

**COCHRAN: THE AFTERMATH (HOW TWO VIRGINIA LOCALITIES
MITIGATED COCHRAN'S IMPACT ON PROPERTY OWNERS'
ABILITY TO OBTAIN ZONING RELIEF)**

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I. INTRODUCTION

In 2006, Arlington and Fairfax Counties passed legislation authorizing their Boards of Zoning Appeals (“BZA’s”) to grant special exception permits to allow modifications to zoning ordinance setback requirements.¹ This legislative action was generated by a 2004 Virginia Supreme Court decision, *Cochran v. Fairfax County Bd. of Zoning Appeals*,² which narrowly interpreted the circumstances in which BZA’s are authorized to grant variances (the primary mechanism through which, until that time, property owners obtained modifications from zoning setback requirements).³ The Court’s decision made BZA’s reticent to grant variances, since, prior to *Cochran*, BZA’s had, in general, operated pursuant to a more liberal and expansive reading of the VIRGINIA CODE section that authorizes the issuance of variances. In an attempt to ameliorate the changes brought about by *Cochran*, a bill was introduced in the General Assembly to alter the definition of when BZA’s can issue variances,⁴ but the bill was sidetracked as it made its way through the legislature and was ultimately passed in a completely modified and ineffective form. As a result of the General Assembly’s inability to mitigate *Cochran’s* impact, Arlington and Fairfax passed zoning laws designed to create a special exception that would serve as an alternate, less stringent mechanism for property owners to use to obtain zoning relief.⁵ In Arlington, this legislation took the form of a use permit;⁶ in Fairfax, it took for form of a special permit.⁷ In both counties, the legislation reflects a determination that, in reasonable circumstances, permitting modifications to setback requirements is acceptable – and desirable – public policy.

This article will discuss why Arlington and Fairfax passed legislation in response to *Cochran*, and what this legislation means to property owners in both jurisdictions – as well as what it could mean for

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¹ ARLINGTON, VA., ZONING ORDINANCE § 36.E.6 (Dec. 2006), available at <http://www.arlingtonva.us/Departments/CPHD/planning/zoning>; FAIRFAX, VA., ZONING ORDINANCE § 8-922 (July 2006), available at <http://www.fairfaxcounty.gov/dpz/zoningordinance>.

² 267 Va. 756 (2004).

³ See Fairfax County, Va., Staff Report (May 1, 2006) [hereinafter Fairfax County Staff Report]. Prepared in connection with the approval of the Fairfax County Special Exception Special Permit, the report states: “[i]n the past, the most typical way a property owner could request a desired modification of specified yard requirements or an increase in fence or wall height was by a variance application submitted for review to and acted upon by the Board of Zoning Appeals (BZA).” However, in light of *Cochran*, “the Board of Supervisors determined that it may be in the County’s best interest to allow some limited flexibility with regard to certain Zoning Ordinance provisions.” *Id.* at 1.

⁴ See H.B. 2159, Va. Gen. Assem. (Reg. Sess. 2005).

⁵ See VA. CODE ANN. § 15.2-2309(5). Arlington and Fairfax identified CODE section 51.2-2309(6), which authorizes local governments to delegate the right to grant special exceptions to BZA’s, as the enabling authority for their legislation.

⁶ See ARLINGTON, VA., ZONING ORDINANCE § 36.E.6 (Dec. 2006).

⁷ See FAIRFAX, VA., ZONING ORDINANCE § 8-922 (July 2006).

property owners in other jurisdictions which choose to adopt similar legislation. In addition to focusing on the series of events leading to and following *Cochran*, the article will highlight the differences and similarities between the way the two counties chose to respond to these events.

II. PRE-COCHRAN: VARIANCES AS THE PRIMARY MECHANISM FOR ZONING MODIFICATIONS

In 2002 and 2003, the two years prior to *Cochran*, the Fairfax BZA and the Arlington BZA granted 359 and 429 variance requests, respectively.⁸ A majority of these variances permitted modifications to setback requirements.⁹ The BZA's granted these modifications pursuant to section 15.2-2309 of the CODE, which states, in summary, that BZA's can grant variances when literal enforcement of the zoning ordinance produces an unreasonable restriction on the utilization of the subject property, provided that the BZA determines that (i) strict application of the zoning ordinance would produce undue hardship, (ii) that hardship is not shared by neighboring properties, and (iii) the grant of the variance will not be of substantial detriment to adjacent properties.¹⁰

Despite the high number of variance cases that were approved in the years preceding *Cochran*, borderline cases arose that forced BZA's to wrestle with whether the circumstances at hand satisfied the CODE's "hardship" language and therefore authorized the BZA to grant relief.¹¹ As a result of this uncertainty, the Court granted certiorari in 2004 to three borderline variance cases. The Court used these three cases, which were consolidated on appeal, to attempt to provide a definitive answer to what constitutes a sufficient hardship to justify a variance. These cases constituted *Cochran*.

III. COCHRAN: THE SUPREME COURT'S NARROW INTERPRETATION OF WHEN A VARIANCE IS AUTHORIZED

The three variance related appeals that generated *Cochran* arose from different parts of the Commonwealth: one from Fairfax County in Northern Virginia, one from Virginia Beach in Southeastern Virginia, and the third from the Town of Pulaski in Southwestern Virginia. Each case involved a struggle within the relevant BZA's to reconcile their finite ability to grant variances, as prescribed by and delineated in the CODE, with a desire to grant reasonable means of relief to variance applicants.

A. Case 1: Fairfax County

The applicants, homeowners in Fairfax County, desired to demolish their single family house and to construct a larger house in its place.¹² To construct this desired house, which would encroach up to 2 feet at multiple points upon a 15 foot side yard setback, the applicants were required to obtain a variance.¹³ Admittedly, the variance was needed to accommodate a convenience: the plans for the post-

⁸ See Arlington County, Va., Staff Report (Nov. 30, 2006) [hereinafter Arlington County Staff Report] (prepared in connection with the approval of the Arlington County Special Exception Use Permit).

⁹ For example, since 2000, approximately 82% of variances granted in Arlington modified street, side, or rear yard setback requirements. Arlington County Staff Report, *supra* note 8, at 7.

¹⁰ *Cochran*, 267 Va. at 767; VA. CODE ANN. §15.2-2309.

¹¹ See *Cochran*, 267 Va. at 767.

¹² *Id.* at 760.

¹³ See *id.* In all, the applicants' requested four variances, because multiple portions of a proposed exterior wall, where chimneys were planned, extended into the required setback. *Id.*

addition house, which would have a footprint measuring 71 feet by 76 feet,¹⁴ could have been altered to comply with the existing setback requirement, but building such a house would have frustrated the applicants' intended use of their property. Due to the grade of the property – which sloped up from front to back – the construction of the new house would, absent a variance, preclude having a flat, useable area in front of the house for the applicant's children to play, and a flat, usable area in the rear of the house to entertain guests.¹⁵ Furthermore, in addition to shifting the house's footprint, the house could have been renovated to have three stories – instead of the two as shown in the applicants' proposed plans – but such a design was considered aesthetically undesirable by the applicants, who felt it would create a “towering structure.”¹⁶ Nonetheless, the BZA granted the variance over the opposition of neighbors, finding that the topographical nature of the lot – in particular, the grade that affected the usable outdoor areas on the property – was a sufficient hardship to justify the variance.¹⁷ On appeal to the Circuit Court, the BZA's determination was affirmed.¹⁸

B. Case 2: Town of Pulaski

The applicants, homeowners in the Town of Pulaski, desired relief from a Town of Pulaski Zoning Ordinance requirement that all main and accessory structures be set back from all side streets by at least 15 feet.¹⁹ Their lot was bounded on three sides by a street, thereby limiting the permitted locations for a desired garage.²⁰ The applicants in this case, like the applicants in the Fairfax case, were further impacted by topographical considerations: their lot sloped in a manner that made placing the garage next to a side street the most sensible, and economical, course of action. However, due to the side street setback provisions, they were precluded from taking this approach without first receiving a variance from the BZA. The BZA wrestled with the question of whether this situation presented a sufficient hardship for it to act; its decision was made ever more difficult due to complaints of neighbors in opposition of the variance who felt that the proposed location of the garage, immediately abutting a sidestreet, would create a blindspot for automobiles passing by, would be an eyesore, and would disturb existing vegetation.²¹

This situation created such a conundrum for the BZA that its consideration of the application was spread out over four hearings and generated a request from the BZA to the town attorney for an opinion on whether or not the applicants' hardship was sufficient to authorize the BZA to act.²² Ultimately, feeling comfortable that the hardship was of a degree sufficient to merit relief from the zoning ordinance, but recognizing concerns raised by neighbors, the BZA approved a modified variance, which permitted the garage to be constructed within the 15 feet setback requirement, but at a distance of 5 feet from the

¹⁴ *Id.*

¹⁵ *Id.* at 761.

¹⁶ *Id.*

¹⁷ The opinion does not identify the number or percentage of neighbors who opposed the application.

¹⁸ *Id.* at 762.

¹⁹ *See id.* at 762-63.

²⁰ *Id.* at 761.

²¹ *Id.*

²² *Id.*

street (not immediately abutting the street as the applicants had requested).²³ On appeal to the Pulaski County Circuit Court, the BZA's determination was affirmed.

C. Case 3: City of Virginia Beach

In this case, the hardship question centered on a provision in the City of Virginia Beach's zoning ordinance that limits the size of accessory structures on a single family lot to 500 square feet.²⁴ The applicants, who sought two variances, had a 528 square foot existing detached garage, which they wanted to bring into compliance with the zoning ordinance. They also wanted to build a detached 288 square foot storage shed – for a total of 816 square feet for both structures. The proposed projects would be located on a 1.25 acre lot, which was large enough that the proposed location of the detached shed did not generate any adverse reactions from neighboring property owners.²⁵ Despite the fact that no neighbors opposed the application, the BZA only granted the variance in part, permitting the existing garage to remain but not allowing the construction of the storage shed. The reason for this decision appeared to be that the BZA believed the accessory structure could have easily been built as an addition to the house (in compliance with zoning) and therefore concluded that insufficient hardship existed for the BZA to permit the shed to be built as an accessory structure.²⁶

On appeal to the Circuit Court, the BZA's denial of the accessory shed was overturned.²⁷ The Circuit Court found that there was a sufficient hardship for the shed to be constructed; this determination appears to have been influenced by a hardship argument that was not made before the BZA: that the male applicant was sick and that his daughter, who had recently returned home to care for him, needed to use the shed to store her belongings.²⁸ (It is not clear whether the Circuit Court addressed why the daughter's needs created a hardship that required the shed to be detached from the home, as opposed to unattached, which could have been constructed without a variance.²⁹)

D. Court's Analysis

To begin its analysis, the Court addressed the overarching question of when BZA's have the right to issue variances. The Court recognized that, in certain circumstances, a zoning ordinance provision might be unconstitutional if its application to a parcel of property rendered the parcel relatively useless.³⁰ It noted that variances have traditionally served as an "escape hatch" or "escape valve" when the strict application of a zoning ordinance as applied to specific property is unconstitutional.³¹ Furthermore, the Court pointed out that statutes can authorize variances in the absence of an unconstitutional result, but that the Generally Assembly, as shown by the CODE's language, has not chosen to do so. The Court found that the CODE's definition of "unnecessary hardship" – the term used to trigger the BZA's authority

²³ *Id.*

²⁴ *See id.* at 762.

²⁵ *Id.* at 763.

²⁶ *Id.*

²⁷ *Id.* at 764.

²⁸ *Id.* at 763.

²⁹ *See id.*

³⁰ *Id.* at 764.

³¹ *Id.*

to authorize a variance – clearly indicates that the Generally Assembly intended that variances only be granted to prevent an unconstitutional result. Consequently, the Court held that BZA’s only have the authority to grant variances to avoid an unconstitutional result (as apposed to a matter of convenience).³²

In explaining its holding, the Court stated that the BZA acts in an administrative capacity when considering variance applications and can only act in accordance with terms prescribed by the General Assembly.³³ In the case of a variance, the General Assembly has only given BZA’s the authority to act in the presence of an undue hardship, which the Court interpreted – pursuant to its belief that the General Assembly only intended for BZA’s to grant variances to avoid an unconstitutional result – to mean that BZA’s have “no authority to grant a variance unless the effect of the zoning ordinance . . . would interfere with all reasonable beneficial uses of the property, taken as a whole.”³⁴

The Court noted that a BZA’s role in a variance proceeding is different than in a special exception proceeding;³⁵ a BZA acts legislatively when it considers applications for special exceptions, and its decision must be upheld so long as it is fairly debatable.³⁶ In comparison, when considering a variance, a BZA only has the authority to act if the case’s circumstances justify such action.

In applying its interpretation of CODE section 15.2-2309 to the three cases before it, the Court found all three to be devoid of the hardship required by the CODE to justify the issuance of the variance.³⁷ The Court explained that, in the Fairfax case, the proposed house could have been moved, or the project could have been abandoned, which would still allow the applicants to use the existing house; in the Pulaski case, the proposed garage could have been moved, or the project abandoned; and in the Virginia Beach case, the shed could have been built as an addition, or the project abandoned.³⁸ The Court stated that although compelling reasons existed for each variance – such as the “desires of the owners, supported by careful planning to minimize harmful effects to neighboring properties; probable aesthetic improvements to the neighborhood as a whole, together with a probable increase in the local tax base; greatly increased expense to the owners if the plans were reconfigured to meet the requirements of the zoning ordinances; lack of opposition, or even support of the application; and serious personal need, by the owners, for the proposed modification” – they were not sufficient to vest the BZA’s with the authority to grant variances in the absence of an undue hardship, according to the definition of the term adopted by the Court.³⁹ In fact, the Court stated that these types of compelling reasons are “immaterial” unless the threshold question of whether an undue hardship exists can be answered affirmatively.⁴⁰

³² *Id.*

³³ *Id.* at 765.

³⁴ *Id.* at 766.

³⁵ *Id.* at 765.

³⁶ *Id.*

³⁷ *Id.* at 766.

³⁸ *Id.*

³⁹ *Id.* at 767.

⁴⁰ *Id.*

IV. VARIANCE RELATED JUDICIAL DECISIONS POST-COCHRAN

Since deciding *Cochran*, the Court has shown no signs of altering its position, thereby perpetuating the case's effect. In *Cherrystone Inlet, LLC v. Board of Zoning Appeals of Northampton County*,⁴¹ the applicant, the owner of 6.59 acres of property that had recently been subdivided into 5 lots, petitioned the BZA for a variance to permit single family dwellings to be constructed on the lots.⁴² Absent a variance, a single family dwelling could only have been constructed on one of the lots, due to existing setback requirements that engulfed the other four lots. The Court, upholding the BZA and Circuit Court's decisions, held that since a single residential structure could have been constructed on the 6.59 acre parcel before it was subdivided, or on one of the lots after it was subdivided – a fact that the applicant was aware of before purchasing and subdividing the property – there was a permissible reasonable beneficial use of the property absent a variance: the permitted single family dwelling.⁴³ The Court characterized the remainder of the property that could not be built upon as a “valuable waterfront amenity appurtenant to that structure.”⁴⁴ In the Court's opinion, the fact that the four lots were unbuildable did not constitute a hardship, since they were created from a larger, buildable lot, and because one of the new lots was buildable. For a sufficient hardship to exist to justify a variance, it seemingly would have had to be present prior to the subdivision.

Similarly, in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*,⁴⁵ the Court, reversing the determinations made by the BZA and the Circuit Court, found that a variance, which was needed to permit the subdivision of a parcel of land when the width of one of the newly subdivided lots would be less than the amount required by the zoning ordinance, was not justified, because, pre-subdivision, “[t]he effect of the zoning ordinance [on the property] does not interfere ‘with all reasonable beneficial uses of the property, taken as a whole.’” The property, pre-subdivision, could accommodate a reasonable beneficial use: a single-family dwelling.⁴⁶

Furthermore, Circuit Courts have followed *Cochran*. In *Andrew N. Aesy v. Zoning Appeals Bd. of City of Salem*,⁴⁷ the applicant property owner had requested a variance to permit a barn to remain in the front yard of a lot on which a residence had been constructed. The City's zoning ordinance provided that accessory structures, including barns, were only permitted in the rear yard of single-family dwellings.⁴⁸ The BZA determined that without the barn (and the variance) the applicant would still have reasonable use of the property: the existing single-family dwelling.⁴⁹ On appeal to the Circuit Court, the Circuit

⁴¹ 271 Va. 670 (2006).

⁴² *Id.* at 672-74.

⁴³ *Id.* at 675. It should be noted that, at the time the Court decided *Cherrystone*, BZA's determinations on questions of law were provided a presumption of correctness on appeal. This presumption for such determinations was repealed by the General Assembly in 2006. Whether this presumption was dispositive in the Court's decision in *Cherrystone* is not clear; however, this change in the law should be considered when predicting how the Court will rule on future variance appeals.

⁴⁴ *Id.*

⁴⁵ 268 Va. 441 (2004).

⁴⁶ *Id.* (quoting *Cochran*).

⁴⁷ 66 Va. Cir. 382 (2005).

⁴⁸ *Id.*

⁴⁹ *Id.* at 384.

Court upheld the BZA's determination and stated that: "In this case, by simply removing the barn, Petitioner [the property owner/variance applicant] can reasonably use the lot by living in the single-family dwelling he built. Thus, there is no unnecessary hardship that requires the granting of a variance."

Likewise, in *Amherst Bd. of Supervisors v. Amherst Bd. of Zoning Appeals*, the Circuit Court found that the requested variance, which would have permitted a 20 foot commercial sign at the entrance to the subject property instead of a 10 foot sign, as permitted by the zoning ordinance, was not justified.⁵⁰ The Circuit Court found no evidence that the variance request was generated by any hardship, let alone a hardship undue enough to satisfy *Cochran's* standards, because the subject property already had a beneficial use: a tractor dealership.⁵¹

V. COCHRAN'S IMPACT

As a result of *Cochran* and the cases that followed, variance approval rates declined dramatically. For example, 359 variance requests were granted in Fairfax County in 2002 and 2003 (the two full years preceding *Cochran*),⁵² while only 5 were granted in the two years following *Cochran*.⁵³ Arlington also experienced a noticeable decrease in the number of variance requests that were heard and approved after *Cochran*; however, unlike in Fairfax, the variance approval rate in Arlington did not suffer a precipitous decline,⁵⁴ as the Arlington BZA continued to grant variances at more than a nominal rate. From 1990 to 2004, the Arlington BZA heard an average of 206 variance cases per year and approved approximately 98% of these cases. In 2005 and 2006, the two years after *Cochran*, the Arlington BZA heard an average of 110 cases per year, and approved approximately 78% of these cases.⁵⁵ Thus, *Cochran* did not

⁵⁰ 70 Va. Cir. 91 (2005).

⁵¹ *Id.* at 93.

⁵² During this time period, 437 variance requests were filed.

⁵³ During this period 78 variance requests were filed.

⁵⁴ One of the reasons for the difference in approval rates in Arlington and Fairfax following *Cochran* is that Arlington is an older community with smaller lots, many of which contain houses that were built prior to the adoption of the zoning ordinance and do not comply with its setback requirements. See Arlington County Staff Report, *supra* note 8, at 3. This situation – where property owners are unable to expand older, modest homes by-right due to the manner and location in which the homes were originally constructed – often resulted in determinations by the Arlington BZA that the subject property suffered from a sufficient hardship to justify a variance.

⁵⁵ It should be noted that although the Arlington BZA denied only 20% more variances than it had before *Cochran*, this number likely does not accurately reflect the case's effect. As noted above, the number of variance requests in 2005 and 2006 almost decreased by half in Arlington. A similar trend occurred in Fairfax, where the number of variance applications significantly decreased after *Cochran*. Had *Cochran* been decided in a manner more favorable to homeowners, it is likely that many more requests would have been heard during that time. Instead, some property owners – especially those who perceived their potential cases to be borderline or worse in comparison to *Cochran's* standards, perhaps because they did not live on extraordinary lots – likely chose not to apply for variances, feeling that doing so was not worth the effort of filing the application or paying the filing fee. If these property owners had filed for variances, many would probably have been denied, further lowering the approval rate in 2005 and 2006. Furthermore, the decline in the number of applications filed in Arlington and Fairfax was probably at least partly due to potential variance applicants learning that the Arlington County Board and the Fairfax County Board of Supervisors, respectively, were on the verge of approving setback modification special exception permit processes. Some property owners, especially those with borderline or worse cases under *Cochran's* standards, probably waited for these permit processes to arrive. This is especially likely due to the temporal schedule that the use permit process approval took. The Arlington County Board was originally schedule to make a determination on the permit in March, 2006, but due to deferrals generated by questions raised during the public hearing process, the

eliminate the variance in Arlington, but it did put it out of reach of those homeowners who lived on “average” lots (those on which the BZA was not able to recognize an undue hardship). Absent some sort of special circumstance – such as owning a corner lot (which is subject to greater setback provisions than a mid-block lot), owning a non-conforming house that was built prior to the adoption of the zoning ordinance, or owning property that has unique topographical considerations – an Arlington property owner’s chance of obtaining a variance was significantly curtailed.

As the decline in variance approvals in Arlington and Fairfax show, *Cochran* had the practical effect of placing variances outside the reach of many property owners (even though it did not technically change any laws – it just provided a narrower interpretation of an existing law than many BZA’s had been using, thereby making it more difficult for property owners to obtain relief from this law). Before the case was decided, property owners were often able to obtain variances for matters that were desired for convenience purposes, but that also contained an aspect of hardship. Afterwards, this was often not the case. As an example of this change, take the factual situation in the Fairfax case in *Cochran*. Prior to *Cochran*, the applicants in the case were able to obtain a variance to modify a side yard setback requirement when their motivation was convenience related (since the design of the proposed house could have been altered to comply with the applicable setback requirement, but such a change was undesirable to the applicants because it would cause them to lose some of their useable outdoor space), and when there was an existing house on the property. Following *Cochran*, similarly situated applicants would have little chance of obtaining a variance in Fairfax; such a request would likely be summarily denied, with transitory, if any, discussion regarding the pros and cons of permitting the desired modification(s), since, pursuant to *Cochran*, there is already a reasonable beneficial use of their property: an existing single family dwelling.

VI. THE GENERAL ASSEMBLY’S ATTEMPT TO MODIFY *COCHRAN*

In an attempt to alleviate *Cochran*’s impact on property owners’ ability (or perhaps more appropriately, inability) to obtain zoning modifications, a bill was introduced in the General Assembly in January 2005 to amend CODE section 15.2-2309 (the section that authorizes BZA’s to grant variances) to allow BZA’s to authorize variances upon finding a “clearly demonstrable” hardship, as opposed to an “unnecessary” or “undue” hardship approaching confiscation.⁵⁶ The ostensible purpose was to eliminate those terms in the statute – such as “unnecessary” and “undue” hardship – that *Cochran* interpreted to mean that the BZA could only act to prevent an unconstitutional result when the effect of the zoning ordinance was to allow no reasonable beneficial use of the subject property. Unfortunately for property owners desiring zoning modifications, the bill was sidetracked during the legislative review process and ultimately was enacted as an amendment to CODE sections 15.2-2286, 15.2-2311, and 15.2-2314,⁵⁷ which did little to alleviate *Cochran*’s impact.

The amendment to CODE section 15.2-2286 altered those powers that localities are authorized to delegate to their zoning administrator. Prior to the amendment, localities had the power to authorize their zoning administrators to grant administrative variances from any building setback requirement provided that the zoning administrator found that (i) the strict application of the ordinance would produce undue hardship; (ii) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and (iii) the authorization of the modification will not be of substantial detriment to adjacent property, and the character of the zoning district will not be changed by the granting of the modification. The amendment changed the wording of the law so that local governments now have the

County Board ultimately did not approve the use permit process until December 2006. Likewise, Fairfax County held a number of public hearings on its special permit legislation before it was enacted, so the public was well aware that it was coming through the legislative pipeline.

⁵⁶ See H.B. 2159, Va. Gen. Assem. (Reg. Sess. 2005).

⁵⁷ See VA. CODE ANN. §§ 15.2-2286, 15.2-2311, 15.2-2314.

right to authorize their zoning administrators to grant administrative modifications – as opposed to administrative variances – to physical requirements on a lot or parcel of land⁵⁸ if the administrator makes the same three findings as were required for administrative variances. The amendments to CODE sections 15.2-2311 and 15.2-2314 provide a right of appeal to parties aggrieved by a decision of a zoning administrator with respect to an administrative modification to the zoning ordinance.⁵⁹

It is unclear what change, if any, these amendments will generate. To date, localities have been reluctant to authorize their zoning administrators to issue administrative modifications, perhaps feeling that doing so would place too much discretion in the hands of one individual, and that administrative employees should not serve as arbiters of who gets discretionary relief from the zoning ordinance. Even if a locality were to authorize its zoning administrator to grant zoning modifications, it is not clear what practical effect this change would have on property owners. The standards for an administrative modification – like those for the old administrative variance, and for BZA’s when granting variances – include the terms “unnecessary” and “undue” hardship. It is not clear whether a court would interpret these terms in the same manner as *Cochran* interpreted them with respect to BZA’s right to grant variances – namely, that zoning administrators do not have the right to grant modifications if a reasonable beneficial use exists on the subject property. Thus, it is not certain that this zoning modification process, if subject to a court challenge, would allow property owners to obtain modifications unless the strict application of the zoning ordinance precluded all reasonable beneficial use of the property.

VII. FAIRFAX COUNTY AND ARLINGTON COUNTY’S LEGISLATIVE RESPONSES TO *COCHRAN*

Due to *Cochran*’s effect on property owners’ ability to obtain setback modifications via variances, coupled with the General Assembly’s inability to mitigate its impact, the Fairfax County Board of Supervisors and Arlington County Board authorized an examination into, and ultimately the approval of, a special exception process through which their BZA’s could modify setback requirements.⁶⁰ In doing so, these localities took a pragmatic approach to analyzing what kind of modifications their BZA’s should be authorized to permit, grappling with issues such as whether the permits should apply to both residential and commercial properties, whether they should be permitted for setback and/or height requirements, and whether they should be permitted for new and/or existing structures.⁶¹

A. Fairfax’s Modification Ordinance – The Special Permit

Fairfax County’s special exception special permit ordinance was adopted in July 2006 and empowers the Fairfax BZA to grant special permits for additions to existing structures that do not reduce minimum yard requirements by more than 50%.⁶² Issuance of the special permit requires that the

⁵⁸ *Id.* § 15.2-2286. These physical requirements include, but are not limited to, size, height, location or features of or related to any building, structure, or improvements. *Id.*

⁵⁹ *Id.* §§ 15.2-2311, 15.2-2314.

⁶⁰ See Arlington County Staff Report, *supra* note 8; Fairfax County Staff Report, *supra* note 3. The Arlington County Staff Report highlights how the legislation was generated as a response to *Cochran*; it says that the “use permit process could be used as an alternative to the variance process that has been used by Arlington homeowners to deal with the constraints of their lots and/or existing dwellings when designing improvements.” Arlington County Staff Report, *supra* note 8, at 11.

⁶¹ As mentioned above, Arlington and Fairfax identified CODE section 51.2-2309(6), which authorizes local governments to delegate the right to grant special exceptions to BZA’s, as the enabling authority for their legislation.

⁶² See FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922 (July 2006). This special permit applies to properties zoned residential, commercial, industrial and planned development districts, provided such yards are not subject to proffered conditions or development conditions related to yards and/or such yards are not depicted on an

proposed addition comply with certain general conditions that apply to all Fairfax County land use applications, such as, *inter alia*, that the proposed use or structure be harmonious with the adopted comprehensive plan, satisfy the general purpose and intent of the applicable zoning district regulations, and be harmonious with and not adversely affect the use or development of neighboring properties.⁶³ Furthermore, these special permits are subject to additional, unique standards.⁶⁴

First among these unique standards is that the proposed reduction cannot be less than 50% of the existing setback requirement.⁶⁵ (This, however, does not preclude property owners from seeking approval from the BZA to encroach beyond this 50% limitation, since such a reduction can still be sought via a variance.)

Second, the special permit cannot authorize the placement of a structure in an otherwise impermissible location.⁶⁶ For example, a shed, which is not permitted by ordinance in a front yard, could not be permitted in a front yard by means of a special permit.

Third, the special permit only applies to existing structures that are in compliance with the zoning ordinance;⁶⁷ it cannot be used as a means to fix an error in building location or other inadvertent error that has already occurred. In this manner, the special permit is prospective only; it serves as a way to help visions of expansion on existing structures become reality, not as a method of providing a safety valve for existing mistakes. Furthermore, the special permit cannot be used on a vacant lot; the intent is that new structures should be designed to comply with the applicable zoning regulations.

Fourth, the resulting gross floor area of an addition to an existing principal structure may not exceed 150% of the total gross floor area of the principal structure that existed at the time of the setback reduction request.⁶⁸ This standard was included to address the “considerable concern expressed at the public meetings [held with the Fairfax community to discuss the special permit] about the replacement of small modest homes with homes that are much larger and out of character with the surrounding area.”⁶⁹ In some situations, this standard may result in a more restrictive building envelope than would otherwise be permitted by right.⁷⁰

approved conceptual development plan, final development plan, development plan, special exception plat, special permit plat, or variance plat. Thus, requirements put in place pursuant to a previous land use approval could not be modified by a special permit. *Id.*

⁶³ *Id.* §§ 8-006, 8-922.

⁶⁴ *See id.* § 8-922(1); Fairfax County Staff Report, *supra* note 3.

⁶⁵ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(1) (July 2006).

⁶⁶ *Id.* § 8-922(2).

⁶⁷ *See id.* § 8-922(3). Fairfax County’s Zoning Ordinance already contains a provision that allows administrative relief for errors in building location that do not exceed 10% of the applicable setback requirement and a provision that allows the BZA to grant a special permit for errors in building location that exceed 10% of the applicable minimum yard requirement, provided that the noncompliance was done in good faith, or through no fault of the property owner, or was the result of an error in the location of a building subsequent to a Building Permit.

⁶⁸ *Id.* § 8-922(4).

⁶⁹ Fairfax County Staff Report, *supra* note 3.

⁷⁰ *Id.* at 4.

Fifth, the resulting floor area of an existing accessory structure and any addition to it must be clearly subordinate in purpose, scale, use, and intent to the principal structure on the site.⁷¹

The sixth, seventh, and eighth special standards require the BZA to weigh the impact of the application on nearby properties to ensure that the proposed development will be in character with the existing on-site development and harmonious with the surrounding off-site uses, and will not adversely impact the use and/or enjoyment of any adjacent property.⁷²

Finally, the BZA must determine that the proposed setback reduction represents the minimum amount of reduction necessary to accommodate the proposed structure on the lot, and that there is no viable alternate location for the proposed addition (such as adding the addition to a different side of the existing structure in a manner that would not create encroachment issues).⁷³

To make sure that the proposed development complies with the above-listed standards, the BZA is given the authority to impose conditions on the development to ensure that it is appropriate.⁷⁴

B. Arlington Ordinance – The Use Permit

Arlington County enacted its special exception use permit ordinance on December 9, 2006. It authorizes its BZA to grant modifications to placement requirements on lots zoned for use by single or two family dwellings, provided that there is no alternative process available that would permit the County Board to modify the setbacks or placement requirements on the subject property (such as a Unified Residential Development or Site Plan – two types of special exceptions in Arlington).⁷⁵ The staff report prepared in connection with the enactment of the use permit makes the legislation’s purpose clear: “This [use permit] process would alleviate the difficulties from the very limited ability of the BZA to grant variances. This special exception use permit process that the BZA would administer would provide Arlington property owners the ability to request modification which formerly could only be done by variance.”⁷⁶

The County Board considered extending this use permit process to include modifications for height and coverage zoning restrictions, but ultimately chose not to do so.⁷⁷ It also chose not to give the BZA the right to grant modifications by use permit to commercial or multiple family dwelling properties. (This, however, does not mean that owners of commercial and multiple family dwelling properties are precluded from seeking setback modifications, since they can request such relief via a variance.)

⁷¹ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(5) (July 2006).

⁷² *Id.* § 8-922(6), (7), (8); Fairfax County Staff Report, *supra* note 3.

⁷³ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(9) (July 2006); Fairfax County Staff Report, *supra* note 3.

⁷⁴ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(9) (July 2006).

⁷⁵ ARLINGTON COUNTY, VA., ZONING ORDINANCE § 36.E.6 (Dec. 2006).

⁷⁶ Arlington County Staff Report, *supra* note 8, at 8.

⁷⁷ *Id.* at 10. In explaining this decision, the Arlington County staff report states: “Variances for height are few and generally are the result of builder error. The BZA has consistently denied these requests. The new coverage restrictions have only recently been adopted and time should be taken to see how well these regulations work.” *Id.*

The County Board conditioned the BZA's authority to grant use permits upon a finding of the following:

- That the proposal will not affect adversely the health or safety of persons residing in the neighborhood;
- That the proposal will not be detrimental to public welfare or injurious to property or improvements in the neighborhood; and
- That the proposal will not be in conflict with the purposes of the master plans of the County.⁷⁸

When considering the above-listed conditions, the County Board instructed the BZA to 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.⁷⁹

Arlington's use permit ordinance is structured to make those factors that *Cochran* labeled as "immaterial" absent a hardship – such as the impact of the proposed improvements in the surrounding neighborhood, the support of the neighborhood, and the need of the applicants – the paramount point of discussion for the BZA when considering a use permit. In this sense, Arlington's use permit ordinance replaces the austere variance ordinance, which only permitted BZA's to engage the case at hand to fashion relief upon the finding of a hardship, with a process that allows the BZA to immediately engage and proactively discuss the proposed modification(s) in a manner designed to accommodate the needs of the applicant while ensuring that no harm is caused to the community by the modification.

Like the Fairfax County Board of Supervisors, the Arlington County Board gave the BZA the authority to impose conditions on the development to ensure that it is appropriate.⁸⁰

C. Comparing Fairfax's Special Permit to Arlington's Use Permit

Although common in their attempt to create a path around *Cochran*, Fairfax and Arlington diverged with respect to the circumstances in which they chose to allow their BZA's to grant modifications through a special permit or use permit. In general, Arlington provided its BZA with greater flexibility in fashioning relief from the zoning ordinance by using more general language in its standards for approval, while Fairfax was more specific in defining the situations in which, and the degree to which, modifications are permitted.⁸¹

One difference between the Counties' legislation is that the Arlington Ordinance applies to both existing and proposed structures, while the Fairfax Ordinance applies only to additions to existing structures. This means that in Arlington, property owners can utilize the use permit in tear-down and rebuild situations; in Fairfax, the Board of Supervisors ultimately determined that property owners could

⁷⁸ ARLINGTON COUNTY, VA., ZONING ORDINANCE § 36.E.6 (Dec. 2006).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Some of the differences between the special exception processes may be the result of inherent zoning differences between the counties. For example, in Arlington, it is not uncommon for a residential lot to be around 6,000 square feet, while lots in Fairfax are usually larger. Due to these reasons, there is more room for property owners to add to and modify existing structures on lots located in Fairfax, while property owners in Arlington are working within tighter quarters when trying to improve their property. This may be why Arlington chose to provide its property owners with a greater means of flexibility in regard to what kind of modifications they could seek.

not use the special permit process in similar circumstances. The Fairfax County staff report states that the “Board of Supervisors has expressed the position that this special permit should only apply to existing structures and should not apply to vacant lots or tear-down/rebuild situations because there is more opportunity to design a new structure that can comply with the yard requirements when not limited by the parameters established by location/orientation of existing structures on a lot.”⁸²

Another difference between the two ordinances is that Fairfax requires some sort of unique circumstance to justify the proposed modification; Arlington does not. Arlington only requires that the proposed design be compatible with and not injurious to neighboring properties.⁸³ An example of the unique circumstance required by the Fairfax Ordinance is set forth in the Fairfax County staff report, which states that “a homeowner may wish to expand a kitchen in such a manner that necessitates the encroachment into a minimum required side yard. Although there may be land area available on the other side of the house for an addition that would not necessitate a modification of the minimum yard requirements, the use of that space for a kitchen addition would be impractical given that the existing kitchen is not located on that side of the house.”⁸⁴ If no special circumstance is present, such as a preexisting condition that necessitates the proposed addition being constructed in a setback area, the Fairfax BZA is not given the right to grant relief. In Arlington, the BZA is not required to address whether or not the proposed addition could be placed in an alternate, compliant location, although it is something that the BZA may choose to address *sua sponte* when weighing the overall effect of a proposed addition on neighboring properties.

A third difference between the two permits is that Fairfax chose to extend its special permit process to all types of uses – whether residential, commercial, or other. Its reasoning is displayed by the Fairfax County staff report, which states that the:

special permit should be applicable in all zoning districts given that certain existing nonresidential structures may have similar constraints as certain residential structures and may not be able to expand and/or make improvements given the lot configuration, environmental features and/or changes in regulations since the structure was originally constructed. This is particularly relevant in those commercial and industrial areas where redevelopment is desired, such as revitalization areas, and without such a special permit, certain properties may not be able to redevelop or undergo proposed development.⁸⁵

Arlington chose not to extend the same opportunities to commercial or multi-family dwelling/apartment properties, limiting the applicability of its use permit to those residential districts that are zoned for use by single or two family dwellings.

A fourth difference is that Fairfax limited the size of special permit aided additions, while Arlington did not. The Fairfax Ordinance states that the “resulting gross floor area of an addition to an existing principal structure may be up to 150% of the total gross floor area of the principal structure that existed at the time of the yard reduction request.”⁸⁶ As stated above, this is the result of “considerable concern expressed at the public meetings about the replacement of small modest homes with homes that are much larger and out of character with the surrounding area.”⁸⁷ Arlington did not similarly restrict the

⁸² Fairfax County Staff Report, *supra* note 3, at 4.

⁸³ ARLINGTON COUNTY, VA., ZONING ORDINANCE § 36.E.6 (Dec. 2006).

⁸⁴ Fairfax County Staff Report, *supra* note 3, at 6-7.

⁸⁵ *Id.* at 3.

⁸⁶ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(4) (July 2006).

⁸⁷ Fairfax County Staff Report, *supra* note 3, at 5.

size of additions that can be authorized by use permits, instead choosing to use general, flexible standards to guide its BZA's decisions. As a result, the Arlington BZA can authorize improvements in any size through a use permit, so long as the resulting improvements are compatible with, and not adverse or detrimental to, nearby properties, and in compliance with other applicable zoning regulations, such as height and coverage limitations.

Similarly, Fairfax limited the size of the setback reduction that can be authorized by the BZA, while Arlington did not. In particular, the Fairfax Ordinance limits reductions to 50% of the required setback, such that an applicant could not request that a 20 foot setback be reduced to less than 10 feet through a special permit (although such a request could be made through a variance).⁸⁸ Arlington, again, did not restrict its BZA in this manner; the Arlington BZA has the power, if it so chooses, to permit setback modifications up to any amount.

D. Special Permit and Use Permit Approval Rates

The approval rates for the special permit and the use permit display a stark contrast with the approval rate for variances in the preceding years, particularly in Fairfax. In fact, at the first Fairfax BZA meeting where special permits applications were heard, more special permits were granted than variances had been granted in the previous two years (10 compared to 5). So far, as of the end of March 2007 (approximately 4 months after the Fairfax BZA started hearing Special Permits), 21 special permits were approved, 1 was approved in part (the BZA granted relief, but not in the form or to the extent requested by the application), and 1 was denied. Meanwhile, the Arlington BZA, as of its April 2007 meeting, had heard and decided 24 use permit applications; of these, 22 were approved, and 2 were denied.

These approval rates show that the Counties' legislation is working as intended; the Counties have created a mechanism for their citizens to use to obtain modifications to setback requirements without having to prove that their property suffers from a hardship. For example, the Fairfax BZA, at a meeting held a few months after its special permit ordinance was passed, approved a special permit to permit construction of an addition to an existing house 7.5 feet from a side lot line (on property with a side lot line setback of 15 feet), and a special permit to permit construction of an addition to an existing house 11.2 feet from a side lot line (on property with a side lot line setback of 20 feet). Prior to Fairfax's adoption of its special permit ordinance, it is unlikely that either of these reductions would have been permitted as variances, since both properties contained existing residences, thereby precluding the existing of an undue hardship according to *Cochran*.

VIII. SETBACK MODIFICATION SPECIAL EXCEPTIONS IN OTHER JURISDICTIONS

In light of the opportunities provided to property owners by Arlington and Fairfax's ordinances, other localities might wish to pass similar legislation. In doing so, the differences between Arlington and Fairfax's legislation highlight some of the key issues that other jurisdictions would likely want to address, such as what kind of standards (whether strict or flexible) to adopt to guide the BZA in its determination, whether to afford relief to all kinds of uses, and whether to provide relief only to additions to existing structures or to new structures as well. Additionally, other jurisdictions may wish to tailor their legislation to address zoning issues pertinent to their way of life. For example, although Arlington and Fairfax did not focus on accessory structures, there is a demand, as *Cochran* shows, in other jurisdictions for a mechanism to permit modifications to zoning requirements that relate to accessory structures.

IX. CONCLUSION

Cochran ushered in a relatively tumultuous time period in the normally stagnant world of zoning law. It caused two local governments – and possibly more to follow – to work proactively to create a solution to the loss of practical opportunities available to property owners. In doing so, it forced these

⁸⁸ FAIRFAX COUNTY, VA., ZONING ORDINANCE § 8-922(1) (July 2006).

localities to have a dialogue regarding how, and under what conditions, modifications should be permitted to zoning regulations. This is likely to be an ongoing dialogue, as certain parts of the Commonwealth – especially Northern Virginia – become increasingly dense, and property owners and localities seek to balance the need and desire to maximize the usability of land, an increasingly scarce and valuable resource, with a duty to ensure that this valuable commodity is regulated in a way that protects the health, safety, and welfare of all.