

The legislative body of Fairfax County (FC), its [Board of Supervisors \(BoS\)](#), has enacted a [zoning ordinance \(ZO\)](#). The ZO places restrictions (which vary by residential district) on such things as how far from the street a house must be set back, the minimum width of a residential lot, etc.¹ Prior to April 2004, “when a property owner desired modification of [such restrictions, e.g.] the specified yard requirements, an increase in fence or wall height, or a waiver of the minimum lot width requirement, a variance application was submitted for review and action by the FC [Board of Zoning Appeals \(BZA\)](#).”²

Believing that the ability to relax the ZO requirements was being abused, residents in McLean (joined by the FC BoS), and people from other parts of Virginia sued their BZA’s for granting variances which they believed were not justified and which they felt diminished the quality of their neighborhoods. In [Cochran v. Fairfax County Board of Zoning Appeals](#), 267 Va. 756 594 S.E.2d 571 (2004), the Virginia Supreme Court agreed with them, holding that variances³ from the zoning ordinance are statutorily⁴ permitted only upon a showing of “undue hardship.” Explaining the undue hardship standard, the Court stated that a county “BZA has no authority to grant a variance unless the effect of the zoning ordinance, as applied to the piece of property under consideration, would, in the absence of a variance, ‘interfere with all reasonable beneficial uses of the property, taken as a whole.’”

The “undue hardship” standard means that a property owner who has *any* reasonable beneficial use of his property whatsoever does not qualify for a variance. It does not, however, mean that every homeowner who does not qualify for a variance is without recourse if he faces a unique situation not contemplated by the general rules applicable to his district. A number of individual ZO provisions provide relief in specific circumstances. ZO section 8-914, for instance, provides for the approval of reduction to the minimum yard requirements based on error in building location. ZO section 9-610 provides for waiving minimum lot size requirements. ZO section 9-613 provides for waiving minimum lot width, minimum yard and privacy yard requirements for single family attached dwelling units. These sections are cited merely as examples and do not comprise an exhaustive list.

¹ See [Va. Code § 15.2-2280](#) for information on the types of things zoning ordinances can regulate in Virginia.

² Introduction to the Staff Comment in the Dec 6, 2004 [Staff Report](#) of a Proposed Fairfax County Zoning Ordinance Amendment originally set for hearing by the Planning Commission on January 12, 2005 and by the Board of Supervisors on January 24, 2005.

³ "Variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done. It shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning. Va. Code § 15.2-2201 (Definitions)

⁴[Va. Code § 15-2.2309](#)

The FC BoS, which had joined the McLean residents in seeking to overturn abuses of the variance provision, felt there were special situations short of “undue hardship” and not already provided for which warranted provisions for relief. Because the BoS “determined it was in the County’s best interest to allow some limited flexibility with regard to certain ZO provisions,”⁵ the first of several anticipated ZO amendments⁶ to provide such flexibility was proposed. The proposed ZO amendment would have allowed the BZA, or the BoS to relax ZO provisions by issuing, respectively, either a special permit (**SP**) or a special exception (**SE**) to define modified requirements specific to the subject property.

While the proposal contained limitations on the granting of relief from ZO restrictions, it did not contain *standards* to guide decision-makers in determining whether or not requests for relief were justified. And while there are general standards in the ZO which apply to all SP’s and to all SE’s,⁷ these standards are not sufficient to provide assurances that SP’s and SE’s granted under the proposed ZO amendment would be limited where relief from the rules applicable to the community as a whole was truly necessary and justified. The proposal was put on a fast track to deal with requests for variances which had accumulated over the period of more than a year since the *Cochran* decision was announced.

Fearing that the BoS was about to pass provisions which could be abused more easily than the variance provision had been abused prior to the *Cochran* decision, the McLean Citizens Association (**MCA**) passed a resolution asking that the BoS provide additional time to consider the proposal and that the BoS provide for public workshops to allow the citizenry to weigh in on the proposal. In response to the request from the MCA and from others around the county, the BoS withdrew the proposal indefinitely while it studied its options.⁸ Meanwhile, the state legislature passed a law amending the Virginia Code to allow counties the option of providing for another form of relief in addition to variances and to SP’s/SE’s—the “modification.”⁹

On August 5, 2005, the county staff briefed a BoS committee on options for reenergizing the proposed ZO amendment. Staff has divided the proposal into fifteen issues which are

⁵ See the previously cited introduction to the Staff Comment in the Dec 6, 2004 [Staff Report](#).

⁶ Additional information about the proposed amendment is available on the county's website at: <http://www.co.fairfax.va.us/dpz/projects/minyard.htm> .)

⁷ ZO section 8-006 contains general standards applicable to SP’ and ZO section 9-006 contains general standards applicable to SE’s,

⁸ On July 11, 2005, the Board of Supervisors passed a zoning ordinance amendment to address a noncontroversial sub issue which would have been addressed by the original proposal. The amendment allows an increase in fence height and/or modification to the corresponding location regulations for containment structures associated with outdoor recreation/sports facilities playing fields/courts and golf courses when such structures are designed to preclude the flight of any ball or other sports equipment onto adjacent property as a special permit granted by the Board of Zoning Appeals or in conjunction with rezoning or special exception approval granted by the Board of Supervisors. The amendment is viewable at: <http://www.fairfaxcounty.gov/dpz/zoningordinance/adopted/nofind/zo05373.pdf>

⁹See paragraph 4 of [Va. Code § 15-2-2286](#)

identified and described in a “Summary Table Elaborating on Staff Recommended Zoning Ordinance Amendments. The county is now seeking input on how to address these issues.