

Honorable Members of the House Counties, Cities and Towns Subcommittee: Subcommittee #2:

A Board of Zoning Appeals (BZA) is a quasi-judicial body within Virginia's judicial system. BZA members hear and decide appeals of a cited zoning ordinance or determination, requests for a variance, and in some cases requests for special or conditional use permits, inter alia.^[1] BZA decisions, unlike those of other county boards and commissions, are subject to review by a Virginia court of law.

The 31st Judicial Circuit Court of Virginia appoints members to our BZA based on recommendations by our governing body, which nominates citizens who they trust will hear and decide cases in accordance with the facts of the case, testimony, and relevant statutes and ordinances. Citizens accept these appointments and conscientiously strive to fulfill the trust and confidence invested in them.

The problem is that members often do not have consistent access to competent legal counsel, despite the serious nature of the decisions that BZA members are called to make.

The Code of Virginia obligates the governing body's attorney to provide advice to the BZA.^[2] Thus, attorneys for our governing body do provide advice when they are not a contending party in a scheduled BZA hearing. Unfortunately, a governing body attorney typically represents the county in a BZA case and cannot advise member(s) due to the conflict of interests.

This absence of consistent access to legal counsel can create a conundrum for BZA members who are not qualified lawyers, which may be the norm statewide. One scenario could include possible conflict of interests. Another could include a desire to understand certain legal practices, concepts, or even terms pertinent to a pending case prior to hearing it.

With respect to a conflict of interest concern, a member who could not discuss a potential conflict of interest concern with competent legal counsel might unnecessarily recuse oneself from a hearing. Recusal, of course, is appropriate if there is a true conflict of interests, but what if there isn't and the member exercised abundant caution in the absence of legal counsel? Recusal could deny the aggrieved party the opportunity for their case to be heard by a full Board if no alternates are available to fill in. If recusal would result in the loss of a quorum, the case would have to be postponed.

Another scenario in which a member might want legal advice is to gain understanding of certain legal concepts, or practices, or even terms pertinent to a pending case. Sometimes a dictionary cannot help the member fully comprehend a legal concept, practice, or terminology relevant to a case that he or she is called to hear and decide. A short discussion with legal counsel prior to the hearing could provide requisite understanding for the member to proceed confidently.

A governing body attorney, for example, might suggest an alternative approach to seeking outside counsel. The suggestion could be for the member to share their conflict of interest concern or question of legal terms or concepts during the hearing to get feedback from the contending parties. The problem with this approach is that a member may not wish to discuss in public personal concerns regarding a matter that may or may not prove to be a true conflict of interest. Similarly, the member could be unwilling to ask what might seem to be very simplistic questions about legal practices, concepts, or terminology out of a fear that a contending party and the audience might begin to question their competence to hear the case. If the BZA had outside counsel, the member could easily discuss matters of concern privately and make a sound decision

regarding the propriety of hearing the case or be sufficiently informed of questionable legal concepts or jargon to hear the case confidently.

For many years, our Commonwealth Attorney provided legal advice to members with conflict of interest concerns before retiring after serving fifty-two (52) years. Presumably, he did so without statutory authority, because he realized that the member could not discuss the case with our governing body attorney due to conflict of interest protocols. Successor Commonwealth Attorneys could not be expected to continue this practice, absent a change to §15.2-1542 that would require them to advise BZA members if a conflict of interest prevented the governing body attorney from doing so.

Some might worry that HB 616 would require governing bodies to budget extravagantly for their BZAs outside counsel. One can understand such a concern, but if the experience of our BZA is typical, the actual cost would probably be very modest. Last year, for example, I would be surprised if members would have used more than 24 hours of billable time if we had counsel.

HB-616 provides a sound solution. Circuit Courts appoint ordinary citizens to adjudicate sometimes complicated case that upon appeal might ultimately be resolved by Virginia's Supreme Court. BZA members are mindful of the importance of rendering conscientious decisions that reflect the facts of the case, evidence and testimony at the hearing, certain county ordinances, and state law. Providing them with outside counsel before a hearing would enhance their ability to fulfill the trust and confidence invested in them.

[1] Code of Virginia, §15.2-2309

[2] Code of Virginia, §15.2-1542