

1 MINUTES OF THE BRIEFING BY THE HENRICO COUNTY ATTORNEY'S OFFICE  
2 REGARDING THE GRANTING OF VARIANCES AFTER COCHRAN V. FAIRFAX  
3 COUNTY BOARD OF ZONING APPEALS, HELD IN THE PLANNING DEPARTMENT'S  
4 LARGE CONFERENCE ROOM, HENRICO COUNTY GOVERNMENT COMPLEX, ON  
5 THURSDAY, JUNE 16, 2005, AT 6:00 P.M.  
6

Members Present: R. A. Wright, Chairman  
James W. Nunnally, Vice-Chairman  
Elizabeth G. Dwyer,  
Helen E. Harris  
Richard Kirkland, CBZA

Also Present: J. T. "Tom" Tokarz, Assistant County Attorney  
David D. O'Kelly, Jr., Assistant Director of Planning  
Benjamin Blankinship, Secretary  
Paul Gidley, County Planner  
Priscilla M. Parker, Recording Secretary  
Ann B. Cleary, Recording Secretary

7  
8 Mr. Wright - We will have Counsel discuss the case of Donald H.  
9 Cochran against Fairfax, Virginia Board of Supervisors of anything revealed in the Town  
10 of Pulaski and the Board of Zoning Appeals, City of Virginia Beach, against Jack  
11 Pennington. Each member of the Board has been furnished with a copy of this opinion  
12 and we have all read it, and I thought it would be good for us to get more input from  
13 legal counsel so that we can all get on the same page.  
14

15 Mr. Tokarz - Yes, sir. Well, I appreciate the opportunity to come and talk  
16 with you and I have a little two-page outline of what I think are the most salient points  
17 and I will hand that out in just a second, but I will hold it for one second and give you a,  
18 hopefully, sort of 90 second lead into this case. I really regard the Cochran case as  
19 being a separation of powers case. I think the Supreme Court basically has said that  
20 the General Assembly, which has the authority to grant zoning authority to localities  
21 under the Police power of the Commonwealth, the Supreme Court was trying to make a  
22 clear delineation between the role of the legislative body and the administrative process  
23 that is involved here. You, as BZA members, have two different types of authority under  
24 the law, and they are governed by 15.2-2309 of the Code of Virginia. One type of  
25 authority is a legislative type of authority. It is an authority where you get to consider a  
26 wide range of information and make decisions which you think are consistent with the  
27 zoning ordinance and the purposes of zoning and the things that have been set forth in  
28 the ordinance. That legislative authority occurs most particularly with cases of special  
29 exceptions and use permits. You basically have a right to make any types of decisions  
30 that you think are appropriate under all the facts and as long as that decision is  
31 something that reasonable people could disagree about, your decision will be upheld.  
32 That is called legislative authority.  
33

34 The second type of authority is administrative authority and administrative authority is  
35 authority that basically is authority for you to exercise solely in conformance with your  
36 statutory rights. Variances, for example, interpretations of the zoning ordinance. You  
37 do not have the right as what is called administrative authority to rewrite the zoning  
38 ordinance or to take upon yourselves the collection of alternatives which are reserved to  
39 the legislature, and really this case talks about administrative authority of the BZA and  
40 the variance situation. So, with that beginning, I would simply say I see this as a  
41 separation case where the Supreme Court wants to make it clear, and wants Boards of  
42 Zoning Appeals to have some guidance as to legislative authority that they have in use  
43 permits, special exception situations and administrative authority, which they have in the  
44 variance situation.

45  
46 And I will hand out this little two-page summary and I will just go over that with you real  
47 quickly here. Zoning is, and I started with a definition of zoning because zoning is  
48 probably one of the more controversial areas of law. It is now commonly accepted that  
49 localities have the right to divide land into districts and by uses, but that is a power of  
50 government to exercise control over someone else's property, so along with the power  
51 to exercise zoning rights, the General Assembly has set forth a number of criteria for  
52 how that gets done. So, I have given you the definition of zoning. You fairly know it,  
53 dividing the property into the uses and districts and then talking about how you can do  
54 the buildings and structures. The General Assembly has made it clear that the zoning  
55 of land can only be accomplished by ordinance, and, of course, under Virginia law,  
56 ordinances can only be passed by the governing body of the locality, and so the  
57 General Assembly has said, "Governing body, you have the right to do the zoning, but  
58 to have to go through various processes that are incumbent upon the ordinance  
59 adoption process, public notice, consideration of public input and that type of thing.  
60 Because the ordinances that are passed by the localities do have the right to regulate  
61 the use of property, there is a built in control on that, and the built in control is what is  
62 normally known as "the taking clause". Both the Federal Constitution and the State  
63 Constitution say that "government may not take somebody's property for public use  
64 without compensating them." And so, one of the cases that is always of concern is  
65 whether government action goes too far. There has been a long series of cases in the  
66 20th Century and the United States Supreme Court dealing with how much  
67 governmental action is too much, and the Virginia Constitution has a similar provision  
68 which says you can't take somebody's property without just compensation. So,  
69 constitutionally, the ability of a locality to zone land and to regulate uses is limited by the  
70 fact that they can't deprive all use of the land to the extent that it takes the land. The  
71 word take is a term of law and basically means you can't remove all economic  
72 usefulness to the land so that people can't benefit from the property they have a right to.  
73 Where you come in, as the Board of Zoning Appeals, is that you are set up, established  
74 by the General Assembly, as a mechanism to insure that for individual properties that  
75 the zoning ordinance does not have an unconstitutional effect, does not take all  
76 beneficial uses from the property. So, the question really that comes up under the  
77 takings provision and that is addressed by the variance provision is "Has the zoning  
78 ordinance removed all beneficial use of the property?" So, that is the first part of this  
79 that I have laid out in the background.

80  
81 In the Cochran case, and I've got copies of that here if you all want them, I didn't know if  
82 you all had it, but I've got copies available if you need it. OK. In the Cochran case the  
83 Supreme Court addressed particular cases, one out of Pulaski, one out of Virginia  
84 Beach and one out of Fairfax, all of them similar in terms of the type of issue that was  
85 raised, although they were different in the facts, of course, and what they did is they  
86 took the three cases and used them as a forum for setting forth the law on variances in  
87 probably as clear a way as they have ever done. One of the things they did very early  
88 on in the analysis was to say that the power to grant variances is administrative in  
89 nature. And in a footnote, they particularly distinguished the administrative nature of the  
90 power to grant variances from the legislative power, to grant special exceptions and use  
91 permits, as I described earlier. And the reason that is important is, I will give you a  
92 parallel example, by the Planning Commission. Ms. Dwyer has been on the Planning  
93 Commission. Certain actions of a Planning Commission are deemed to be legislative in  
94 nature, and certain actions are deemed to be administrative. Approval of subdivisions,  
95 for example, the law is because subdivision approval is administrative, the Planning  
96 Commission must approve any subdivision plan that meets the requirements of the  
97 ordinance. Whether they think it is a good subdivision, a bad subdivision or what, they  
98 have no discretion to do that. Similarly here, because the power to grant variances is  
99 administrative in nature, whether it is a good idea or a bad idea is not really the test.  
100 And that is really what the Supreme Court was trying to point out here, and so what the  
101 BZA in the analysis in Cochran was said to have is "authority to grant variances only to  
102 avoid an unconstitutional result." It has a limited scope. The administrative power that  
103 it has is limited solely to, and this is my reading of it, solely to avoid the situation where  
104 a taking would occur. They don't use the word taking, per se, but I am giving you the  
105 lay translation of this. You have the right in a particular case to hear from citizens who  
106 say, "The zoning ordinance as applied to my property will take my property away from  
107 me and deprive me of all use." And you have the right and the authority under the State  
108 Code to provide a remedy, a relief from the zoning ordinance in that particular case,  
109 under whatever conditions you think are appropriate, conditions that effectuate the spirit  
110 and intent of the ordinance, do the least amount of harm to surrounding property, and a  
111 number of the considerations that are set forth in the ordinance. But the key  
112 consideration here is that before you even get to all of the equity questions about  
113 whether you should put conditions on or anything like that, the key first question is,  
114 "Does the zoning ordinance in this particular case deprive the property of all beneficial  
115 use?" And if the zoning ordinance does not, what Cochran said is, "You can't go any  
116 further in your zoning analysis. That is the end of the story. And they also make it clear  
117 by citing a case that came out in 1980. They make a distinction between removing all  
118 beneficial use of the property, which would be a taking, from a case where simply there  
119 is a substantial decrease in the property value. That has not been regarded as a taking  
120 under Federal jurisprudence and it is not regarded as a unconstitutional result in my  
121 reading of this case, and so, simply the fact that somebody comes in and says to the  
122 BZA, "The zoning ordinance has diminished the value of my property by \$100,000, so  
123 that it is only worth \$300,000 instead of \$400,000," does not constitute a taking or an  
124 unconstitutional result, that I think brings it within the scope of the variance power that  
125 you have.

126  
127 What I wanted to just direct your particular attention to is down near the bottom, the  
128 second to the last paragraph says, and this really is the starting and probably your  
129 ending point for a lot of your cases. The “threshold question” in any variance case is  
130 “whether the effect of the zoning ordinance upon the property under consideration, as it  
131 stands, interferes with all reasonable, beneficial uses of the property, taken as a whole”  
132 If the answer is in the negative, the BZA as no authority to go further. And I will give  
133 you my lay shorthand analysis of what that means. If you have a variance case and a  
134 landowner has any reasonable economic use of their property, then with the ordinance  
135 being applied to it, then they are not entitled to a variance and you don’t have any  
136 authority under the Cochran decision to grant a variance. So, that is really the first  
137 question and if the answer is yes, they continue to have use of their property, then the  
138 variance must be denied under the Cochran decision, and the reason for that is, once  
139 again it goes back to the separation of powers, what the General Assembly is doing is  
140 trying to make it clear that it is up to the governing body, and in this case the Board of  
141 Supervisors can decide how wide the setbacks have to be, what sort of uses there can  
142 be in the district, whether you allow accessory structures under this condition or that  
143 condition, because they are the legislative body, whereas the BZA, being a quasi-  
144 judicial body, only has administrative authority in this particular case, in the case of the  
145 variance.

146  
147 On Page 2, I just summarized the three applications and Cochran and the three cases  
148 they had before them. In each case, they found that the variance that had been granted  
149 was improper. The first one was in Fairfax County. The owner wanted to demolish his  
150 existing home and to put a bigger home on the property, and he asked for a two-foot  
151 setback variance and it was possible, under the facts of the case, for him to move the  
152 house on the property and get what he wanted to do, and, in fact, get more square  
153 footage because he could build three stories instead of two, which is what his plan was.  
154 And he said, “But I don’t want to do that, because I want to have a side loaded garage  
155 rather than a front loaded garage. It is going to be more aesthetically pleasing. It is  
156 going to have more curb appeal. It is going to improve its parking value. The Supreme  
157 Court said “Those may all be good reasons, and aesthetically that might be the right  
158 decision, but that does not give the BZA the authority to grant a variance.” And the  
159 reason was that it was because the property could continue to be used for beneficial  
160 use. The Court said specifically the house could have been reconfigured. It could have  
161 been moved two feet to the south, or they could have simply abandoned the project and  
162 allowed them to continue the existing use. So, because the property wasn’t being  
163 deprived of its economic use, the variance that was granted by the BZA was overturned.  
164 That was the first case.

165  
166 In Pulaski there was a request for construction of a garage on a corner lot. The owner  
167 requested a 10-foot setback variance. The Court said that under the facts of that case,  
168 the proposed garage could have been moved to another location, or the project  
169 abandoned. He had a home on the property, and so they continued to have beneficial  
170 use of the property. It did not constitute the denial of all reasonable use, and, therefore,

171 the variance that was granted in that case was found to be illegal by the Supreme  
172 Court.

173  
174 Finally, in the Virginia Beach case there were actually four variances requested. There  
175 were two variances that were acted upon by the BZA. The major one, and the only one  
176 that I think that the Supreme Court addressed was the variance request for construction  
177 of an accessory shed. They wanted to have an accessory shed that was larger than the  
178 maximum size permitted by the ordinance. The ordinance permitted a maximum size of  
179 500 square feet. They already had an existing, I think, attached garage of 528 square  
180 feet. They wanted a variance to go up to add an additional almost 200 square feet,  
181 which would take it up to 819 or 860, something like that. They also asked for a  
182 variance to allow the 500 foot maximum side limitation to be overcome to accommodate  
183 the fact they had an existing 528 square foot garage on the property. The Zoning  
184 Administrator did not oppose that one, because it would simply bring them into  
185 conformance with the existing ordinance. The Zoning Administrator did, however,  
186 oppose the increase in the maximum size of 800 plus square feet. The BZA turned  
187 down the increased request to go to 800 plus square feet, approved the increase to 28  
188 feet, to bring it in conformance with the existing ordinance. The circuit court then  
189 overturned the BZA and granted the variance for everything, including the increase in  
190 the maximum size to 819 square feet, and the Court reversed that. The Court said that  
191 as in the other two cases, the shed that the people wanted to build in Virginia Beach  
192 could have been built as an addition to the existing house under the ordinance. The  
193 ordinance permitted it had they attached it to the house, but they wanted a detached  
194 shed. Or they could have simply abandoned the project and, therefore, there were no  
195 grounds for a variance.

196  
197 When you take those three cases together, it basically comes down to this. I didn't put  
198 this on the listing, but what I distill is this. No. 1, Simply because you want an increase  
199 in market value or simply because you want something that is more aesthetically  
200 pleasing, or simply because you want something that you think would meet your family's  
201 needs all may be good reasons for a variance, but under the Supreme Court's analysis  
202 would not be within the authority of the BZA to grant. If there is already an existing use  
203 on the property that can be continued, or if there are other alternative uses of the  
204 property that can be provided. It doesn't always just apply just to existing buildings. For  
205 example, if a variance request were to come to a BZA for property that was vacant, and  
206 I will give you the classic example. A builder goes out, subdivides a lot of property into  
207 real small lots, but wants to put big houses on them. He puts houses that are so big  
208 that they can't put a deck and meet the setback requirements. The typical thing that  
209 they have done is they said, "Well, we are not going to build a deck on there, but you go  
210 in and request a variance from the BZA." And basically under the analysis that comes  
211 out in Cochran, you would not have the authority to grant a variance to allow the  
212 construction of a deck that violated setback requirements because there would be an  
213 existing use of the property. That has been common practice in a lot of localities. I  
214 don't know how much that has occurred in Henrico, but certainly it has been a common  
215 practice in a lot of localities according to my colleagues. Cochran says that is  
216 absolutely no proper use for the variance power of the BZA. The remedy for the



217 builders, the developers in that situation is either build the homes to meet the setback  
218 requirements with the deck, or go to the Board of Supervisors and the City Council and  
219 ask for a change in the setback requirements. It becomes a legislative decision.  
220 Otherwise, what happens is bit by bit, variance by variance, they come and they ask the  
221 BZA to rezone the property in violation of the zoning ordinance. That is a decision that  
222 really is left to the Board of Supervisors rather than through misuse of a variance  
223 process. So, my basic rule of thumb is if they come to you and they have an existing  
224 use or they can have a, if there are beneficial uses on vacant property that can be  
225 made, then a variance to go outside of the zoning ordinance to do something in addition  
226 to that is something that should be left to the Board of Supervisors and not to the BZA.  
227 That is my analysis of the case, Mr. Chairman.

228  
229 Mr. Wright - I've got a couple of questions. In the third case, the one with  
230 the garage..

231  
232 Mr. Tokarz - At Virginia Beach, yes.

233  
234 Mr. Wright - The Supreme Court didn't address the fact that the garage  
235 was built in 1972, the way I see it. I wasn't sure it was in violation when it was built or  
236 they changed the ordinance or what.

237  
238 Mr. Tokarz - Yes. It didn't make it clear...

239  
240 Mr. Wright - It didn't make it clear and the BZA granted that variance and  
241 the Supreme Court affirmed that part of it.

242  
243 Mr. Tokarz - Well, I am not sure.

244  
245 Mr. Wright - They affirmed the decision of the BZA, which denied the  
246 additional construction of the accessory building, but approved the 28 extra feet. Of  
247 course, that excites my curiosity because I wondered if what happens when somebody  
248 has done that and it comes to the attention of the staff or somebody complains next  
249 door, and they come in and they come before the BZA and say now, this was somehow  
250 approved or they got this thing. Now what are we going to do? Are we going to make  
251 them whack off 28 feet? Especially, these cases have come before us – not as many  
252 recently, but in years past. The homeowners, when they construct the house, either  
253 that or the contractor or homeowner don't want to spend their money to get the surveyor  
254 to come out and stake the house. Invariably, the house will be put up improperly. In  
255 other words, it will encroach on the setback line a foot, or two feet, or a side line, a foot,  
256 or the back, and we used to have those. I know there was a case in the City, I believe,  
257 that they required them to remove the building. I know that case. We have been sort of,  
258 if it didn't affect anybody, we've been granting those. The only alternative would be to  
259 chop off maybe a certain part of the building or to move the house. I don't know how  
260 that fits in with this thing here. I was trying to get some help out of that 28 feet, but I  
261 don't believe I got much.

262

263 Ms. Dwyer - They didn't address that, did they?  
264  
265 Mr. Wright - They didn't address that. They let that go. I guess they  
266 figure they had gone as far as they could go.  
267  
268 Mr. Blankinship - Was it before the Supreme Court?  
269  
270 Mr. Tokarz - When you look at the conclusion where they talk about the  
271 reasoning they use for each of the cases, the only thing they say about the Virginia  
272 Beach case is they say "The shed in Virginia Beach could have been built as an  
273 addition to an existing house or the project abandoned." What we don't know from the  
274 summary of facts that we have here is whether that 28 foot portion of the variance was  
275 contested in the Supreme Court or not. My guess is that it was not, that probably by  
276 agreement of the parties, the issue was focused solely on the increase from the 500 sq.  
277 ft. maximum to the 816 sq. ft. maximum. That would have been encompassed with  
278 going with the building of that accessory shed. They don't mention, other than simply  
279 stating the facts, and maybe this was completeness of the statement of fact. Do they  
280 refer to it, but they don't refer to it in their conclusions and their description of the  
281 Virginia Beach case, nor do they really address it in their final say, where they simply  
282 say, "We will reverse the Circuit Court's cases in Fairfax and Pulaski and reinstate the  
283 resolution of the Board of Zoning Appeals for the City of Virginia Beach." My guess is  
284 the parties said we are not contesting that...  
285  
286 Mr. Wright - How does this case apply to these cases, where the builders  
287 make an error and build a house over the line? What happens, they get their  
288 occupancy permit and the County checks it out and finds, "Oops. You built this house  
289 too close. It is a foot or two feet over the building line or the sideline or whatever, and  
290 we haven't had one of those in a while.  
291  
292 Ms. Dwyer - A church case not too long ago.  
293  
294 Mr. Wright - Yes, but we have always admonished the people. We have  
295 tried to get the guilty party and say, especially if it is the same contractor. One of these  
296 days we are going to turn it down and you are going to have to move the house or  
297 whatever. We tried to admonish them and really make it tough when they come before  
298 us, but generally we have approved those cases where the only alternative would be to  
299 move the house or tear it down and start all over again.  
300  
301 Mr. Tokarz - Well, that, you probably put your finger on probably what is  
302 the highest of all the cases. You know, the Supreme Court, has to be given credit for  
303 giving a real bright line here. But the case that you are talking about is what I consider  
304 to be in that little crease. And I guess what the argument that would have to be made in  
305 that case is a discussion that you guys have been thinking about in that case, it is  
306 whether they would be deprived of the beneficial use of the house if you made them  
307 take it down. In theory, if you apply Cochran literally, even if you made them take it  
308 down, they will still have the right to make economically beneficial use of the property.

309 By the same token, I will put my property owner's hat on for a second. I can see myself  
310 arguing to a court for the right amount of money. I can see myself arguing to a court,  
311 "Your Honor, if you make them take down a \$400,000 house, this is in a sense a taking  
312 of the property. This isn't just a substantial decrease in market value. You are  
313 eliminating all beneficial uses of that."  
314

315 Mr. Kirkland - How about moving it? Yank it up and move it back a foot.  
316 Jack it up and move it.  
317

318 Ms. Dwyer - When Mrs. Harris and I took this course, BZA course, and  
319 we had a speaker come from different jurisdictions. And I believe it is, they are pretty  
320 diligent about following Cochran to the letter, and I understood from their attorney that  
321 they would make them move out or chop off the wall or whatever, that they would  
322 interpret it that strictly. But I think your argument about the taking, if there is any gray  
323 area, that may be it.  
324

325 Mr. Tokarz - That would be a hard case. Now let me tell you what I think.  
326 Here's where I think it may be wise for people trying to apply Cochran and handle the  
327 separation of powers seem to go. This would be a legislative judgment, but the  
328 legislative judgment is this. In the past session of the General Assembly, the General  
329 Assembly allowed for zoning ordinances to provide for modification of the zoning  
330 ordinance by the zoning administrator. This would require the Board of Supervisors to  
331 amend the zoning ordinance to allow a zoning modification. It is a right given through  
332 your local governing body to use or not use, as they choose fit. The analog, for  
333 example, is the locality, county to county has a right to impose civil penalties on a wide  
334 variety of things, including zoning code violations. The Board of Supervisors has never  
335 chosen to adopt civil penalties because there are also the questions about how you do  
336 that fairly and whether it is a good idea or not. But the Board of Supervisors now has a  
337 statutory authority if they wish to enact a zoning ordinance amendment that would allow  
338 the Director of Planning to be able to modify the terms of the ordinance, and I can see a  
339 very good case for saying to the Board of Supervisors, "You know if you don't want to  
340 give broad authority to Mr. Silber to run crazy and wild, and hand out modifications like  
341 candy," because they probably know he probably would because he is such a nice guy.  
342 But they could give a limited grant of authority to do modifications. They could say, for  
343 example, "The zoning administrator shall," and I am just making this up as we go along,  
344 "shall under the appropriate circumstances, have the right to modify the distance  
345 requirements of the zoning ordinance up to two feet for setback requirements in cases  
346 where there has been mistakes in construction, not due to the fault of the owner of the  
347 property," and list two or three of these hard situations where Mr. Silber could do that  
348 administratively, and not put the BZA in that particular case, but technically speaking, I  
349 mean, I think if you read Cochran literally, you would not have the right to grant a  
350 variance in the case that you are talking about.  
351

352 Mr. Wright - I understand it now. But let's take it a step further. The  
353 Packer case in 1982, and Cochran quotes that. A statute may, of course, authorize  
354 variances in cases where an ordinance application to the particular property is not



355 unconstitutional. My reading of that is that if legislature so decided, it could enact  
356 legislation which would permit Boards of Zoning Appeals to vary the ordinance in certain  
357 conditions, like if it didn't have an impact on, similar to the use permit. It didn't have an  
358 impact on neighborhood, traffic, all the other, and my reading, of course, is our statute,  
359 the one we have, as interpreted by the Supreme Court, doesn't permit that, but it could.

360  
361 Mr. Tokarz - That is correct.

362  
363 Mr. Wright - So what I would advise someone to do, maybe, I think what  
364 is going to happen here, I think there is going to be an uproar, because I think based on  
365 my, I went to this course back 25 to 30 years ago. It was a little different atmosphere  
366 then. Everything went. And just what I got from all of the people that were around, they  
367 were granting variances for two feet, three feet, if it didn't harm anybody.

368  
369 Mr. Tokarz- Right.

370  
371 Mr. Wright - That was a pretty standard thing. Now, the way I see this,  
372 we have no authority to grant a variance for any addition to a residence that is there,  
373 where the beneficial use is already there. We have no authority to grant, I don't care if it  
374 is a foot, or six inches. We don't have the authority to do it.

375  
376 Mr. Tokarz - I think that is correct.

377  
378 Mr. Wright - And that is going to have an impact on a lot of people who  
379 want a little more use of their property and I think it is going to cause a hue and cry, and  
380 maybe the legislature would see fit to give the Board of Zoning Appeals some discretion  
381 in this area.

382  
383 Mr. Tokarz - Well, there are two things I'd say to that. No. 1 is they have  
384 provided the governing body the right, without going back to the General Assembly at  
385 all, the governing body may amend the zoning ordinance and allow those modifications  
386 to the Planning Administrator. That is No. 1.

387  
388 Mr. Wright - Yes, but that wouldn't affect something that is  
389 unconstitutional. Would it?

390  
391 Mr. Tokarz - No. Absolutely. The language that is in House Bill, what is it,  
392 2159? I think it is 2159. It is extremely broad, and we don't have it codified in the book  
393 yet, because it doesn't come into effect until July 1. It is not even called a variance. It is  
394 called a modification.

395  
396 Mr. Wright - Now, I wasn't aware of that, so what you are saying is, after  
397 July 1, the Board of Supervisors, on its own accord, could adopt an amendment that  
398 changes the ordinance, which would permit the BZA to grant variances?  
399

400 Mr. Tokarz - Not the Board of Zoning Appeals. The Zoning Administrator.  
401 Maybe the things we could do. Could you go down and pull that code?  
402  
403 Mr. Wright - What would be its guidelines?  
404  
405 Mr. Tokarz - They've got the guidelines specified in the statute and rather  
406 than do it from memory, let's have Ben pull that down.  
407  
408 Mr. O'Kelly - This is a compromise, Mr. Wright. The Homebuilders  
409 lobbied the General Assembly pretty hard in the last session.  
410  
411 Mr. Wright - I imagine they would.  
412  
413 Mr. O'Kelly - Because of the Cochran decision.  
414  
415 Mr. Wright - I wasn't aware of that amendment to the statute, but,  
416  
417 Mr. O'Kelly - And there were three different pieces of legislation proposed  
418 and the compromise that was actually adopted was this modification process by the  
419 Planning Administrator.  
420  
421 Mr. Wright - The legislature could go forth. They could go further and  
422 adopt a statute that would have a little more...  
423  
424 Mr. Tokarz - That is right. They could amend 2309, which is your  
425 enumeration of powers.  
426  
427 Mr. Wright - Put it with the Board of Zoning Appeals.  
428  
429 Mr. Tokarz - They could do that, too.  
430  
431 Mr. Wright - So consider these small variances, two feet, three feet and  
432 give the Board of Zoning Appeals the authority, the power, to grant those, similar to  
433 what we do in the Use Permit.  
434  
435 Mr. Tokarz - That is correct. The General Assembly certainly could do  
436 that.  
437  
438 Mr. Wright - From what you are telling me, I don't know whether this  
439 amendment to the statute would go far enough to really help people.  
440  
441 Mr. Tokarz - Actually, it is extremely broad. It is much broader, I read it  
442 as being much broader than the limitations that are applicable to variances, and that  
443 basically, if the governing body is willing to permit the Zoning Administrator to do that, to  
444 modify almost all of the provisions of the zoning ordinance in particular cases, assuming  
445 that (unintelligible). I don't recall – is there an undue hardship.....do you remember?

446  
447 Mr. Silber - It seems like it was really intended for minor modifications. It  
448 also had an appeal process so the adjacent owners were notified of the decision of the  
449 Planning Administrator and if they objected to it, then they were brought into the  
450 process, as well.  
451  
452 Mr. Wright - And the Board of Supervisors may not be willing to do that.  
453 That is why I think we ought to have legislation that would make it clear.  
454  
455 Ms. Dwyer - I was going to say any of that, that doesn't effect the BZA. It  
456 doesn't effect it at all. Now new law does not effect us and how we conduct business  
457 at all.  
458  
459 Mr. Tokarz - No. It has no effect on you. Now the second part of the  
460 answer to your question is that in addition to that, statutory authority is given to the  
461 governing body. If the Board of Zoning Appeals would like to have an expansion of  
462 authority to deal with those particular things, it seems to me that the proper way to do  
463 that, or one way to do that, would be to send the letter to the County Manager and the  
464 Board of Supervisors, and ask for that to be included in the legislative package. And  
465 really, it is appropriate to do it at this point, because what happens here over the next  
466 two or three months, Linda Robinson, who is the County's Legislative Liaison, will be  
467 taking legislative requests from all of the departments and County agencies and the  
468 Board of Supervisors for things they want to put into a legislative package. The Board  
469 of Supervisors considers what it wants to ask the General Assembly to do, and then  
470 they actually meet with the General Assembly delegation in November or December to  
471 talk about the items that they wish to have considered. So, my suggestion to you, if the  
472 Board, as you all think about this, wishes to have legislative changes, would be to make  
473 that type of request and sort of give the Board of Supervisors an idea of what  
474 parameters you'd like for that to be, because, you know, one of the tensions that gets  
475 involved here is if you ask the Board of Supervisors to go to the General Assembly, first  
476 of all, you never know what is going to come out of the General Assembly. I mean, it is  
477 really like rolling dice sometimes, and you go down there and you go down there and try  
478 to get a legislative change so see it actually come out the way that it goes in. Very hard  
479 to get that done.  
480  
481 Mr. Nunnally - I think we should do that, because if you don't, we are going  
482 to be out of business. We won't be able to issue a variance. A rose bush or something  
483 like that,  
484  
485 Mr. Tokarz - Well, you will be out of business for most of your things...  
486  
487 Mr. Wright - Our caseloads will be cut about 90%.  
488  
489 Mr. Tokarz - For variances they would. You'd still have your...  
490  
491 Mr. Wright - I think we had one use permit last time.

492  
493 Mr. O'Kelly - We have been getting a lot of appeals, recently.  
494  
495 Ms. Harris - What about economic hardship? We can still handle those  
496 cases, right? This case still seems to respect the fact that we would be dealing with  
497 economic hardship.  
498  
499 Mr. Tokarz - Economic hardship only to the extreme degree that the use  
500 of the property would be totally removed by application of the ordinance. It is not even,  
501 and this is the point I was trying to make on the first phase. Either the appearance of  
502 substantial decrease in the value of the property by application of the zoning ordinance;  
503 that does not allow you to grant a variance on that basis alone. It is basically, it has got  
504 to be that the cause of the particular circumstances of that particular piece of property,  
505 that it couldn't be used under the zoning ordinance could you then grant a variance.  
506 That is the whole point of the Cochran thing.  
507  
508 Ms. Dwyer - By saying that is the threshold question, what they are  
509 saying is "Is this person deprived of all reasonable uses of property because you don't  
510 grant the variance?" Then you are meeting the test. And if they still have use of the  
511 property and any reasonable use of the property, then you don't have the authority, and  
512 we don't really have jurisdiction to grant a variance.  
513  
514 Mr. Tokarz - That is right.  
515  
516 Ms. Dwyer - We don't have any legal jurisdiction over that case.  
517  
518 Mr. Tokarz - That is correct.  
519  
520 Ms. Dwyer - If they are to be deprived of all of their economic value, then  
521 we look into questions like, will it harm the neighbors?  
522  
523 Mr. Tokarz - Right. Then you get it through all those tests that are set  
524 forth in the ordinance itself. Is there substantial hardship? Is it going to be in  
525 accordance with the general purpose and intent of the ordinance? Is it going to be  
526 substantial justice? Are there conditions you want to impose to protect the adjacent  
527 property from any adverse effects? Those types of things. But the point of Cochran,  
528 you never get to address any of those questions if they've got any economic beneficial  
529 use. When you said, "We are out of business as to variances," let me just say, I think  
530 that the original purpose of the BZA was supposed to be a very limited purpose anyway.  
531 It was designed to be, and they referred to this in the case. It was designed to be, as  
532 they referred to in soccer, as the escape hatch or escape value. It was really the first  
533 purpose of the BZA was to prevent unconstitutional taking. All of the other things have  
534 been added on to the BZA, in addition to that, but your first and most important function  
535 is to prevent unconstitutional taking. Now, the good news is, and Mr. Wright, I would  
536 say this is the best news of all. If you only have a few cases where people are coming  
537 in to you and saying, "The zoning ordinance is going to deprive me of all economic

538 beneficial use as a property,” that is probably a good thing for the citizens of Henrico.  
539 And they may disagree as to how you set the setbacks as to what the uses are, but if  
540 we are not depriving them of unconstitutional use of the property, then what is at stake  
541 then is a legislative judgment that gets resolved by the Board of Supervisors through the  
542 public hearing process and the legislative process. Where I would be worried, as an  
543 attorney for the County, and Board of Supervisors, is if you all had month after month  
544 after month of cases that were saying “There is nothing in the ordinance that is  
545 preventing me from using my property in any way whatsoever.” What my response  
546 would be to go back to the Board of Supervisors and say, “You need to amend the  
547 ordinance. You need to make it so that is so restrictive that people can’t use their  
548 property. But if you have simply a decrease because people want to do things that they  
549 can’t do under the ordinance, this really isn’t to you, it is to the Board of Supervisors. I  
550 think that is what the teaching of Cochran is.

551  
552 Mr. Wright - Under this case, the Cochran case right now, say there is a  
553 home on the property built within the guidelines of the zoning ordinance. We have no  
554 authority or no jurisdiction to grant any variance for an addition, anything that would  
555 impose on the rear yard, side yard or front yard. And 80% of the cases that we have  
556 want that. Two feet here, three feet there. So, the people ought to be advised. This  
557 case really brought it into focus. It has been there all along, but we have been trying to  
558 help people. People ought to be advised when they come in to apply for that and not to  
559 put their \$300 bucks up, because they are not going to get it.

560  
561 Mr. Tokarz - Well now, let me go back about five years for you, because  
562 this case, this question came to the Board of Zoning Appeals about five years ago and I  
563 think we heard the whole case or another case like that where there was a – I think it  
564 was a –

565  
566 Mr. Kirkland - Was that on Greenwood Road?

567  
568 Mr. Tokarz- Here’s the question, because I tried this case in front of you.  
569 There was a request for a either a permit or a variance that did not meet the  
570 requirements of the ordinance. We knew going in it did not meet the requirements of  
571 the ordinance. We said you can’t file it. They filed an administrative appeal of that  
572 decision, which the administrative appeal goes to the BZA. And the BZA says “Now, we  
573 don’t want the staff to make that decision. Our applications should come to us for us to  
574 make a decision. So, the staff was doing what you were suggesting, and the BZA said,  
575 “Now we want all of these cases to come to us.” I think from the standpoint of saving  
576 you unnecessary time and the applicant’s unnecessary time, the staff will be perfectly  
577 happy to advise people. Here are the requirements program. It doesn’t appear that you  
578 look like you are entitled to that. You have the right to file for the variance, but it is  
579 going to cost you \$300 and it is your decision, but you ought to make a decision  
580 knowing that.

581  
582 Mr. Kirkland - I think that ought to be done from now on. Up front from now  
583 on.



584  
585 Mr. Tokarz - If that is what you want, then certainly the staff can do that.  
586  
587 Mr. Blankinship - We need to decide the best way to do that. We have been  
588 going into more detail with applicants. But we get applications that just come in the  
589 mail. And I think there are builders and other people in the business who are used to  
590 the way things used to be done, and who are telling them, "Oh, no problem. It is just a  
591 rubber stamp."  
592  
593 Mr. Wright - I think they ought to be advised that this is the way things  
594 are.  
595  
596 Mr. Silber - Mr. Wright, in talking with some of my colleagues from other  
597 localities, Chesterfield and Hanover, they have begun to follow the Cochran case more  
598 seriously. They have seen their agenda drop off considerably and their staff has begun  
599 to tell the applicants when they come in, your chances are now are that you really do  
600 have to prove a real hardship. They are educating the people before they file  
601 applications. We would have to do that, too. Depending on the position the Board is  
602 going to take, we've got to be more fair up front and tell them...  
603  
604 Mr. Wright - Just be fair. They are wasting their \$300 bucks.  
605  
606 Mr. Blankinship - And a lot of people do that. A lot of people call and ask, "Do  
607 you think I'd get this variance?"  
608  
609 Mr. Wright - That is why I wanted this evening to get all of this cleared up  
610 because I don't think it is fair to these folks, these people putting out this word, "Hey,  
611 don't worry about." Two or three people get that and telling their neighbors. Is  
612 everybody in agreement?  
613  
614 Mr. Tokarz - And the other thing is, in addition to the staff advising folks,  
615 they can address the people who are coming in to make the application, but what is also  
616 important is for the Board, through its decisions, making it clear to the people who might  
617 be tempted as they develop property that they understand that this Board doesn't have  
618 the authority to bail them out later when they put these huge houses on a small lot, and  
619 then they tell the people to go in and get a variance for the deck from the BZA. If the  
620 BZA is saying that we don't have the authority to help you in that situation, then it is  
621 going to be a matter of redesign of those houses and that type of thing, and they need  
622 to understand that, too.  
623  
624 Ms. Dwyer - Well, we are not involved in that piece of the process. That  
625 might be a Board or Planning Commission education. I don't know how that gets out,  
626 although I think once the BZA starts to change, and starts to follow Cochran, I don't  
627 think it takes long for the word to get out.  
628

629 Mr. Tokarz - I agree with you and that is all I am saying. I think if you  
630 apply Cochran and it is done consistently, then within six months people will  
631 understand, the ones who would be tempted to use that same old practice would  
632 understand that is something they can't do.

633  
634 Ms. Dwyer - And I would say, it doesn't look like we have a lot of options  
635 as far as following Cochran. That is the law of the land.

636  
637 Mr. Tokarz - I don't think you do.

638  
639 Mr. Wright - I don't think we do. We could be called on the carpet and  
640 kicked out of office if we did, and we'd be violating the law of the land.

641  
642 Mr. Tokarz - Like I said earlier, it is a pretty bright line at this point.

643  
644 Mr. Wright - It doesn't leave much for questions.

645  
646 Mr. Tokarz - Let me just run real quickly and if you've got a couple of  
647 minutes I will show you this decision of House Bill 2169. If you look, this is the  
648 permitted provisions of the zoning ordinance, just to give you the context. This is what  
649 the governing body can do in the zoning ordinance, and what they have allowed here  
650 now is, you can see at the top of page 2, the first full paragraph, it now says when the  
651 ordinance provides, the zoning administrator may be authorized to grant a modification.  
652 They don't use the word variance. They call it a modification from any provision  
653 contained in the zoning ordinance. They changed this from building setback to any  
654 provision contained in the zoning ordinance with respect to physical requirements on a  
655 building, a lot or parcel of land, including but not limited to size, height, location or  
656 features of or relating to any building structure or improvements if the administrator  
657 signs in writing and then they have the same type of requirements you have for  
658 variances. But look how broad that is. Physical requirements of the lot, including size,  
659 height, location features or related to any building structure or improvement. Now, I will  
660 be frank in telling you, I don't believe that the Board of Supervisors is going to give the  
661 full extent of authority to the Zoning Administrators we've got here. They are not going  
662 to let them make those decisions. They are not going to let them make unlimited types  
663 of decisions.

664  
665 Mr. Kirkland - If they were going to let anybody do it, it would be the zoning  
666 administrator.

667  
668 Mr. Tokarz - I don't believe the Board of Supervisors is going to amend  
669 the code to do that. I do believe, however, that there is a case to be made, and I think it  
670 is up to the Board of Zoning Appeals whether you want to suggest this or not, but  
671 considering whether the request on legislative package item on the General Assembly  
672 amending the statute, it is also making a suggestion of whatever you think is most  
673 appropriate in your wisdom as to whether the zoning ordinance should be modified to

674 deal with some of these cases that have now been taken outside of your authority. You  
675 certainly can suggest the types of situations that you have got.

676  
677 Mr. Silber - Tom, also, if you read on it does say that once the zoning  
678 administrator makes the decision on an application for modification, the written notice  
679 then goes to the applicant and any adjoining land owner, and if the land owner then  
680 wants to appeal that decision of the zoning administrator, it would go to the Board of  
681 Zoning Appeals.

682  
683 Mr. Tokarz - Right. That is correct. Now the interesting thing is when it  
684 comes to the Board of Zoning Appeals, I think the only issues that would have to be  
685 addressed there is whether #1, that the modification has been granted within the  
686 authority provided in the ordinance. You would have to find that, and #2, whether you  
687 agree that the three enumerated provisions here have been satisfied. Now, I haven't  
688 given this a whole lot of thought because one of the things that we'd have to do is  
689 consider how this would play out if we drafted any type of ordinance like this, but you  
690 can see how broad it is, and it would allow the governing body, the Board of  
691 Supervisors, to address the type of situation you are worried about. Because I agree  
692 with you. I think those issues are difficult and you do want to have some way of dealing  
693 with that.

694  
695 Mr. Wright - We are going to take this under advisement. We appreciate  
696 the help. Thank you for your advice.

697  
698 Mr. Tokarz - Thank you.

699  
700 Mr. Wright - This session is adjourned, and we will go over to the Board  
701 Room for our next session.

702