NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 30, 2021

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**Re:** ***In Re: March 10, 2021 Hearing of the Board of Zoning Appeals of Fairfax County, Virginia (Harmony Hills Equestrian Center, Inc., et. al. v. Board of Supervisors of Fairfax County, Virginia)***
**Case No. CL–2021–4806**

Dear Counsel:

The issue before the Court is whether the Fairfax County Board of Supervisors ("BOS") may procedurally demurrer to a Petition for Writ of Certiorari appealing a decision of the Fairfax County Board of Zoning Appeals ("BZA"), or to the ensuing writ.

The Court holds the BOS has no authority to pursue a demurrer in a circuit court exercising its appellate jurisdiction pursuant to VA. CODE ANN. § 15.2-2314. The Court will grant Harmony Hills Equestrian Center, Inc.'s (Harmony Hills') "Motion to Strike County's Demurrer."

OPINION LETTER

## I. PROCEDURAL OVERVIEW: THE BOS DEMURRERS TO AN APPEAL FROM THE BZA.

Harmony Hills, aggrieved of a decision of the BZA, filed a "Petition for Writ of Certiorari Under Section 15.2-2314 of the Virginia Code" March 30, 2021. The Court entered a Writ of Certiorari April 1, 2021, ordering the BZA to submit its hearing record to the Court. Harmony Hills served the BOS with the Writ April 9, 2021, and the BOS filed a Demurrer and a Motion to Dismiss April 29, 2021.

Harmony Hills, objecting to the procedural propriety of a demurrer in an appeal to this Court of a BZA decision, filed a "Motion to Strike County's Demurrer" ("Motion to Strike") June 11, 2021. The BOS, asserting a right to file a demurrer as a named party to this appeal, opposed the Motion to Strike, and the parties argued the motion June 25, 2021.

## II. PARTIES MAY NOT DEMURRER TO BZA APPEALS TO THE CIRCUIT COURTS.

VA. CODE ANN. § 15.2-2314 governs appeals from the BZA to the circuit courts. It reads, in relevant parts:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals . . . may file with the clerk of the circuit court for the county or city a petition that shall be styled "In Re: date Decision of the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30 days after the final decision of the board.
>
> Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals and shall prescribe therein the time within which a return thereto must be made and served upon the secretary of the board of zoning appeals . . . Once the writ of certiorari is served, the board of zoning appeals shall have 21 days or as ordered by the court to respond . . .
>
> 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. The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.
>
> The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return 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.
>
> The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.
>
> In the case of an appeal from the board of zoning appeals to the circuit court of an order, requirement, decision or determination of a zoning administrator or other administrative officer in the administration or enforcement of any ordinance or provision of state law, or any modification of zoning requirements pursuant to § 15.2-2286, the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo . . .
>
> In the case of an appeal from the board of zoning appeals to the circuit court of a decision of the board, any party may introduce evidence in the proceedings in the court in accordance with the Rules of Evidence of the Supreme Court of Virginia . . .

An appeal from the BZA to a circuit court under this procedure is a hybrid of an appeal and a trial. As a result, "[t]he requirements for filing a petition to appeal the decision of a board of zoning appeals are controlled by the specific provisions of Code § 15.2-2314 and by our decisions interpreting this statute, rather than default rules that apply to the initiation of ordinary actions." *Boasso Am. Corp. v. Zoning Adm'r of City of Chesapeake*, 293 Va. 203, 208 (2017).

Thus, per VA. CODE ANN. § 15.2-2314, the appeal process from the BZA to the circuit courts is simple and streamlined—and is different than for most civil actions. First, the person aggrieved of a BZA decision timely files and presents a writ of certiorari to the circuit court. Second, the circuit court enters a writ, directing a deadline for the BZA to "return thereto." The writ also sets a deadline for the BZA to "respond" after being served. Necessary parties, by statute, are the governing body (here, the BOS),[1] the landowner, and the applicant. The BZA is expressly not a party, although it must "return" and may "respond." Third, the circuit court must permit any party to introduce evidence. Fourth, the circuit court may reverse, affirm, or modify the BZA's decision brought for review. At the hearing, the BZA's fact findings enjoy a rebuttable presumption in its favor. To rebut the presumption, the appealing party must prove a

[1] The Supreme Court of Virginia explained the reason for making the BOS and not the BZA a necessary party to the appeal—the governing body has an interest in defending its zoning ordinances while the BZA is merely a quasi-judicial entity. *Frace v. Johnson*, 289 Va. 198, 201 (2015).

BZA error by a preponderance of the evidence. Unlike the deference it gives to the BZA's fact findings, the circuit court reviews the BZA's rulings on questions of law *de novo*.[2]

Reading the controlling statute in context, the Court concludes the BZA's "return" means a return on service of the writ to the BZA.[3] It also means the BZA's transmittal of its hearing records to the circuit court, along with other verified pertinent and material facts showing the grounds for its decision.[4] The subject matter of the BZA's right to "respond" is unclear. However, this open question is immaterial to the issue at bar because, here, the BOS filed the disputed demurrer, not the BZA. Nothing in the operative statute permits the BOS to "respond." VA. CODE ANN. § 15.2-2314.

It is true the BOS is a specially designated party per VA. CODE ANN. § 15.2-2314. However, possessing the status of "party" does not, alone, permit the use of specific trial tools. By analogy, an appellee to a petition for appeal to the Supreme Court of Virginia is a "party," but it is not permitted to demurrer to the petition for appeal. Even if the appellee knows the petition must be rejected because the appellant never preserved an issue for appeal, it cannot short-circuit the appeal by filing a demurrer—it must file an opposition to the petition and let the appeal process play out. *See* VA. SUP. CT. R. 5:18. Just as with appeals the to the Supreme Court, appellate rules for appeals from the BZA to the circuit courts do not provide for demurrers.

While uncomplicated, the appeal process from the BZA to a circuit court is an unusual appellate-trial hybrid.[5] The Supreme Court of Virginia clarified the nature of this unusual status in *Bd. of Zoning Appeals of Fairfax Cty. v. Bd. of Sup'rs of Fairfax Cty.*, 275 Va. 452 (2008), holding the procedure has "the indicia of an appeal." *Id.* at 456. It noted VA. CODE ANN. § 15.2-2314 allows the circuit court to "review" the BZA's decision and is not "a trial court resolving an issue in the first instance." *Bd. of Zoning Appeals of Fairfax Cty.*, 275 Va. at 457. The statute refers repeatedly to the process as an "appeal" and limits the circuit court's disposition authority by directing it only to "reverse or affirm, . . . or [ ] modify the decision brought up for review." *Id.* (quotations in original). The Supreme Court considered a circuit court's then-discretionary, now mandatory, ability to hear new evidence, but still held the process to be an appeal and not a

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[2] However, statutory interpretations of the BOS and the Zoning Administrator are entitled to "great weight." *Bd. of Sup'rs of Fairfax Cty. v. Robertson*, 266 Va. 525, 538 (2003).

[3] VA. CODE ANN. § 15.2-2314 (". . . the court . . . shall prescribe therein the time within which a return [to the writ] must be made and served upon the secretary of the board of zoning appeals.").

[4] *Id.* ("The board of zoning appeals shall not be required to return the original papers acted upon by it but it shall be sufficient to return certified or sworn copies thereof or of the portions thereof as may be called for by the writ. The return 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.").

[5] There are, however, other examples of the General Assembly granting circuit courts similar appellate-trial hybrid authority in other contexts. *See, e.g., Gilman v. Commonwealth*, 275 Va. 222 (2008) (distinguishing contempt appeals from the general district courts to circuit courts under VA. CODE ANN. § 16.1-69.24 and § 18.2-459—which are more similar to true appeals, despite a circuit court's authority to take additional evidence—from general *de novo* appeals under VA. CODE ANN. § 16.1-132 and § 16.1-136—which are more similar to second trials).

trial.[6] *Id.* at 459; *see also Robert & Bertha Robinson Family, LLC v. Allen,* 295 Va. 130, 148 n. 21 (2018) (noting the distinction between a traditional appeal from a circuit court to the Supreme Court versus an appeal from a general district court to a circuit court—the latter reviews the entire case *de novo* and the former reviews only questions of law *de novo*).

Because appeals to the circuit courts from the BZA are appeals, and because VA. CODE ANN. § 15.2-2314 governs the procedure, tools available to litigants in a trial do not exist for parties appealing from the BZA. For example, a party may not suffer a nonsuit. *Bd. of Zoning Appeals of Fairfax Cty.*, 275 Va. at 459.

The BOS argues that the Supreme Court of Virginia implicitly permits demurrers, citing *Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals*, 280 Va. 221 (2010). *Arogas* affirmed a circuit court that sustained a county's demurrer to an appeal from a Frederick County Board of Supervisors action. However, *Arogas* did not address the procedural propriety of a demurrer in such an appeal to the circuit court. In fact, the high court refused to entertain the issue of whether a plea in bar by the appellant was a more appropriate procedural vehicle than a demurrer because it was not preserved for appeal. *Id.* at 224, n. 1. Moreover, unhighlighted procedural errors in lower courts do not always prompt appellate court comment and do not signal appellate court approval. For example, courts long approved motions craving oyer when the parties agreed to oyer under circumstances a court could not have ordered. *See Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997). There is a difference between an appellate court assuming without deciding that a procedural vehicle is proper, and a court expressly approving of the procedural vehicle. This is especially so when no one raises the procedural problem to the appellate court. This Court concludes *Arogas* did not directly approve of the use of demurrers in appeals from the BZA to the circuit courts.

The BOS appropriately protests that the Court's own guidance directs it to file "responsive pleadings." *See* FAIRFAX CIRCUIT COURT PRACTICE MANUAL § V, 12.08.4 (2018). However, local rules inconsistent with statutes are unenforceable. VA. CODE. ANN. § 8.01-4. Regrettably, the Court holds its procedural guidance does not comport with VA. CODE ANN. § 15.2-2314, and its guidance cannot be enforced. Nothing in VA. CODE ANN. § 15.2-2314 permits a responsive pleading. The BOS, in oral argument, conceded it is not required to file an answer. So, by the BOS's interpretation of VA. CODE ANN. § 15.2-2314, it may answer a petition for a writ, but does not have to do so, and it may file a responsive pleading, such as a demurrer, but it does not have to do so. It cannot point to any controlling authority that says this. It also cannot explain why a party relieved of answering can file a responsive pleading if it chooses.

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[6] The Court considered whether this statutory change effectively reversed the Supreme Court's decision in *Bd. of Zoning Appeals of Fairfax Cty.* It concludes the decision is not reversed because of the change. Before the statutory change, the circuit courts could decline to take additional evidence. After the change, the circuit courts must take additional evidence if desired by any party. The Supreme Court clearly considered whether the possibility of new evidence converted BZA appeals into trials. If the General Assembly intended to reverse the Supreme Court, it would have changed the more numerous indicia of appellate procedure in the statute. It did not do so.

The absence of authority is consistent with appellate procedure. There are few or no provisions for demurrers, responsive pleadings, or discovery in the appellate rules. *See* VA. SUP. CT. R. 5:1, *et. seq.* and 5A:1, *et. seq.* Exceptions occur when an appellate court exercises its original jurisdiction. *See, e.g.*, VA. SUP. CT. R. 5:7(a)(4) (directing responsive pleadings in petitions for writs of habeas corpus). Appeals from the BZA to the circuit courts are, obviously, not original jurisdiction matters, so the Supreme Court's few exceptions to its general rule against responsive pleadings in appeals are inapplicable in the present case. Instead, they are "appeals." While the Court's guidance is incorrect as to responsive pleadings, it does appear to be correct with regards to eliminating discovery in BZA appeals to the circuit courts. FAIRFAX CIRCUIT COURT PRACTICE MANUAL § V, 12.08.5 (2018). Neither responsive pleadings nor discovery are mentioned in VA. CODE ANN. § 15.2-2314.

There is logic to the Code's procedural rules for BZA appeals to the circuit courts. First, the controlling statute tasks a specialized body, the BZA, to conduct the primary fact-finding in land use disputes. Second, it permits appeals by an aggrieved party, but it does not treat the appeals as it does the re-hearing-style appeals from the district courts to the circuit courts. *Cf.* VA. CODE ANN. § 16.1-106 and VA. CODE ANN. § 8.01-129 (governing appeals from the general district courts to the circuit courts). Rather, it treats the appeals more like traditional appeals. Third, the allowance of a writ to a circuit court does not automatically stay decisions from the BZA. So, speed in adjudication with a streamlined appeal procedure as opposed to a full *de novo* re-hearing is critical. Finally, to what exactly would the BOS be demurring?

> The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [complaint], *but only may determine whether the factual allegations of the [complaint] are sufficient to state a cause of action.*

*Bd. of Sup'rs of Fluvanna Cty. v. Davenport & Co., LLC*, 285 Va. 580, 585 (2013) (alteration in original) (emphasis added) (quoting *Harris v. Kreutzer*, 271 Va. 188, 195–96 (2006)). Since an aggrieved party to an adverse BZA determination may appeal to a circuit court as a matter of right (if done so timely), there are no "causes of action" to sufficiently state. *See Bd. of Zoning Appeals of Fairfax Cty.*, 275 Va. at 457 (rejecting a trial court's ruling that a certiorari petition was a "cause of action" for the purpose of the nonsuit statute). It is an appeal. The appellant asserts the BZA erred in its ruling on the law, facts, or both. If the opposing side believes the BZA reached the right result, it can defend the BZA's decision, enjoying the statutory presumption of correctness. Therefore, the BOS's complaint that, absent the use of a demurrer or other pre-hearing tools of trial litigants, it cannot defend its interests is untrue. It can defend itself at the appeal. The General Assembly granted it party status so it could argue the merits as an appellee. However, the process it enters is an appeal, not a trial, and the trial tools it craves do not exist at an appeal. The time for the BOS to raise otherwise demurrable issues are at the hearing on the appeal, not as a pre-hearing demurrer.

## III. CONCLUSION.

The BOS has no authority to pursue a demurrer in a circuit court exercising its appellate jurisdiction. The Court will grant Harmony Hills' "Motion to Strike" and permit the BOS to argue its points at the hearing on Harmony Hills' appeal.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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|---|---|---|
| In Re: March 10, 2021 Hearing of the Board of Zoning Appeals of Fairfax County, Virginia | ) ) ) ) ) | CL-2021-4806 |

**ORDER**

THIS MATTER came before the Court June 25, 2021, on Petitioner Harmony Hills Equestrian Center, Inc., *et. al.*'s "Motion to Strike County's Demurrer." And, for the reasons set forth in the accompanying Opinion Letter dated June 30, 2021, which is incorporated herein by reference; it is

ORDERED the Motion is GRANTED and the demurrer is stricken.

THIS CAUSE CONTINUES.

JUN 30 2021

[redacted]

Entered

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS MUST BE FILED WITHIN 10 DAYS.