VIRGINIA

IN THE CIRCUIT COURT OF STAFFORD COUNTY

STAFFORD LAKES LIMITED PARTNERSHIP, Complainant, v. BOARD OF ZONING APPEALS OF STAFFORD COUNTY, and DANIEL J. SCHARDEIN, Stafford County Zoning Administrator, and LINDA FELLERS AND JACK FELLERS, Respondents.	)	Chan. No. CH05-662

RESPONDENTS LINDA AND JACK FELLERS MEMORANDUM IN OPPOSITION TO THE COMPLAINANT'S MOTION FOR EMERGENCY INJUNCTIVE RELIEF AND APPLICATION FOR WRIT OF PROHIBITION AND

Respondents Linda and Jack Fellers ("Landowners"), by counsel, file this memorandum in opposition to the request of Stafford Lakes Limited Partnership ("Applicant") for emergency injunctive relief and a writ of prohibition on the grounds that (1) by code, all actions are stayed upon appeal to the Board of Zoning Appeals ("BZA"); (2) the Applicant's request is pre-mature and without statutory authority as the BZA has not acted, and this Court lacks jurisdiction to rule upon a BZA appeal issue until the BZA has acted; (3) the BZA statute provides for the specific type of injunctive relief allowed and the required conditions for same, and such conditions have not been met or alleged; (4) Applicant lacks standing to interrupt a BZA appeal by seeking review in this Court before the BZA decision is rendered; and (5) the Applicant relies upon an incorrect statement of law to exclude review of zoning ordinance decisions.

THE STATUTORY PROVISIONS AND INJUNCTIVE RELIEF

The Applicant's request for injunctive relief and a writ in prohibition, indeed, Applicant's entire suit, should be dismissed as contrary to the statutory mandates of the BZA code provisions. Virginia is a Dillon Rule state, and local government statutes and legislative provisions must be followed as expressly stated. The applicable code provision states:

> An [BZA] appeal *shall* stay all proceedings in furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in a certificate a stay would in his opinion cause *imminent peril to life or property*, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown (*emphasis added*). Va. Code § 15.2-2311(B). (See also, Stafford County Zoning Ordinance at § 28-349(b)).

In its wisdom, the Legislature has declared the specific conditions of a BZA appeal and the consequences thereof. There are logical reasons for these provisions given the absence of other remedies for errors by local government planning staffs, but these need not be explored here.[1] When a BZA appeal is filed, *all proceeding are stayed.* Everything must wait until the BZA has acted on the appeal.

The legislature fully anticipated that there might be consequences of such a BZA appeal, such as alleged here, and considered and described, *in detail*, the remedy that would be available to an potentially injured applicant. The legislature, in an extremely rare statutory action,

---

[1]/ The BZA code provisions provide the only effective means to appeal asserted errors of local government staffs, who play a large role in preparing case decisions for the Planning Commission and Boards of Supervisors. Without these provisions, errors in ministerial duties and code interpretations could not be challenged until after all formal actions were taken, a waste of time and resources. The BZA also plays an important role in providing affected citizens an administrative appeal route without the cost and formality of judicial review, conserving judicial resources as well.

specifically set forth that the zoning administrator, a person the legislature selected as appropriate, would make a determination of harm. The legislature set forth the degree and nature of the harm warranting injunctive relief - a finding of *imminent peril to life or property*. The Applicant in this case does not even allege such a level of harm.

The only other relief that can be provided by this Court is that supported by the remainder of the code section: an "order granted by the board or by a court of record, on application and on notice to the zoning administrator and for good cause shown." Thus, under the code provisions, and the choices of the Legislature, a Court must find "good cause" in the context of a statutory provision that restricts injunctive relief to imminent peril to life or property.

In this case, the zoning administrator has made no finding of "imminent peril" nor certified same to the BZA. Indeed, the Applicant does not even claim an "imminent peril to life or property" and could never do so because there is none. Instead, the Applicant simply claims an unspecified economic harm that is no different than any other Applicant who finds themselves embroiled in a dispute over the application of a zoning ordinance - he will have to wait for the BZA to decide the matter, an event already scheduled for February 28, 2006. Such "harm" (which is no harm at all) does not meet the test laid out in the statute; indeed, the Applicant did not even file his completed preliminary site plan until December 1, 2005, and can hardly claim harm now. A potential appeal to the BZA is merely a part of the statutory zoning review process; there is no harm here that the Legislature recognizes. The Applicant just doesn't like the process.

Despite all the unsupported claims about the merits of the Fellers' appeal, the only issue for the Court to decide in granting or denying injunctive relief is whether the harm is so great that the Court should intervene in the middle of a local government decision, conclude (in advance)

that the Applicant's have a high likelihood of success (which the cited cases don't support) and then remove a case from BZA authority and order, by judicial fiat, that the issue be placed before another governmental body. These actions would constitute an insertion of the judiciary into the workings of local government in an unprecedented manner and should not even be considered except in the most unusual of circumstances, which this case is not.

There is no likelihood of success, no demonstrable harm, and no "cause" presented to override the plain language expressions of the legislature. Injunctive relief must be denied.

APPLICANT'S ACTION IS PRE-MATURE

As conceded in the Applicant's Bill of Complaint and motions for emergency relief, the facts of this case are that a timely and proper notice of appeal and application has been filed with the Stafford County BZA, accepted by the County and the BZA and scheduled for hearing, all pursuant to the express statutory provisions of Va. Code § 15.2-2311(B).

Virginia is a Dillon Rule state; with respect to local government powers and authority, and indeed, with respect to all actions involving local government, the statute provides the express authority for all actions and any ambiguity in the statute is resolved against the local government. In this code provision, once a proper notice of appeal and application have been filed, the legislature has required that all proceedings *shall be stayed.*

Further, in the case of a notice to the BZA, which is fundamentally the only check citizens have against the improper decision of a County official, the statute does not provide for any other review by a court until and unless the BZA has decided the appeal. Even if the Court elects to grant injunctive relief, there is no statutory provision cited by the Applicant that allows the Applicant to appeal the jurisdiction of the BZA before it decides the matter for itself. There

has been no decision by the BZA; they have not even heard the appeal. The "actual controversy" under the declaratory judgment act is between the persons filing the appeal and the County officials alleged to have made an improper determination. The Applicant has no statutory standing and no legal right to enter this appeal and ask for a writ to stop what is a determined statutory mandate: *all proceedings are stayed.* The Applicant's appropriate remedy is intervention in the BZA appeal and argue jurisdiction to the BZA, not this Court.

Our Supreme Court has long held that the legislature "has undertaken to achieve in the enabling [zoning] legislation a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public . . . [and] it is peculiarly a function of the General Assembly to determine, subject to constitutional constraints, what revisions in the statutes may be required to maintain the appropriate balance between these important but frequently conflicting interests." *Board of Supervisors v. Horne*, 216 Va. 113, 120 (1975). In the BZA statute, the legislature provided for a complete and total stay of all proceedings, absent a specific and detailed finding of imminent harm which is not present here, until the BZA acts.

By operation of the BZA statutory appeal provision, all parties must await a decision of the BZA before the statutory stay can be lifted. This court is not given any authority to override such express legislative language, and the Applicant has cited none. For the same reasons, the Applicant lacks any statutory authority to challenge the BZA jurisdiction over this appeal - that is a decision solely for the BZA to decide, not a third party.

THE BZA HAS JURISDICTION OVER THIS APPEAL

If the Court does consider anything past the statutory bar, the gravamen of the Applicant's argument is that the present site plan review is for a subdivision of property, and as such, only the Stafford County Subdivision ordinance has any application in this case. Relying on these assumptions, the Applicant then relies on the BZA's lack of authority to review subdivision plans to exclude review of this appeal. The Applicant is correct on only part of the argument. Boards of Zoning Appeals do not hear appeals of subdivision plans; that task is given directly to the Circuit Courts *after a decision by the Planning Commission or other appropriate agent.* Va. Code § 15.2-2260. Although this code section is not clear, despite Applicant's assertions, about what happens during challenges before a decision by the Planning Commission as we have here, the express authority of the BZA is stated clearly in its authorization statute:

> 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. . . . Va. Code § 15.2-2309.

This "article" is Article 7, Zoning. Subdivision plans are in Article 6. The BZA authorization statute does not include review of subdivision plans but rather "*any*" review of administrative decisions or determinations of any zoning ordinance. The one case relied upon by the Applicant, *Mason v. Board of Zoning Appeals*, 25 Va. Cir. 198 (1991) is of no help here because the plaintiffs in *Mason* made a direct appeal to the BZA relying solely on the authority of the local government subdivision ordinance, not the zoning ordinance. The court held that the BZA cannot review a subdivision plan under the subdivision ordinance. That appeal rests with the circuit court. Va. Code § 15.2-2260.

This appeal is squarely within the authority of the BZA as it seeks BZA review of a determination by the Planning Director, an administrative officer, of compliance with the provisions of the Stafford County zoning ordinance, not the Stafford Subdivision ordinance or the subdivision plan.[2] The subdivision plan has not yet been acted on by the Planning Commission, and there is no review of such plan until the Planning Commission acts. Va. Code § 15.2-2260.

Contrary to the claim of the Applicant in paragraph 34 of their pleadings, a planning director is exactly the type of government official capable of rendering a determination of ordinance compliance or non-compliance. *Foster v. Geller*, 248 Va. 563, 565 (1994) (review of planning director determination). Such determination does not even have to be in writing; an oral decision is appealable to the BZA. *Lilly v. Caroline County*, 259 Va. 291, 296 (2000). Indeed, *Lilly* is very instructive regarding the procedures required before an appeal to the circuit court can even occur. With respect to zoning decisions of County officials, no appeal of a determination by a county official regarding the zoning ordinances can be made to a circuit court without first exhausting the administrative remedy by BZA appeal. Failing such appeal, the error is waived. *Lilly* at 296.

---

[2]/ Applicant attaches to their Bill materials from another case, *Kurpiel v. Board of Zoning Appeals*, CL05 000359-00 (2005), an appeal of the Stafford County BZA to this court. Apparently there has been no decision at this time. Applicant argues that the BZA decision not to accept the appeal sets forth "clear precedent" that matters concerning subdivision review are not subject to BZA review. The BZA decision is of no precedent here (without addressing that appeal), however, because the BZA in *Kurpiel* acted on a zoning administrator's decision not to forward an appeal the BZA, an entirely different matter. The transcript record also indicates that the subdivision application was not even decided as complete or incomplete by the zoning administrator, and no issue was even ripe for BZA review. Any comments by BZA members regarding the subdivision ordinance are dicta at best, and in any event are not binding on this Court.

In this case, Respondents seek BZA review of the Planning Director's decision that the submitted plan is in compliance with the Stafford County zoning ordinance, exactly what the BZA exists for. The appeal does not seek a review of the subdivision plan, and does not attack or even cite elements of the subdivision ordinance, other than to note that the subdivision ordinance provides for compliance with the zoning ordinance.

The Applicant argues that the zoning ordinance does not apply because the subject plan is for a subdivision of land. That argument fails by the admission of the Applicant and the plain language of the ordinance. The Applicant concedes that the Stafford County Subdivision Ordinance, at section 22-60, states that "every preliminary subdivision plan must meet the applicable requirements of the Stafford County Zoning Ordinance." Applicant Bill at ¶ 32. Nevertheless, the Applicant then concludes that if review of any compliance with the zoning ordinance is permitted, then every subdivision plan would then be reviewable by the BZA, an intent not set forth by the legislature.

This is not so. First, only the determination of the Planning Director that the plan complies with the zoning ordinance is appealed. Landowners believe that the subdivision plan contains many errors, but that is an issue for the Planning Commission and no allegations are presented to the BZA on any subdivision issue. Second, the Virginia Supreme Court has made clear that the "enabling zoning legislation enumerates various permissible provisions that may be included in local zoning ordinances." *Horne* at 120. In the case of Stafford County, the local government has enacted subdivision ordinances which require compliance as well with the zoning ordinance. The wisdom of such action is made clear in this very appeal. The zoning ordinance contains all of the Chesapeake Bay Act land use restrictions, buffers and stream

protection conditions as required by that Act. These same conditions must be shown and complied with in any subdivision plan by virtue of the requirements of section 22-60 of the subdivision ordinance. If the subdivision plan did not have to comply with the zoning ordinance requirements in this regard, subdivisions would be effectively exempted from the provisions of the Act and the zoning enactments thereto.

It is well within the authority of the local government, who is empowered to adopt both the zoning ordinance and the subdivision ordinance, to chose the procedural and ordinance language to implement both its subdivision and zoning land use objectives. Just recently, the Virginia Supreme Court held that the language of the zoning ordinance must be taken precisely as is, as such ordinances are legislative acts which must be accorded their plain meaning unless prohibited by statute. *See, Capelle v. Orange County*, 269 Va. 60, 65 (2005).

Who makes the determination of compliance with the zoning ordinance requirements for the Chesapeake Bay Act? In Stafford County, it is the Planning Director. And the Planning Director's determination of compliance with the zoning ordinance is reviewable by the BZA. The Applicant tries to confuse this court by asserting that the Director has only reviewed a subdivision plan, but that is only partially correct. The Planning Director has reviewed a subdivision plan, but he has also reviewed compliance provisions with the zoning ordinance, as permitted in the ordinances, and that part of his review is a "determination" subject to BZA appeal. Once the Planning Commission acts on the final plan, then circuit court review is the remedy; but until the plan is acted upon by the Planning Commission, official staff actions on the zoning ordinance issues are reviewed by the BZA.

This result is undisturbed by *Shilling v. Jimenez*, 268 Va. 202 (2004) because *Shilling*

held only that an appeal of the final approval of the subdivision plan is to the Circuit Court, and that the local government could not, by ordinance, create an alternative review by local landowners after the subdivision was already approved. In fact, *Shilling* is highly supportive of exactly the case here. *Shilling* unequivocally "reaffirmed the authority of localities to regulate the subdivision and development of land," and specifically noted that the local government is "enabled to resort to any of its authorized agents, in addition to its Planning Commission, for the enforcement of its subdivision ordinance." *Shilling* at 208, citing to section 15.2-2255 (administration of subdivision regulations vested in the governing body). Here, the governing body, Stafford County, has made compliance with zoning ordinances a part of its subdivision ordinance plan. Such is within their authority; they have done so, and official determinations of compliance with such ordinances is, by statute, appealable to the BZA.

CONCLUSION

There is no statutory authority for the developer in this case to interfere with the statutory mandate to stay all proceeding in a BZA appeal. The legislature has already balanced the harms, and decided the statutory procedure. Nor does the Applicant have the authority to ask this Court to rule on the jurisdiction of the BZA before the BZA has ruled upon such matter - the action is neither mature nor is it ripe. Even if the Applicant has authority to bring this action, the BZA is authorized by code to review administrative determinations of compliance with the zoning ordinance, and Stafford County has incorporated, by ordinance, the requirement that all subdivision plans meet the requirements of the zoning ordinance. To the extent, as here, that a BZA appeal alleges a determination in error with respect to compliance with the zoning ordinance, such appeal falls within the statutory authority of the BZA. For these reasons, the

Applicant's request for injunctive relief and a writ of prohibition must be denied.

Respectfully submitted,

Linda and Jack Fellers
By counsel

David S. Bailey (Va. Bar 24940)
16397 Triple Creek Lane
Beaverdam, Virginia 23015
TEL: 804-227-3122
FAX: 804-227-3581
email: dsbailey@igc.org

Gina Pisoni (Va. Bar 71363)
David S. Bailey, PLLC
9311 Silver Stream Lane, #L
Richmond, Virginia 23294
TEL: 804-787-0897
FAX: 804-270-2537
email: gmpisoni@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing memorandum in opposition to Stafford Limited Partnership's request for injunctive relief and emergency hearing was mailed, first class postage, to counsel for Stafford Lakes Limited Partnership, Stephen M. Sayers, Arthur E. Schmalz, Courtney R. Sydnor, Hunton and Williams, 1751 Pinnacle Drive, Suite 1700, McLean, Virginia 22102, and to H. Clark Leming, John E. Tyler, Leming and Healy P.C., P.O. Box 445, Garrisonville, Virginia 22463; to counsel for Stafford County, Joseph L. Howard, Jr., County Attorney, 1300 Courthouse Road, P.O. Box 339, Stafford, Virginia 22555; and to counsel for the Stafford County BZA, Carl F. Bowmer, LLC, P.O. Box 330, 904 General Puller Highway, Saluda, Virginia 23149, all this 3rd day of January, 2006.

David S. Bailey