



## ARLINGTON COUNTY, VIRGINIA

**County Board Agenda Item  
Meeting of Nov. 15, 2008**

**DATE:** November 5, 2008

**SUBJECT:** Adoption of Zoning Ordinance amendments to Section 36, Subsection E, Administration and Procedures, to re-authorize the Board of Zoning Appeals to grant special exception use permits to modify Zoning Ordinance placement requirements for structures on lots in "R-20," "R-10," "R-8," "R-6," "R-5" and "R2-7" zoning districts where there is no option in the Zoning Ordinance to allow modifications of requirements by the County Board.

**C. M. RECOMMENDATION:**

Adopt the attached ordinance to amend, reenact and recodify Section 36. E of the Arlington County Zoning Ordinance to continue authorization for the Board of Zoning Appeals to grant special exception use permits that modify Zoning Ordinance placement requirements for structures on lots in "R-20," "R-10," "R-8," "R-6," "R-5," and "R2-7" zoning districts to facilitate the creation of a convenient, attractive and harmonious community; and for other reasons required by the public necessity, convenience and general welfare and good zoning practice.

**ISSUES:** The Board of Zoning Appeals' authority to approve use permits for placement of structures in one-family dwelling districts will expire on December 31, 2008 unless Section 36, Subsection E is amended to continue that authority.

**SUMMARY:** On December 9, 2006 the County Board adopted an amendment to Section 36, Administration and Procedures of the Arlington County Zoning Ordinance that gave the Board of Zoning Appeals (BZA) the authority to approve use permits that modify placement requirements for structures on lots in the "R" zoning districts. The amendment provided an alternative to variances. The BZA's authority to grant variances is strictly limited by the Code of Virginia (as was confirmed by several recent Supreme Court of Virginia decisions) to those cases where the strict application of the Zoning Ordinance would amount to a loss of all reasonable beneficial use of the property. The County Board also provided that the amendment would expire on December 31, 2008. Staff recommends that the County Board adopt the attached ordinance to re-adopt the amendment to Section 36, Subsection E. of the Arlington County Zoning Ordinance so that the BZA may continue to approve use permits.

County Manager: \_\_\_\_\_

County Attorney: \_\_\_\_\_

Staff: Tony Burnette, Deputy Zoning Administrator

PLA-5110

**BACKGROUND:** The variance process was used for many years by Arlington County property owners to fit by-right improvements onto lots where no special exception use permit or site plan option exists. The BZA generally granted variances when it found that the proposed variance would not create a negative impact on the neighborhood or set a negative precedent in the community.

In 2004 the Supreme Court of Virginia issued a decision in the case known as Cochran v. Board of Zoning Appeals. The single opinion disposed of three cases. In each of the three cases the Supreme Court ruled that the respective circuit court erred in upholding the BZA's grant of a variance. The Supreme Court adhered strictly to its previous rulings that a BZA lacks authority to grant a variance unless the property owner, in the absence of a variance, would lose all reasonable beneficial uses of the property. It noted that the BZA lacked discretion to even consider granting a variance until this threshold was met.

On December 9, 2006, after an extensive public process, the County Board adopted an amendment to Section 36. E. of the Arlington County Zoning Ordinance that gave the BZA the authority to grant Use Permits that modify the placement of structures on lots in the "R-20," "R-10," "R-8," "R-6," "R-5," and "R2-7" zoning districts. The County Board approved the amendment to provide an alternative to variances. The County Board also provided for a sunset date of December 31, 2008 for that amendment.

**DISCUSSION:** The first use permits under the new Section 36.E were heard at the February 13, 2007 BZA meeting. In 2007 the BZA heard a total of 95 use permit cases at 10 regularly scheduled meetings (there is no January BZA meeting and the August 2007 meeting was canceled) or 9.5 cases per meeting. Of these, 88 cases were approved, 5 cases were denied and 2 cases were withdrawn. For 2008, through the October 15 meeting, the BZA has heard 88 cases with 83 approved, 3 denied and 2 withdrawn. There are 13 cases pending for the November and December 2008 BZA meetings.

**DISPOSITION OF USE PERMIT CASES  
2007 – 2008\***

	CASES	APPROVED	WITHDRAWN	DENIED
2007	95	88	2	5
2008	88	83	2	3

\*Includes the cases through the October 15, 2008 BZA meeting

For 2007 and 2008 (though the October 15<sup>th</sup> meeting), more than 50 percent of the use permit cases approved by the BZA were requests to modify placement requirements for covered front porches, screened porches, sunrooms or decks. For 2007 and 2008 the BZA has heard and approved 8 use permits to modify the placement requirements for new one-family dwellings; three of which were the result of building location errors.

**TABLE 2**

**USE PERMIT CASES BY ORDINANCE SECTION\***

<b>SECTION</b>	<b>2007</b>	<b>2008**</b>
Street Setbacks (32, D1e)	40	35
Side Yards (32, D2b)	33	26
Rear Yards (32, D2b)	25	31
***All Others	<u>12</u>	<u>5</u>
Totals	110	97

\*Some cases included requests to modify more than 1 ordinance section

\*\*Includes cases through the October 15, 2008 BZA meeting

\*\*\*Includes accessory structures; fences; air conditioning units; and resubdivisions

**VARIANCE CASES:** The BZA heard 9 variance cases in 2007. Of these, 4 were denied, 4 were approved and 1 was withdrawn. The cases that were approved included a condominium conversion, and additions to one-family dwellings not located in an “R” district. Cases that were denied included a variance to create a substandard building lot, to permit a building footprint larger than permitted by the ordinance and to permit an addition of greater than 50-percent of the existing dwelling. In 2008, through the October 15th meeting, the BZA has heard and approved 1 variance case, which was for a condominium conversion.

Many of the existing single-family residential properties in the County are nonconforming with regard to lot size and placement of existing structures. The use permit process has afforded Arlington home and property owners the ability to design improvements that better suit their needs, respond to existing construction on their properties, preserve significant trees and foliage and fit in better with the surrounding neighborhood. If the amendment is allowed to sunset, property owners who wish to make improvements that require a modification of placement requirements will have to either apply for a variance, which are strictly limited by state law, or forgo their plans.

**CONCLUSION:** Adopt the attached ordinance to amend Section 36, Subsection E of the Arlington County Zoning Ordinance. This will allow the Board of Zoning Appeals’ authority to approve use permits to continue.

**ORDINANCE TO AMEND, REENACT, AND RECODIFY SECTION 36.  
ADMINISTRATION AND PROCEDURES OF THE ARLINGTON COUNTY ZONING  
ORDINANCE TO CONTINUE AUTHORIZATION TO THE BOARD OF ZONING  
APPEALS TO GRANT SPECIAL EXCEPTION USE PERMITS THAT MODIFY  
PLACEMENT REQUIREMENTS FOR STRUCTURES LOCATED IN “R-20,” “R-10,”  
“R-8,” “R-6,” “R-5,” AND “R2-7” ZONING DISTRICTS.**

Be it ordained, by the County Board of Arlington that Section 36 of the Arlington County Zoning Ordinance is amended, reenacted and recodified as set forth below, in order to facilitate the creation of a convenient, attractive and harmonious community; and for other reasons required by the public necessity, convenience and general welfare and good zoning practice.

**Section 36, ADMINISTRATION AND PROCEDURES**

\* \* \*

**E. Board of Zoning Appeals; Variances and Appeals.**

1. There shall be a Board of Zoning Appeals as provided for and having the powers, functions and responsibilities as described in the Code of the Commonwealth of Virginia.
2. Every appeal from a determination of the Zoning Administrator and every application for a variance shall be filed in writing with the Zoning Administrator. The time of the public hearing is determined by the Board of Zoning Appeals. The filing fee shall be as follows:
  - a. Appeals from a determination of the Zoning Administrator -- \$517.
  - b. Variances or Use Permits for existing single-family residential -- Three hundred twenty-one dollars (\$321) for the first subsection of the Zoning Ordinance being modified. Each additional subsection to be modified will be an additional fee of twenty percent (20%) of the base fee.
  - c. Variances or Use Permits for single-family new construction/resubdivision for new construction - Two thousand five hundred forty-two dollars (\$2,542) for the first subsection of the Zoning Ordinance being modified. Each additional subsection to be modified will be an additional fee of twenty percent (20%) of the base fee.
  - d. Variance or Use Permit applications from nonprofit organizations and for nonprofit institutional uses -- Two hundred sixty-four dollars (\$264).

- e. Variances or Use Permits for a building location error, defined as a request for an "as-built" variance when a new structure is not built in accordance with the approved plans – Three thousand eight hundred twenty-three dollars (\$3,823).
  - f. Variances or Use Permits for all other uses – Three thousand one hundred sixty-seven dollars (\$3,167) for the first subsection of the Zoning Ordinance being modified. Each additional subsection to be modified will be an additional fee of twenty percent (20%) of the base fee.
  - g. A 10% automation enhancement surcharge shall be applied to each application above.
3. In addition to the above, the board shall have authority to grant, upon such conditions and safeguards as it may determine, such variances from the ordinance as may be in harmony with its general purpose and intent, so that the spirit of this ordinance shall be observed, public safety and welfare secured, and substantial justice done, as follows:
- a. Permit the continuance of a nonconforming use in a conforming building for periods of three (3) years beyond the three-year limitation contained in Section 35, subsection B.2, if the board finds that: (a) said nonconforming use is not detrimental to, and does not affect adversely, adjacent property by reason of the nature of the use, generation of traffic, parking, lighting, noise and similar factors; (b) no commercial display, lighting, advertising and wholesale or retail merchandising is carried on in connection with the conduct of said nonconforming use; (c) such discontinuance shall work practical difficulty and undue hardship upon the owner of said building.
4. If any variance or use permit granted by the Board of Zoning Appeals is not acted upon and put into effect within one (1) year after the date of such grant, then the variance shall be null and void and of no force and effect.
5. Every applicant for a variance or use permit shall file with his application a complete disclosure of the equitable ownership of the real estate to be affected including in the case of corporate ownership, the names of stockholders, officers and directors and in any case the names and addresses of all of the parties in interest; provided that the requirement of listing names of stockholders, officers and directors shall not apply to a corporation whose stock is traded on a national or local stock exchange and having more than five hundred (500) stockholders.
6. The Board of Zoning Appeals may approve use permits that allow modifications of placement requirement for structures on lots in “R-20,” “R-10,” “R-8,” “R-6,” “R-5,” and “R2-7” districts where there is no option in the Zoning Ordinance to allow modification of requirements by the County Board, such as special exception use permits described in Section 36.G. or site plans described in Section 36.H. The

Board of Zoning Appeals may impose conditions on the use permit that it deems necessary in the public interest, including limiting duration of the use permit. The BZA shall not approve a use permit unless it finds:

- a. That the proposal will not affect adversely the health or safety of persons residing in the neighborhood.
- b. That the proposal will not be detrimental to the public welfare or injurious to property or improvements in the neighborhood.
- c. that the proposal will not be in conflict with the purposes of the master plans and land use and zoning related policies of the County.

In determining whether the proposal will be detrimental to the public welfare, injurious to property or improvements in the neighborhood or will adversely affect the health or safety of persons residing in the neighborhood, the BZA shall consider whether the modification will promote compatibility of development with the surrounding neighborhood because the structure's overall footprint size and placement are similar to the structures on the properties surrounding the lot in question; and whether the modification will help preserve natural land form, historical features and/or significant trees and foliage.