclosure made to either (i) all BZA applicants or (ii) denied BZA applicants.

Response

It is my opinion that (1) BZAs do not have the authority to deviate from procedural rules found in applicable zoning local ordinances and statutes; and (2) BZAs cannot “discreetly disclose” the existence of “reconsideration” options to a limited and subjective group of denied applicants.

Applicable Law and Discussion

I first note that the Attorney General historically does not opine on the interpretation of local ordinances:

This Office historically has followed a policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule or regulation. In instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control.^[1]

¹ 2001 Op. Va. Att’y Gen. 65, 66 (citations omitted); *see also* 1987-1988 Op. Va. Att’y Gen. 69, 72 (noting that the Attorney General has declined to render official opinions when the request involves a matter of purely local concern or procedure).

Accordingly, I have limited the analysis herein to the scope of authority and rules of procedure of BZAs under state law, and this opinion does not weigh in on the specifics of any local ordinance or the facts of any local proceedings.

Pursuant to state law, a BZA is a creature of statute whose powers are limited to those expressly granted.² Section 15.2-2309 of the Code sets out the primary powers and duties of BZAs. These include the authority “[t]o hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement” of the zoning statutes or local zoning ordinances.³ BZAs are also authorized to grant variances upon appeal or original application, and to interpret the district map where there is uncertainty about the location of a district boundary.⁴

The Code establishes certain rules of procedure for BZA proceedings.⁵ Additionally, the Code provides that each BZA may “make, alter and rescind rules and forms for its procedures, consistent with ordinances of the locality and general laws of the Commonwealth.”⁶ That is, a BZA may “direct [its] mode of procedure via by-laws.”⁷ By-laws adopted by a BZA must be consistent with local ordinances and the Code of Virginia.⁸ Therefore, in my opinion, a BZA may not deviate from procedural rules set out in a local zoning ordinance or statute.

You also ask, more specifically, whether a BZA may hear and vote upon a matter that the local body has reserved unto itself in its zoning ordinance. For example, § 15.2-2286 of the Code provides that “the governing body of any locality may reserve unto itself the right to issue . . . special exceptions.” Additionally, under Virginia Code § 15.2-2301, an appeal of a zoning administrator’s decision concerning proffered conditions shall be heard by the local governing body, rather than the board of zoning appeals. Where a local governing body has reserved the right to hear such matters, it is my opinion that a BZA may not hear or vote upon such a matter.

Regarding your second question, generally under the Virginia Freedom of Information Act (“FOIA”), all meetings of public bodies shall be open.⁹ Prior opinions of this Office have held that BZAs

² *Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals*, 261 Va. 407, 415 (2001) (“The BZA is a creature of statute possessing only those powers expressly conferred upon it.” (internal quotation marks omitted)); *Bd. of Zoning Appeals v. Bd. of Supervisors*, 276 Va. 550, 554 (2008) (noting that neither Dillon’s Rule nor its corollary are applied to BZAs and that BZAs possess only “powers expressly granted”).

³ VA. CODE ANN. § 15.2-2309 (2018).

⁴ *Id.*

⁵ *See, e.g.*, VA. CODE ANN. § 15.2-2310 (2018); VA. CODE ANN. § 15.2-2311 (Supp. 2021); § 15.2-2312 (2018).

⁶ VA. CODE ANN. § 15.2-2308(C) (Supp. 2021).

⁷ *Bd. of Supervisors v. Bd. of Zoning Appeals*, No. CL-2017-15190, 2018 Va. Cir. LEXIS 625, at *11 (Fairfax Cty. Cir. Ct. Nov. 19, 2018) [hereinafter “*Fairfax Supervisors*”].

⁸ VA. CODE ANN. § 15.2-2308; *W. Lewinsville Heights Citizens Ass’n v. Bd. of Supervisors*, 270 Va. 259, 266-67 (2005) (invalidating a BZA by-law that was inconsistent with the Code of Virginia); *Fairfax Supervisors*, 2018 Va. Cir. LEXIS 625, at *14-15 (“A plain and ordinary reading of the applicable statutory scheme directs the BZA may enact some by-laws, restricted however, by the norm that they not conflict with applicable zoning ordinances or statutes.”).

⁹ VA. CODE ANN. § 2.2-3707(A) (Supp. 2021). This is the general rule; however, there are limited exceptions regarding certain General Assembly meetings and closed sessions of a public body. *See* VA. CODE ANN. § 2.2-3707.01 (Supp. 2021) (General Assembly exceptions); VA. CODE ANN. § 2.2-3711 (Supp. 2021) (closed session authorization).

are public bodies under FOIA, and therefore must comply with its rules.¹⁰ FOIA requires every public body to “give notice of the date, time, and location of its meetings.”¹¹ Furthermore, “[e]xcept for matters governed by § 15.2-2312, no action of [a BZA] shall be valid unless authorized by a majority vote of those present and voting” and a BZA “shall keep a full public record of its proceedings.”¹² Therefore, if a BZA offers a “reconsideration” option,¹³ the existence of such option would be open to the public under FOIA. Thus, it is my opinion that a BZA cannot discreetly disclose a “reconsideration” option to only a limited and subjective group of denied BZA applicants.¹⁴

Conclusion

For the reasons discussed herein, it is my opinion that a BZA is not authorized to deviate from procedural rules found in local ordinances.

It is also my opinion that BZAs cannot “discreetly disclose” the existence of “reconsideration” options to only a limited and subjective group of denied applicants because the existence of any “reconsideration” options would be considered open to the public under FOIA.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

¹⁰ See 1985-1986 Op. Va. Att’y Gen. 103, 103; see also 1973-1974 Op. Va. Att’y Gen. 451, 452.

¹¹ See VA. CODE ANN. § 2.2-3707(C). Minutes shall be recorded at all open meetings. They must be in writing and made accessible to the public. VA. CODE ANN. § 2.2-3707(H).

¹² VA. CODE ANN. § 15.2-2308(C). Section 15.2-2312 provides that: “The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance.”

¹³ I note that Virginia Circuit Courts have questioned whether Virginia law permits BZAs to reconsider their decisions. See *Fairfax Supervisors*, 2018 Va. Cir. LEXIS 625, at *17 (“Unanswered nevertheless is whether finality under the *West Lewinsville* test alone forecloses the BZA’s right to reconsider its decisions.”); *In re Chesapeake Zoning Appeals Bd. Decision*, 103 Va. Cir. 233, 235-36 (City of Chesapeake, Oct. 11, 2019) (“[T]he Supreme Court of Virginia has not expressly foreclosed the ability of a BZA to reconsider its decisions.” (citing *W. Lewinsville*, 270 Va. at 268)). This opinion does not address whether a BZA may offer a reconsideration option.

¹⁴ Your question is whether the BZA could discreetly disclose a reconsideration option to denied applicants. This opinion assumes that such disclosure would be made by the BZA as a whole, as opposed to an individual member. Regarding discussions between an individual BZA member and a denied applicant, Virginia Code § 15.2-2308.1(A) allows an individual BZA member to engage in *ex parte* communications with an applicant *before* the applicant’s hearing, so long as there is no discussion of facts or law. While § 15.2-2308.1(A) allows *ex parte* discussions under these parameters, it is silent on discussions between individual BZA members and denied applicants. Assuming that a BZA member was otherwise permitted to speak with a denied applicant, any such communication would be subject to applicable provisions of law including, without limitation, FOIA and the Virginia State and Local Government Conflict of Interests Act.