MEMORANDUM

TO: THE HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: RASHAD M. YOUNG
CITY MANAGER

JAMES L. BANKS, JR.
CITY ATTORNEY

DATE: May 22, 2012

SUBJECT: IN RE APRIL 12, 2012 DECISION OF THE BOARD OF ZONING APPEALS FOR THE CITY OF ALEXANDRIA; QUESTIONS REGARDING THE BZA'S ROLE

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. Being in this position has raised a number of questions about how the process of an appeal works when the appeal is brought by the City rather than an outside appellant. To address these questions, the City Attorney provided a memo to the City Manager regarding the legal questions about the process. The City Manager, then taking that advice into consideration, sent a memo to the Board of Zoning Appeals, copying the City Council (dated May 16, 2012) explaining that because the BZA is not a party to this proceeding, there is no need for additional counsel to be brought on to represent the BZA. On Friday, May 18, 2012 the BZA held a worksession to discuss the matter among themselves; at that time, staff, including the City Attorney, was available to answer questions that the BZA had about this matter. During that worksession, staff, the City Attorney, and outside counsel retained by the City Attorney answered the questions of the BZA members with specific citation to case and statutory law.

Below we have provided information regarding 1) why the BZA is not considered a party in this case and does not require outside counsel; 2) what the responsibility of the BZA is in this case and how it will be fulfilled; and 3) how the BZA will be represented if the need arises.

1) **The BZA is not considered a party to this case and does not require independent counsel because the State Law has clarified the role of a BZA in an appeal of their decision.**

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 has 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 statue 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 primarily by the City Charter, not exclusively by the State Code (as is the case with counties), this language is informative in understanding the intent of the roles of the parties in a proceeding appealing a BZA decision.

Therefore, for all the reasons stated above, there is no legal reason for the City to retain additional counsel for the BZA and no reason to justify the expenditures related to additional counsel.

2) The BZA’s role in the current pending case, In Re April 12, 2012 decision of the Board of Zoning Appeals for the City of Alexandria is limited to providing the record.

In the recent appeal filed by the City the BZA is listed as a respondent with the limited responsibility of providing the record to the Court. The complaint specifically states: “Respondent BZA is named herein as a party for the purpose of providing the record on
appeal.” Therefore, the case has been specifically filed to make it clear that it is not a proceeding against the BZA but instead it is strictly a review of the BZA’s decision.

As such, the BZA’s responsibility is limited to providing the record which is an administrative function performed by staff for the BZA. Specifically, the following actions will be taken to comply with this responsibility:

- The staff for the BZA will compile the documents that make up the record in this case. The record consists of every document that was before the BZA when it made its decision, the transcript of the proceeding, and the findings of fact and conclusions of law that were ultimately approved by the BZA. The staff will then certify that these are true copies of the documents that make up the record.
- The staff will directly submit that certification and the documents to the Circuit Court (please note that staff has submitted the record of BZA actions to the Circuit Court in numerous other appeals without involvement of outside counsel for the BZA).
- The staff will report to the BZA at the BZA’s next hearing that this record has been submitted and what was included in the record.

This is the extent of the BZA’s responsibility and once this is completed, the BZA will have complied with any requirement of the appeal.

3) The City Attorney is the legal advisor for the BZA and will retain outside counsel if the need arises.

Pursuant to Section 11.02 of the City Charter, the City Attorney is the “...legal advisor of the city council, the city manager, and all departments, boards, commissions and agencies of the city...in all matters affecting the interest of the city...” As such, the City Attorney is the legal advisor for the BZA. There is no conflict of interest in this current case because the appeal as filed is not adverse to the BZA. The BZA is not a party and is only involved in the case to provide the record.

We are not aware of any other case where the BZA as a board, or any individual member was called upon to be a fact witness or to provide additional information in the case. However, if the BZA or any of its individual members were required to provide additional information in the case, additional evidence, or to testify in the Circuit Court appeal, the BZA and/or its individual members would need further advice about how to respond. At that time, the City Attorney would retain and the City Manager would authorize the necessary funds for separate outside counsel for the BZA and/or its individual members.
Dear Mayor Euille, Vice Mayor, and City Council:

Last night's session was a tour de force triumph of politics over good governance. To me it hammered home the weakness of the city's case and strengthened the perception of a city hall that has eliminated "the people" from the top of its municipal organization chart, even highly qualified, volunteer, city-appointed board members.

At this point, this appears to be a strictly internal issue. There has been no legal event to trigger the city's filing of this brief with any hope of prevailing. We are dealing with a city's internal legal tool - in this case, an unclear ordinance. All boards, commissions etc reside within the city's corporate structure and issues concerning them should not reach beyond that corporate structure for resolution. The chairman of the BZA
rightfully concerned that internal city staff and the attorney bringing the appeal will be responsible for producing a body of materials that substantially and fairly support the BZA’s decision. To date various city officials having acted to deliberately create an environment of hostility and distrust of their actions. This does have everything to do with the waterfront development and the downstream implications of this decision. It is simply disengenuous to insist otherwise. It has nothing to do with precedent. Policy is used to deal with future possibilities. Prior to a year ago, I was unconcerned with city hall - but after a year of watching, listening, and talking with friends in municipal government in other cities - I’m worried.

Sincerely,
Kathryn Papp
Kerry,

The concern stemmed from the fact that the BZA is named as a Respondent. We all know that the City isn’t “suing” its own Board (as unfortunately some have said). The state statute says quite clearly 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 proceedings; however, the board shall participate in the proceedings to the extent required by this section.” Va Code Sec. 15.2-2314. It goes on to say that the Board shall file a return that “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.” Board members were concerned about who decides what is “pertinent and material” and who will do the verifying. It’s never been a problem before, but in my experience we’ve never had a case where the City was the one appealing.

In all the other appeals, the complainant/petitioner is a citizen unhappy with a decision, and the City Attorney’s office, in conjunction with the Planning staff, has always responded for us. They do fine work. They prepare and file the record for us, which is probably all we have to do. (See attached from the most recent appeal). We never even see it.

But I’ve been told by the folks opposing the City’s appeal that they’re going to scour the “record” to see that it’s properly compiled and filed, and I’d hate for them to have some sort of objection based on the fact that the City Attorney filed it for us (as they did in prior cases) and at the same time filed the Petition for Review in this case.

Sounds technical, I know. I would imagine that any counsel we have would review the record as prepared by staff, be sure it’s as complete as we can make it, and sign off on submitting it, much as Mr. Banks did in the attached. This lawyer would also stand by if we were required to file anything else as the case proceeded. He/she would NOT be filing briefs, NOT appearing in court, NOT arguing the case, etc.,. That’ll get done by the lawyers for the other respondents. So the role would be very limited.

And for what it’s worth from a policy perspective, it would take the wind out of the sails of those critics who are vociferously critical. Believe me, none of us wants to spend the City’s money needlessly.

Mark S. Allen
Law Offices of Mark S. Allen
111 Oronoco Street
Alexandria, Virginia 22314
703-836-8787
f703-836-7459
Mark

Thanks for writing and I appreciate the BZA's position. Quick question, since the decision as a matter of record is the subject of the appeal, why I'd there a need for counsel? Surely a judge's decision when appealed does not necessitate hiring outside counsel. Additionally, would the circuit court even consider briefs or opinions from other counsel since the matter is the BZA's decision of record? I would hate to hire counsel and have their work rejected by the court.

Hope you are well.

Kerry

Sent from my iPhone

On May 22, 2012, at 3:44 PM, "Mark Allen" <mallen@markallenlaw.com> wrote:

**COA Contact Us: Mayor, Vice Mayor, and Council Members**


Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Mark
Last Name: Allen
Street Address: 111 Oronoco Street
City: Alexandria
State: VA
Zip: 22314
Phone: 703-836-8787
Email Address: mallen@markallenlaw.com
Subject: Letter to Council from BZA

I wanted to be sure you received this letter from the BZA, which was delivered to the City Clerk's office yesterday. I do not believe this representation will be very expensive, nor long-lasting. We anticipate that such counsel would assist in being sure the record is properly filed and that any other duties which may be asked of the Board be properly fulfilled. Most Board members felt that the City Attorney's office -- which does outstanding work for us in other, more traditional cases--may have at least the appearance of a conflict in advising both the BZA and the Council.

Mark Allen

Attachment: df9b0ab1be6f1331f8ad4205c2f58be4.pdf
IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

DONNELL R. FULLERTON, NANCY JENNINGS, AND SEMINARY HILL ASSOCIATION, INC.

v.

CITY OF ALEXANDRIA CITY COUNCIL

BOARD OF ZONING APPEALS FOR THE CITY OF ALEXANDRIA

ALEXANDRIA CITY PUBLIC SCHOOLS,

Respondents.

RECORD ON APPEAL

COMES NOW, the Board of Zoning Appeals for the City of Alexandria, Virginia, by counsel, and hereby submits a certified copy of the transcript of the proceeding before the Board of Zoning Appeals in BZA Case #2011-0012.

BOARD OF ZONING APPEALS FOR THE CITY OF ALEXANDRIA

By counsel

James L. Banks, Jr., VSB #28052
Christopher P. Spera, VSB #27904
Joanna C. Anderson, VSB #65463
Office of the City Attorney
301 King Street, Suite 1300
Alexandria, Virginia 22314
(703) 746-3750
Counsel for respondents

Record in Exhibit Room
Certificate of Service

I hereby certify that a true copy of the foregoing was mailed, postage pre-paid, this 5th day of December, 2011, to:

Donnell R. Fullerton, VSB 16991
Erika L. Dogan, VSB 70954
Carter, Fullerton, & Hayes, LLC
4115 Annandale Road, Suite 205
Annandale, Virginia 22003
Counsel for Petitioner Donnell R. Fullerton

Frank Putzu, VSB 28828 (Associate Member)
1423 Juliana Place
Alexandria, Virginia 22304
Counsel for petitioners Nancy Jennings and Seminary Hill Association, Inc.

Julia Judkins
Bancroft, McGavin, Horvath & Judkins, PC
3920 University Drive
Fairfax, VA 22030
Counsel for Respondent Alexandria City Public Schools

Joanna C. Anderson
Hello Council members,

Please have the BZA choose its own counsel and make the funds available. Your own outside counsel is expensive enough!

This unnecessary charade is unbelievable. Instead of going back to the drawing board and working with your voters to develop a compromise plan, Alexandria is becoming the laughing stock of the rational world out there. And personally: I pay multiple taxes, business included, so that the City (via Council) can decide to fight itself. I then pay/donate again to fight the City determined to “win” against itself and its citizens, no matter what.

Can you imagine how much more usefully these funds could be spent to help those in the City who need some help?

I feel I am watching kids in the sandbox play "I am bigger and better than you!" Well, things will...
change on June 12...

Ursula Weide
Dear Mayor and Council:

I'm writing to ask that the City Council:

1) Approve tonight the hiring of outside, independent legal counsel to represent the BZA in Circuit Court: "City Council for the City of Alexandria and Faroll Hamer, Director of Planning and Zoning for the City of Alexandria v. the City of Alexandria Board of Zoning Appeals and April

2) Provide the citizens of Alexandria with a complete accounting (City staff time and outside counsel) of all the taxpayer funds that have spent on legal matters related to Wales Alley (Old Dominion Boat Club) and the Protest Petition related to the waterfront rezoning hearing of January 21.
Sincerely,

Andrew Macdonald
COA Contact Us: Mayor, Vice Mayor, and Council Members

Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Bert
Last Name: Ely
Street Address: 200 South Pitt Street
City: Alexandria
State: VA
Zip: 22314
Phone: 703-836-4101
Email Address: bert@ely-co.com
Subject: Provide independent legal counsel to the BZA

Dear Mayor Euille, Vice Mayor Donley, and members of Council:

I am writing to urge Council to appropriate sufficient funds to the City's Board of Zoning Appeals to enable the BZA to hire independent legal counsel to advise and guide it in complying with all applicable laws and regulations as the BZA prepares and transmits to the Circuit Court the record of its decision in the waterfront zoning matter. Hopefully these funds can be appropriated at tonight's Council meeting so that the BZA can move forward in fulfilling its duties.

Very truly yours,

Bert Ely
Dear Members of Council:

Having decided to take the BZA to court over its ruling on Waterfront rezoning, the City is obligated to pay its legal fees in this matter. Of course it was a ridiculous and vindictive thing to do in the first pace, but now the City can hardly expect its own Board to rely on City legal staff to defend itself against the City's accusation.

Robert and Barbara Pringle
Residents and Taxpayers since 1968
It is ironic that Jim Banks has no problem spending our taxpayers money to hire outside council to defend his position in the Circuit Court Lawsuit on the BZA appeal on the Waterfront Zoning issue. BUT, when the BZA seeks city funds for a lawyers advise on what their responsibilities are as named defendant in the BZA appeal Banks says "no" if Banks is so incompetent that his office cannot handle a simple zoning appeal then he needs to find other employment. If taxpayers money is to be used, it should be used to help the cities council appointed BZA citizen members. It would be a minimal amount, unlike what Mcguire Woods will charge the city.

Please provide the BZA with sufficient funds so that it can hire independent legal counsel to advise and guide the BZA in complying
with all applicable laws and regulations as it prepares and transmits to
the
Circuit Court the record of its decision in the waterfront zoning
matter.
Kahryn Papp <kpappva@gmail.com>

Sunday, May 20, 2012 7:03 PM

William Euille; Frank Fannon; Kerry Donley; Alicia Hughes; Del Pepper; Paul Smedberg; Rose Boyd; Jackie Henderson; Rob Krupicka; Linda Owens; Elizabeth Jones

COA Contact Us: Fund BZA

ATT00001.txt

COA Contact Us: Mayor, Vice Mayor, and Council Members


Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Kahryn
Last Name: Papp
Street Address: 504 Cameron Street
   City: Alexandria
   State: VA
   Zip: 22314
   Phone:
Email Address: kpappva@gmail.com
Subject: Fund BZA

Dear Mayor, Vice Mayor and Council Members:

Provide the BZA with sufficient funds so that it can hire independent legal counsel to advise and guide the BZA in complying with all applicable laws and regulations as it prepares and transmits to the Circuit Court the record of its decision in the waterfront zoning matter.

Comments: This is not beyond the means or bounds of good governance for the City of Alexandria. Any hesitation or reluctance to provide this fundamental and necessary legal assistance to the city's chartered Board of Zoning Appeals might be interpreted as an act of poor judgment by elected officials.

Sincerely,
Kathryn Papp
COA Contact Us: Mayor, Vice Mayor, and Council Members

Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Hugh
Last Name: Van Horn
Street Address: 416 South Pitt Street
City: Alexandria
State: VA
Zip: 22314
Phone: (703) 836-1066
Email Address: vanhorns1@verizon.net

Subject: BZA representation

Dear Mr. Mayor, Mr. Vice-Mayor, and Members of City Council:

Please provide the BZA with sufficient funds so that it can hire independent legal counsel to advise and guide the BZA members in complying with all applicable laws and regulations as it prepares and transmits to the Circuit Court the record of its decision in the waterfront zoning matter.

Thank you.
Christine Bernstein <chbernstein@comcast.net>

Sunday, May 20, 2012 1:32 PM

William Euille; Frank Fannon; Kerry Donley; Alicia Hughes; Del Pepper; Paul Smedberg; Rose Boyd; Jackie Henderson; Rob Krupicka; Linda Owens; Elizabeth Jones

COA Contact Us: Legal Counsel for BZA

ATT00001.txt

COA Contact Us: Mayor, Vice Mayor, and Council Members


Issue Type: Mayor, Vice Mayor, and Council Members
First Name: Christine
Last Name: Bernstein
Street Address: 121 Princess St.
City: alexandria
State: VA
Zip: 22314
Phone: 703 683-0456
Email Address: chbernstein@comcast.net
Subject: Legal Counsel for BZA

City Attorney, Mr. Banks, does not believe it is necessary for BZA to have legal counsel for the City's Circuit Court appeal of the BZA decision. I would like to suggest that since McGuire Woods has already been retained by the City, that they be redirected to represent BZA and that Mr. Banks do the job that he was hired to do and that is to represent the City.

Comments: It seems to me that a trained attorney for the City should be capable of handling a zoning issue at the Circuit Court level. If not, we have the wrong man for the job. What is Mr. Banks going to do during the court appeal, carry the briefcase for the McGuire Woods attorney?

I urge you to support the BZA in their interest to hire legal counsel.

Thank you.
The City must provide the BZA with sufficient funds so that it can hire independent legal counsel to advise and guide the BZA in complying with all applicable laws and regulations as it prepares and transmits to the Circuit Court the record of its decision in the waterfront zoning matter. To do otherwise would be another flagrant example of political and institutional conflicts of interest...the City playing any angle it can invent to disenfranchise and discriminate against its own tax-paying citizens. Doesn't the fact that so many of Alexandria's citizens now have to resort to the courts so many times to get this current city government to act responsibly mean anything to anyone in city public office able to think outside of their own bathwater drinking bubble?
Dear Mr. Mayor and Members of Council:

On Friday, the BZA voted to request funds from the City to hire independent counsel to advise on its response to the Council's appeal of its April 12 ruling overturning the City Planning Director's rejection of the citizens' protest petition against the proposed rezoning under the Waterfront Plan.

The City Comments: Attorney has publicly declared that the BZA has no need for outside legal help. He is wrong. He would be right if the City's appeal to the Circuit Court had limited itself to the legal merits of the BZA's finding of fact. It would then be up to the lawyers for the protesters to argue why the decision was correct. The City Planning Director's rejection of the citizens' protest petition against the proposed rezoning under the Waterfront Plan.

The City Comments: Attorney has publicly declared that the BZA has no need for outside legal help. He is wrong. He would be right if the City's appeal to the Circuit Court had limited itself to the legal merits of the BZA's finding of fact. It would then be up to the lawyers for the protesters to argue why the decision was correct. The City Planning Director's rejection of the citizens' protest petition against the proposed rezoning under the Waterfront Plan.

The City
BZA's action but the
BZA's process as well. Why the City opted to this
course of action is unclear.

What is clear is that the BZA has
the right to defend its integrity, called into question by the city's
appeal. For that it needs legal counsel. The city attorney, having
attacked the BZA, cannot defend it at the
same time. Hence, the City,
being unable to provide legal defense for the BZA, has the obligation to
provide funds for the BZA to seek independent counsel. Under these
circumstances, the Council would
be remiss if it voted to deny the BZA, a
Council appointed body, the funds needed to defend itself against
the
serious allegations contained in the City's
appeal.

Respectfully,

Dennis Kux
Hon. William D. Euille and Members
of the Alexandria City Council
City Hall
301 King Street
Alexandria, Virginia 22314

VIA HAND DELIVERY

Re: In Re: April 12, 2012 Decision of the Board of
Zoning Appeals for the City of Alexandria
Case No. CL 12002769, Alexandria Circuit Court

Dear Mr. Mayor and Members of Council:

As Chairman of the Alexandria Board of Zoning Appeals, I write to forward to you the Board’s request that the City Council direct the appointment of outside counsel to represent and assist the Board in fulfilling its duties as a respondent in the above-referenced matter.

This request is made as a result of extensive discussions held during the Board’s work session on May 18, 2012, which included the Board’s members, City staff, the City Attorney, and outside counsel that has been retained to assist the City Attorney in this case. The request was supported by a vote of 6-1 and is made consistent with the provisions set forth in Section 15.2-2308(D) of the Code of Virginia, which authorizes a Board of Zoning Appeals to hire legal counsel to be paid for by the applicable City or County authority.

Please feel free to contact me or other Board members if you have questions. We thank you for your consideration and look forward to hearing your response as quickly as possible.

Sincerely,

Mark S. Allen