

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

**IN RE: JULY 17, 2019 DECISION OF THE
BOARD OF ZONING APPEALS OF THE
TOWN OF VIENNA, VIRGINIA**

**JULIA KREYSKOP
and
BRIAN JOSEPH BUYNISKI
Petitioners,**

versus

**TOWN COUNCIL OF THE TOWN OF
VIENNA, VIRGINIA,
Respondent.**

CIVIL CASE NO. CL-2019-11361

ORDER

This matter is before the Court on a Writ of Certiorari and Judicial Review of the Board of Zoning Appeals of the Town of Vienna, Virginia's ("BZA") July 19, 2019 Order denying Julia Kreyskop and Brian Buyniski's ("Petitioners") application for a variance from § 18.33.E of the Vienna Town Code. The Court received briefs from the Petitioners and the Town of Vienna and heard oral arguments on the matter on December 20, 2019. The Court now remands¹ the matter to the Board of Zoning Appeals for clarification, as further described below.

¹ See *Steele v. Fluvanna County Bd. of Zoning Appeals*, 246 Va. 502, 504 (1993); *Toone v. Board of Zoning Appeals*, 54 Va. Cir. 33, 2000 WL 1047894, at *7-8 (Fairfax 2000) ("Absent specific language to the contrary, a statutory grant of appellate jurisdiction to a circuit court implies a power to remand the case to the administrative body whose decision the court is reviewing on appeal.")

The matter before the BZA was a petition for a variance submitted by Petitioners. The pertinent statute sets out the standard by which the BZA may grant or deny a variance. The statute reads in part that:

a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, or alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application.

Va. Code Ann. § 15.2-2309(2) (emphasis added).

On appeal to this Court, the pertinent statute states that “the decision of the board of zoning appeals shall be presumed to be correct” but that the petitioner “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.” Va. Code Ann. § 15.2-2314. After consideration of the matter, the Court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review.” *Id.*

The reason for the remand is that the Court cannot discern from the record the basis or bases of the BZA’s rejection of Petitioners’ request for a variance. A review of the petition for a variance

indicates that Petitioners asserted both grounds – unreasonable restriction and hardship – for the variance to be granted. The petition reads in part:

Unreasonable Restriction on the Utilization of the Property/Hardship

We purchased our house in 2010 in its current condition. Our house is 2 stories, does not have a basement, and is 2,124 square feet in area. We love living in the Town of Vienna and would like to be able to create more livable area in our home, to be shared with family and friends, but are unreasonably restricted from being able to do so by the unique combination of the setback requirements, the specific characteristics of the property, and the footprint of the house. Due to the shape of the lot (it being wider than it is deep) and the diagonal footprint of the house (with the closest corner being 35.7' away from the rear property line), we are effectively barred from making any enclosed additions to the rear of the house. We also cannot make any additions to the house at the front due to its closest corner being 26' from the front property line. Since ours is a corner lot, the setback requirement for the right side of the house (towards Cottage Street) is 25' rather than the 12' typical of non-corner lots. As a result, the setback on that side of the house would be permitted from the standpoint of setback requirements, it is impracticable due to the presence on that side of the house of an underground gas line, cable lines, electric lines, and various meters, all of which would have to be rerouted and relocated, as well as, the presence of the air conditioner, which would also have to be relocated (to the opposite side of the house towards Cottage St, even though in its current location it directly connects to the house's utility room, containing the interior HVAC system, hot water heater and laundry area). [*Please see Exhibit A for depiction of this area*]. Further, since that left side of the house contains the carport and the aforementioned utility room, access to any such addition from that side of the house would require completely rearranging the entirety of the gas lines, ducting and water lines serving the home from the existing utility room, resulting in having to make material interior modifications to our home. Building a screened porch in the rear is the most practical way to increase our living space while minimizing the impact on the surrounding community, existing utilities, easements and our existing house, but it requires a variance.

While we have a deck in the rear of our house (constructed in the 1980s), use of the deck is severely limited by the high mosquito presence. We love our backyard and invested heavily in landscaping it when we first moved in, but have discovered in our almost 9 years in Vienna that usage of our yard in the summer is virtually impossible due to the enormous number of mosquitos, a situation likely exacerbated by the stream that lies about 250' behind our property, in a park area. The addition of a screened porch would provide us

with more livable area and allow us to enjoy our yard in the summer months without worrying about mosquitos and the diseases they carry.

Pet. For Writ of Certiorari and for Judicial Review (Ex. B-1). Thus, the petition asserts a number of related grounds in support of the Petitioners' claim that they meet both the unreasonable restriction and hardship grounds.²

The Court cannot evaluate whether the BZA "erred in its decision" without clarification as to the rationale for its decision. The hearing transcript recounts the presentation by the Petitioners and the BZA's denial of the petition. Mr. Rak, who moved the BZA to deny the variance, stated that he did so because he did not "see hardship" and "that's kinda where it comes down to for me." However, in making the motion, Mr. Rak said that he was seeking denial of the variance for "consistency" of the "application of the ordinance...."³ Even if the Court could find on the basis of the transcript that the BZA rejected the petition on lack of "hardship" grounds, that still leaves the alternative grounds for relief – "that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property" – unaddressed.

The BZA's Order, dated July 19, 2019, does not provide the Court additional clarity on these issues. While the Order does summarize some of the arguments made in favor of and against the variance, the Order never states the findings of the BZA with respect to the asserted grounds for a variance nor does it adopt or reject the arguments that are summarized in the order.

² The Petitioners also assert in their appeal to this Court that the BZA never determined whether they had one or two decks in their backyard, which is relevant to whether or not the "long" deck would need its own variance in the event that a variance for the porch was granted.

³ Petitioners take issue with the "consistency" argument, asserting that this argument is "entirely incorrect." See Memorandum in Support of Petition for Judicial Review, at pages 9-10, fn. 13, and attached exhibits.

In sum, this Court cannot determine whether the BZA “erred in its decision” without understanding the basis or bases of the decision. Therefore, the Court remands the matter to the BZA for clarification and issues the following additional Orders:

- Clarification from BZA as to its findings and grounds for denial of the variance, to be filed with the Court on or before March 23, 2020.
- Supplemental briefs to be filed by the Town of Vienna and petitioners on or before April 13, 2020.
- The matter will then be taken under advisement for the Court to render a final decision. The Court will only schedule further oral argument if the Court deems it necessary.

SO ORDERED, this 22 day of January, 2020.



JUDGE RANDY I. BELLOWS

ENDORSEMENT OF THIS ORDER IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA