

Planning Commission Meeting  
November 3, 2010  
Verbatim Excerpt

ZONING ORDINANCE AMENDMENT (ZONING APPEAL FEE)

After the Close of the Public Hearing

Chairman Murphy: Public hearing is closed; Mr. Hart, please.

Commissioner Hart: Thank you, Mr. Chairman. First, let me thank staff, particularly Jill Cooper and Leslie Johnson for their fine work on this case. I also would like to thank the citizens that came out tonight to testify and those who submitted correspondence. We received a letter and a resolution from the McLean Citizens' Association which, I believe, is in the record, as well as Mr. Farrell's letter. As the Commission is aware, the filing fee for appeals to the Board of Zoning Appeals was raised in 2009 from \$375 to \$2,455. Subsequently, the General Assembly enacted an amendment to 15.2-2311 which limits what a locality can charge for a filing fee. Staff is in support of the advertised Amendment and has recommended a reduction to \$1,000, although the Board of Supervisors has authorized advertising a range from \$500 to \$1,000. On Zoning Ordinance Amendments, I usually agree with the staff position. Tonight I generally agree, but will be making one modification and wanted to address my rationale for doing so. This could be a very difficult decision, especially in light of the economic situation in the County's budget. But I believe that the cost recovery objectives, which were relied upon at the time of the increase from \$375 to \$2,455, should be inapplicable to appeal applications. Unlike applications for rezonings, special exceptions, or special permits, an appeal applicant may not be requesting anything other than to be left alone. Some of the applicants have received a violation notice; others may be a citizens association or neighbors to something that has been approved or for which a permit has been issued with which they may legitimately take issue. Unless they note an appeal, the determination becomes a thing decided. Although this can be a difficult and expensive process, we should not forget that some of those appellants actually prevail and this process, which may pass through several tribunals, is intended to allow citizens access to a fair and impartial review. We also have to be careful not to conflate the concept of punishment for violators with a filing fee for an impartial audience. Fines for violations can be determined and imposed by a judge in Circuit Court if appropriate. Both equal protection and due process concerns have been articulated about the current fee. We have essentially precluded less affluent citizens from disagreeing with the Zoning Administrator or DPWES staff on Zoning Ordinance issues, which prevents them from a public hearing to present their argument. Two thousand, four hundred, fifty-five dollars may be more than many citizens earn in a month or pay for rent or a house payment. For senior citizens or those on fixed incomes, it's an expense they cannot afford. For a citizen who receives a zoning violation, who may take legitimate issue with staff's conclusions or measurements, or wishes to present evidence contradicting the Zoning Administrator, they may be priced out of the process. By comparison to later steps in the process, the fee is enormous. It costs only \$86 or \$89 to appeal from the BZA to the Circuit Court; \$50 to appeal from the Circuit Court to the Virginia Supreme Court; and \$300 to appeal from the Virginia Supreme Court to the U.S. Supreme Court. Cost recovery at those stages does not seem to be a factor for those tribunals. Even at \$1,000, this filing fee is a big obstacle to access to the

process. Another rationale expressed for the staff recommendation for the fee being \$1,000 is that it should be higher than \$885, which is a fee for certain types of special permit fees and variances as a deterrent. But I do not believe the General Assembly has included deterrents as a permissible basis for higher fees. And although many appeals are ultimately withdrawn, we have not seen significant abuse of the process in recent years. Although many cases are deferred, many appeals involve complicated issues, and the deferrals that are granted are almost always with staff concurrence while staff and the parties are negotiating or engineering submissions remain under review by staff. I trust also that potential abuses of the process can be monitored by staff and the BZA and dealt with as each case is administered with benefit of the specifics. I have faith in that process. I do believe a good faith argument can be made in defense of the \$1,000 fee, but I am more comfortable recommending a fee of \$600, which is significantly higher than where we started, is consistent with 15.2-2311, and generally in line with, or even higher than our sister jurisdictions. In addition to the localities in the staff report – and the examples that were cited were \$492 in Prince William; \$350 currently in Loudoun; the fee is \$100 in Orange County; it's \$250 in Frederick and Warren Counties; \$500 in Culpeper and Fauquier; and it's – it's \$750 in Clarke County, although in Clarke the fee is refunded if the applicant prevails. Six hundred dollars is almost identical to the fee in Arlington which, for whatever reason, is \$596.20 with a potential raise to \$602.80; they seem to have figured it out. Arlington is a similar jurisdiction to Fairfax in many ways. I believe that at a fee of \$600, which is more in line with these neighboring counties, we'll be better able to justify the fee which is still over a 60 percent increase from where we were a year and a half ago, and it's consistent with the General Assembly's direction. Therefore, Mr. Chairman, I MOVE THAT THE PLANNING COMMISSION RECOMMEND TO THE BOARD OF SUPERVISORS THAT IT ADOPT THE PROPOSED ZONING ORDINANCE AMENDMENT ON THE ZONING APPEAL FEE, AS SET FORTH IN THE STAFF REPORT DATED SEPTEMBER 28, 2010, WITH THE FOLLOWING MODIFICATION:

- ON PAGE 4 OF THE STAFF REPORT, LINE 19, CHANGE THE FIGURE OF \$1,000 TO \$600; AND FURTHER
- THAT THE AMENDMENT BE EFFECTIVE AS OF 12:01 A.M. ON THE DAY FOLLOWING ADOPTION BY THE BOARD OF SUPERVISORS.

Commissioner Lawrence: Second.

Chairman Murphy: Seconded by Mr. Lawrence. Is there a discussion of the motion?

Commissioners de la Fe and Flanagan: Mr. Chairman?

Chairman Murphy: Mr. Flanagan and then Mr. de la Fe.

Commissioner Flanagan: Yes, thank you, Mr. Chairman. A question of the maker of the motion, Commissioner Hart. Is it beyond the ability of the Commission to also have a provision for refunding the fee in the event that there is a – that the charge is denied?

Commissioner Hart: I left that out. It's my understanding that any – either a waiver provision or a request for proceeding "in forma pauperis" or case-by-case review by the Board of Supervisors – any of that – is outside the scope of the advertising; that all we're allowed to do is to change the dollar amount of the fee. And the fee applies to everybody, no matter what.

Commissioner Flanagan: Thank you.

Chairman Murphy: Mr. de la Fe.

Commissioner de la Fe: Mr. Chairman, I just have a question. I believe when you asked staff at the beginning of the public hearing whether the range of the fee of \$500 to \$1,000 covered all of the advertising costs. And I think the answer was yes. And I was – frankly, I look at this as a matter of access to the process and I wish the fee were lower. And I was wondering if you would accept a friendly amendment that we recommend to the Board that it make it \$500 instead of \$600.

Commissioner Hart: I spent all week trying to come up with a reason for a number other than the \$1,000. I thought Arlington's not our twin, but it's close. We have such a horrible budget situation that our costs legitimately are probably more than just the advertising. I won't take it as a friendly amendment, but if the Commission wants to go to \$500, I certainly understand and we can present that to the Board.

Commissioner de la Fe: That's all right. I'll – the Board can always change it, so –

Chairman Murphy: Further discussion of the motion?

Commissioner Lawrence: Mr. Chairman?

Chairman Murphy: Yes, Mr. Lawrence.

Commissioner Lawrence: As seconder to the motion, I concur with Mr. Hart's reasoning. I think \$600 seems to be what we should do. But I'd like to say one other thing, and that is I came here tonight thinking about going the other way. But after the dialogue with staff, and the testimony of the witnesses, and the dissertation made by Commissioner Hart, I am persuaded that this is an arbitrary amount. And Commissioner de la Fe used the absolutely correct term: access and accessibility. So I'm very much in support of this idea. Thank you.

Chairman Murphy: Further discussion of the motion? All those in favor of the motion to recommend to the Board –

Commissioner Flanagan: Mr. Chairman? Yes, I agree with everything. In fact I think Commissioner Hart's rationale this evening was one of the more eloquent rationales that I've heard in the Commission here. And I'm going to vote in favor of his motion. But I am also going to recommend to my Supervisor that when this comes to their attention I think they should add to this legislation a waiver of the fee in the event that the applicant is found not guilty.

Chairman Murphy: Then they're going to have to readvertize and start from scratch again and it will have to come back to the Planning Commission.

Commissioner Flanagan: Fine. Let's do that.

Chairman Murphy: Well, let's get a phrase for ourselves then, if we have to listen to this one more time.

Commissioner Hall: I second that motion.

Chairman Murphy: Build that into the motion, okay? All those in favor of the motion to recommend to the Board of Supervisors that it adopt the Zoning Ordinance Amendment regarding the Zoning Appeal Fee as amended by Commissioner Hart this evening, say aye.

Commissioners: Aye.

Chairman Murphy: Opposed? Motion carries.

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(The motion carried unanimously with Commissioner Harsel not present for the vote; Commissioner Alcorn absent from the meeting.)

JN