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## HOUSE BILL 2326 AND ITS EFFECT ON *COCHRAN V. BOARD OF ZONING APPEALS*'S CHILL: HOW VARIANCES IN VIRGINIA MAY THAW AFTER CODE REVISION

*Michael Keoni Medici*

### I. INTRODUCTION

“It was the best of times, it was the worst of times . . . .”<sup>1</sup> Depending upon which side one fell—whether petitioning landowner, Board of Zoning Appeals board member, or Board of Supervisors/City Council—these words rang true. The legal application of variances in Virginia law and other jurisdictions have traveled down a winding road.<sup>2</sup> A variance is a tool that a delegated body may use to permit a deviation from the local ordinance.<sup>3</sup> In Virginia, variances may only be granted for dimensional or area deviations.<sup>4</sup> Commonly referred to as an “escape

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J.D. Candidate, 2010, University of Richmond School of Law; B.A. 2007, West Virginia University, *magna cum laude*. I would like to thank Professor Berryhill for giving me initial guidance, my parents for encouraging me to continue my education, and my wife for her incessant support and love throughout law school.

1. CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (Andrew Sander ed., Oxford University Press 1988) (1853).

2. *Cf. Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004) (stating that variances may only be granted in narrow circumstances to avoid an unconstitutional result); J. Elliott Drinard, *Municipal Corporations*, 46 VA. L. REV. 1638, 1640–42 (1960) (discussing changes in the law respecting variances in zoning regulations); David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295–99 (2004) (discussing how variances have been used widely in practice despite the law). For a quick summary of the *Cochran* case, see Brian R. Marron, *Real Estate and Land Use Law*, 39 U. RICH. L. REV. 357, 398–400 (2004).

3. STANDARD STATE ZONING ENABLING ACT § 7 (1926). This standard act provides limitations for variances “as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” *Id.*; see also Brent Ellis Dickson, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398, 398 (1967) (stating that a variance should be distinguished from a special exception, which permits “property to be used for purposes which, although contrary to the specific zoning classification for the area in which the property is located, are expressly authorized by the ordinance as contingent upon board approval.”).

4. VA. CODE ANN. § 15.2-2201 (Repl. Vol. 2008). A zoning ordinance variance is defined as:  
a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or

hatch” or “escape valve,”<sup>5</sup> a variance provides localities with the ability to prevent unconstitutional takings that violate either the Constitution of the United States or the Constitution of Virginia.<sup>6</sup> As stated in an early Virginia variance case:

there will arise from time to time exceptional situations which will justly call for the granting of individual variances within the prescribed legislative conditions and standards and in harmony with the intended spirit and purpose of zoning ordinances, thereby providing a safeguard from unreasonable restrictions on the use of property.<sup>7</sup>

For quite some time, those who applied for variances enjoyed a likelihood of realizing their efforts.<sup>8</sup> Since 2004, however, Virginia has experienced heightened judicial scrutiny over the administration of variances.<sup>9</sup> The 2009 General Assembly of Virginia reviewed relevant sections of the Code of Virginia and amended the law concerning variances.<sup>10</sup> The effect of the General Assembly’s seemingly slight revision presents the purpose of this comment.

Part II of this comment presents the General Assembly’s enactment. Part III discusses the development of the relevant area of variance law that has fostered dissent. This part also presents *Cochran v. Fairfax*

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unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done. It shall not include a change in use which change shall be accomplished by a rezoning or by a conditional zoning.

*Id.* Virginia does not permit a use variance, which allows a jurisdiction to permit a property use prohibited by a zoning ordinance. See Dickson, *supra* note 3. One commentator notes that jurisdictions try to harmonize variance practice and statutory commands by applying less stringent tests to increase the availability of variances. Owens, *supra* note 2, at 289–90 (noting that jurisdictions apply less stringent standards for area variances than use variances because area variances are less harmful).

5. See Packer v. Hornsby, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980).

6. See U.S. CONST. amend. V; VA. CONST. art. I § 11.

7. Azalea Corp. v. City of Richmond, 201 Va. 636, 640, 112 S.E.2d 862, 865 (1960).

8. See Owens, *supra* note 2, at 295–96 (“Studies confirmed that variance approval rates in the 70%–80% range continued to be common throughout the 1960–1990 period in a wide variety of settings, including urban, small town, and rural jurisdictions.”).

9. See Bd. of Supervisors v. Bd. of Zoning Appeals, 268 Va. 441, 604 S.E.2d 7 (2004); Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004) (holding that a Board of Zoning Appeals has no authority to grant a variance unless the effect of the ordinance would represent an unconstitutional taking); see also Goyonaga v. Bd. of Zoning Appeals, 275 Va. 232, 657 S.E.2d 153 (2008); Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals, 70 Va. Cir. 91 (2005); Aesy v. Bd. of Zoning Appeals, 66 Va. Cir. 382 (2005).

10. H.B. 2326, Va. Gen. Assembly (Reg. Sess. 2009), ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206, 2009 Va. Acts \_\_\_).

*County Board of Zoning Appeals*<sup>11</sup> as a landmark case in Virginia variance law and examines subsequent developments, which are all likely targets for revision. Part IV brings the previous parts to bear addressing and discussing the impact of House Bill 2326 on variance law.<sup>12</sup> Part of this discussion revisits case law for facts that exemplify and temper the Code revision. As this comment will demonstrate, the General Assembly has a legislative desire to decrease the scrutiny of the variance test.

## II. HOUSE BILL 2326

The General Assembly amended section 15.2-2309 of the Virginia Code, which delegates authority to Boards of Zoning Appeals (“BZA”) to grant variances.<sup>13</sup> Section 15.2-2309 provides the procedure, standards, and notice requirements for variances.<sup>14</sup> The General Assembly’s revision deleted two words from the code provision:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship ~~approaching confiscation~~, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.<sup>15</sup>

Therefore, what does removing “approaching confiscation” accomplish? To understand this question, one should be informed of contemporary Virginia variance practice and the importance of “approaching confiscation.”

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11. 267 Va. 756, 594 S.E.2d 571 (2004).

12. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

13. VA. CODE ANN. § 15.2-2309 (Repl. Vol. 2008); H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206); *see also* E.A. Prichard, *The Fundamental of Zoning Law*, 46 VA. L. REV. 362, 364–66 (1960) (discussing the form and function of Virginia Boards of Zoning Appeals).

14. VA. CODE ANN. § 15.2-2309 (Repl. Vol. 2008).

15. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

### III. THE “UNNECESSARY HARDSHIP” HURDLE—VIRGINIA VARIANCE PRACTICE SINCE 2004

The originally conceived notion of permitting a variance from an ordinance contained language requiring a demonstration of “unnecessary hardship” before permitting deviation from legislatively enabled ordinances.<sup>16</sup> The “unnecessary hardship” provision, possibly the most challenging aspect of a variance application,<sup>17</sup> permeates state codes and common law.<sup>18</sup> “Unnecessary hardship” is an elusive term requiring BZAs and courts to determine the definition.<sup>19</sup> In Virginia, courts interpret the language of section 15.2-2309 when a BZA’s application is appealed.<sup>20</sup> In 2004, the Supreme Court of Virginia settled any controversy concerning “unnecessary hardship” interpretation and explicated the proper standard and analysis.<sup>21</sup>

#### A. *Cochran v. Fairfax County Board of Zoning Appeals*

##### 1. The Facts and Procedure of *Cochran*

In *Cochran*, the Supreme Court of Virginia consolidated three cases from Fairfax County, the Town of Pulaski, and the City of Virginia Beach involving variance applications.<sup>22</sup> Each case involved a landowner petitioning its respective BZA for an area variance pursuant to section 15.2-2309.<sup>23</sup> Discussion of the three cases will aid in understanding the court’s analysis.

The Fairfax County case involved a landowner’s petition for a variance from front yard setbacks to posture their proposed house and utilize a side garage.<sup>24</sup> The Fairfax County BZA granted the front yard setback variance and three other requested variances over neighborhood dissent.<sup>25</sup> The circuit court affirmed the BZA’s decision.<sup>26</sup>

16. See STANDARD STATE ZONING ENABLING ACT § 7(3) (1926); Owens, *supra* note 2, at 282–84 (discussing zoning laws that predated the Standard State Zoning Enabling Act).

17. Owens, *supra* note 2, at 288.

18. *Id.* at 286–87.

19. *Id.* at 287 (noting that the term “unnecessary hardship” was left “to the judiciary and the good judgment of board of adjustment to fill in the details of just what situations qualify for a variance”).

20. See *Packer v. Hornsby*, 221 Va. 117, 121–22, 267 S.E.2d 140, 142 (1980).

21. See *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004) (holding that a BZA has authority to grant variances only to avoid an unconstitutional result).

22. *Id.* at 759–64, 594 S.E.2d at 573–76.

23. *Id.* at 759, 594 S.E.2d at 573.

24. *Id.* at 759–60, 594 S.E.2d at 573–74.

25. *Id.* at 761, 594 S.E.2d at 574.

26. *Id.*

The variance case from the Town of Pulaski also involved a landowner desiring to construct a garage.<sup>27</sup> The landowner planned to place the garage adjacent to a roadway within a setback.<sup>28</sup> The topography of their lot made building the garage in accordance with the ordinance nearly impossible.<sup>29</sup> The Pulaski BZA granted a modified variance permitting construction of a garage within the setbacks.<sup>30</sup> The circuit court affirmed the BZA's decision.<sup>31</sup>

The City of Virginia Beach variance case arose from an application to construct a shed.<sup>32</sup> Virginia Beach ordinances concerning accessory structures prohibited the landowners from constructing a shed at the landowner's desired height.<sup>33</sup> The landowner also petitioned to bring a previously constructed garage into conformity by seeking a variance for the twenty-eight feet by which the existing garage exceeded the limitations imposed by the zoning ordinance.<sup>34</sup> The Virginia Beach BZA granted the garage variance but denied the shed variance on the grounds that "no hardship" existed.<sup>35</sup> The landowner appealed, and the circuit court overruled the BZA's decision, thereby granting the shed variance.<sup>36</sup>

## 2. The Virginia Supreme Court's Analysis and Decision in *Cochran*

Before analyzing the merits of the three variance cases, the Virginia Supreme Court discussed precedent and the basis for the government's authority to decide such controversies.<sup>37</sup> The government's authority to grant variances comes from the section of the Constitution of Virginia that prohibits the government from depriving citizens from the use of their property without just compensation.<sup>38</sup> The court then restated the following proposition:

Because a facially valid zoning ordinance may prove unconstitutional in application to a particular landowner, some device is needed to

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27. *Id.* at 761–62, 594 S.E.2d at 575.

28. *Id.*

29. *Id.* at 762, 594 S.E.2d at 575.

30. *Id.*

31. *Id.*

32. *Id.* at 763, 594 S.E.2d at 575.

33. *Id.* at 762–63, 594 S.E.2d at 575.

34. *Id.*

35. *Id.* at 763, 594 S.E.2d at 576.

36. *Id.* at 763–64, 594 S.E.2d at 576.

37. *Id.* at 764, 594 S.E.2d at 576.

38. *Id.* (citing VA CONST. art. I § 11(III)(C)).

protect landowners' rights without destroying the viability of zoning ordinances. The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch" or "escape valve." A statute may, of course, authorize variance in where an ordinance's application to a particular property is not unconstitutional. However, the language used in Code § 15.1-495(b) [now § 15.2-2309(2)] to define "unnecessary hardship" clearly indicates that the General Assembly intended that variances be granted *only in cases where application of zoning restrictions would appear to be constitutionally impermissible*.<sup>39</sup>

Applying the precedent of *Packer v. Hornsby*,<sup>40</sup> the court concluded that the BZA could only grant variances to circumvent "an unconstitutional result."<sup>41</sup> Finally, the court discussed the General Assembly's delegation of power to administrative bodies and quoted pertinent sections of the Virginia Code.<sup>42</sup>

The Virginia Supreme Court applied the cited Code and precedent to analyze the three individual cases in *Cochran*.<sup>43</sup> In each of the cases, the court evaluated the record to determine whether the applicants demonstrated "unnecessary hardship," and in each case, the court found the landowners failed to show "unnecessary hardship."<sup>44</sup>

In each of the three cases, the court remodeled and reconfigured the variance petitions. In the Fairfax County case, the court determined that the ordinance did not create an "unnecessary hardship" because the house could be moved two feet to satisfy the ordinance and creating "curb appeal" was not a proper justification for a variance.<sup>45</sup> In the Pulaski case, the court suggested that the garage could be moved or abandoned without denying the landowner reasonable use of his property.<sup>46</sup> Finally, in the Virginia Beach case, the court determined that the shed could be built as an adjoining home addition or abandoned

39. *Id.* (quoting *Packer v. Hornsby*, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

40. 221 Va. 117, 267 S.E.2d 140 (1980).

41. *Cochran*, 267 Va. at 764, 594 S.E.2d at 576.

42. *Id.* at 765–66, 594 S.E.2d at 577 (quoting *Commonwealth ex rel. State Water Control Bd. v. County Utilities Corp.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)). The court also addressed an argument raised in *Narella v. Board of Zoning Appeals*, 231 Va. 451, 345 S.E.2d 295 (1986), which involved an apartment conversion project where the court permitted a variance because the statute authorized a variance for an instance "where an ordinance's application to particular property is not unconstitutional." *Cochran*, 267 Va. at 766 n.3, 594 S.E.2d at 577 n.3 (citing *Packer*, 221 Va. at 122, 267 S.E.2d at 142).

43. *Cochran*, 267 Va. at 766–67, 594 S.E.2d at 577–78.

44. *Id.*

45. *Id.*

46. *Id.*

without interfering with all reasonable beneficial uses of the property.<sup>47</sup> The court recognized that the landowners still maintained “reasonable beneficial uses of the property, taken as a whole.”<sup>48</sup> The final decision vacated variances granted in Fairfax County and the Town of Pulaski and reinstated the BZA’s denial of a variance in Virginia Beach.<sup>49</sup> The landowners did not receive variances to construct and encroach upon setbacks.<sup>50</sup>

## B. Variance Administration and Review since *Cochran*

### 1. Supreme Court of Virginia Cases Applying *Cochran*

The Supreme Court of Virginia revisited the precedent of *Cochran* in two cases.<sup>51</sup> Only five months after *Cochran*, the court decided one case involving similar issues.<sup>52</sup> In *Board of Supervisors v. Board of Zoning Appeals*,<sup>53</sup> a landowner sought a variance to encroach the minimum lot width to subdivide and construct two homes on his property.<sup>54</sup> The BZA granted the landowner a variance conditioned on the landowner satisfying other requirements of the Code.<sup>55</sup> The circuit court affirmed the BZA’s decision.<sup>56</sup> The Supreme Court of Virginia reversed the circuit court and vacated the BZA’s variance grant.<sup>57</sup>

The Supreme Court of Virginia based its decision in *Board of Supervisors v. Board of Zoning Appeals* upon *Cochran*.<sup>58</sup> Unlike in *Cochran*, the court in *Board of Supervisors* first restated the important facts for variance review.<sup>59</sup> The court cited *Cochran* and *Packer* to

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47. *Id.*

48. *Id.*

49. *Id.* at 767, 594 S.E.2d at 578.

50. *Id.*

51. See *Cherrystone Inlet, LLC v. Bd. of Zoning Appeals*, 271 Va. 670, 628 S.E.2d 324 (2006); *Bd. of Supervisors v. Bd. of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004).

52. Compare *Bd. of Supervisors v. Bd. of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004), with *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 594 S.E.2d 571 (2004).

53. 268 Va. 441, 604 S.E.2d 7 (2004).

54. *Id.* at 444, 604 S.E.2d at 8. This case focuses more upon an issue of standing than variance administration. See *id.* at 445–51, 604 S.E.2d at 8–12.

55. *Id.* at 444, 604 S.E.2d at 8.

56. *Id.*

57. *Id.* at 453, 604 S.E.2d at 13.

58. *Id.*

59. Compare *id.* at 451–52, 604 S.E.2d at 12, with *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). The court resolved two issues in *Board of Supervisors*, whereas in *Cochran* the court reviewed only the variance issue. Compare *Board of Supervisors*, 268 Va. at 450–51, 604 S.E.2d at 12, with *Cochran*, 267 Va. at 764–66, 594 S.E.2d at 576–77.

support its finding that the ordinance did not deprive the landowner of “all reasonable beneficial uses” or create an “undue hardship.”<sup>60</sup> According to the court, “undue hardship” could not be satisfied when an ordinance prohibited the subdividing of property and construction of newer homes.<sup>61</sup> Because the landowner owned and enjoyed the use of his home, the court decided the landowner did not incur an “undue hardship” warranting a section 15.2-2309 variance.<sup>62</sup>

The second case decided by the Virginia Supreme Court presented a more complex issue of variance administration because of overlapping setbacks.<sup>63</sup> In *Cherrystone Inlet*, the landowner sought a variance to construct four homes on four recently subdivided lots.<sup>64</sup> The overlap of ordinances establishing setbacks came from local road setbacks and locally adopted state Chesapeake Bay Preservation laws.<sup>65</sup> The BZA unanimously denied the landowners variance application.<sup>66</sup> The circuit court affirmed the BZA’s decision.<sup>67</sup> The Supreme Court of Virginia affirmed the circuit court’s decision.<sup>68</sup>

The Virginia Supreme Court first reasoned that variances were improper because the lots were not recorded before the Chesapeake Bay laws became effective.<sup>69</sup> Second, the court relied on *Cochran* and held that the landowner failed to demonstrate that the ordinances deprived him of “all reasonable beneficial uses.”<sup>70</sup> Before affirming the BZA’s variance denial, the court noted that the landowner could have built one house on six and a half acres of land resting on an inlet.<sup>71</sup>

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60. *Bd. of Supervisors*, 268 Va. at 452, 604 S.E.2d at 12–13 (quoting *Cochran*, 267 Va. at 766, 594 S.E.2d at 577–78). The court also cited the facts of *Board of Zoning Appeals v. Nowak*, 227 Va. 201, 315 S.E.2d 221 (1984), to show an ordinance that prevents the construction of a home in setback areas does not constitute a hardship. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13 (quoting *Nowak*, 227 Va. at 205, 315 S.E.2d at 223).

61. *Bd. of Supervisors*, 268 Va. at 453, 604 S.E.2d at 13.

62. *See id.* at 453, 604 S.E.2d at 12–13.

63. *See Cherrystone Inlet, LLC v. Bd. of Zoning Appeals*, 271 Va. 670, 672, 628 S.E.2d 324, 324 (2006).

64. *Id.* at 672–73, 628 S.E.2d at 325.

65. *Id.*

66. *Id.* at 673–74, 628 S.E.2d at 325.

67. *Id.* at 674, 628 S.E.2d at 325–26.

68. *Id.* at 675, 628 S.E.2d at 326.

69. *Id.* The Chesapeake Bay Preservation Act only allows variances for intrusions under “very restricted circumstances.” *See id.* at 673 n.2, 628 S.E.2d at 325 n.2.

70. *Id.* at 675, 628 S.E.2d at 326.

71. *Id.*

## 2. Circuit Court Cases Applying Cochran

Since 2004, two Virginia circuit courts have reviewed BZA decisions and have applied the *Cochran* rule.<sup>72</sup> In *Aesy v. Board of Zoning Appeals*,<sup>73</sup> a landowner purchased property with an accessory structure—a barn—that pre-dated the local zoning ordinances.<sup>74</sup> The barn became an issue after the landowner built and attempted to occupy a home.<sup>75</sup> To remedy the zoning violation and occupy his home, the landowner sought a variance for the seventy-five year old barn.<sup>76</sup> The BZA denied the variance application.<sup>77</sup> When the circuit court reviewed the variance denial, the court relied on *Cochran* and stated, “if any reasonable beneficial use of the property can be made in accordance with the existing zoning ordinance, then the BZA has no authority to grant a variance, and an unnecessary hardship as contemplated by statute [section 15.2-2309] does not exist.”<sup>78</sup> The court reasoned that no undue hardship existed because the landowner could remove the barn and enjoy a reasonable use of his property.<sup>79</sup> The circuit court affirmed the BZA’s denial.<sup>80</sup>

In the second circuit court case applying the standard of *Cochran*, the court reviewed a request for a sign to encroach upon a height limitation.<sup>81</sup> In *Amherst County Board of Supervisors*, the landowner operated a John Deere tractor retail operation.<sup>82</sup> Franchise rules and state regulations required the retail store to erect a sign.<sup>83</sup> Local law limited the sign to ten feet in height, while the landowner desired the sign to be twenty feet in height.<sup>84</sup> The landowner sought a variance to construct a twenty-foot sign, because a ten-foot sign would be nearly obstructed on one side and fully obstructed on the other side.<sup>85</sup> The

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72. *Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals*, 70 Va. Cir. 91 (2005); *Aesy v. Bd. of Zoning Appeals*, 66 Va. Cir. 382 (2005).

73. 66 Va. Cir. 382 (2005).

74. *Id.* at 382.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 383–84.

79. *Id.* at 384. The landowner pleaded to the court that he could not afford demolition. *Id.* at 382.

80. *Id.* at 382.

81. *Amherst County Bd. of Supervisors v. Bd. of Zoning Appeals*, 70 Va. Cir. 91, 91 (2005).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 91–92.

BZA granted the variance.<sup>86</sup> In a letter opinion, the circuit court reversed and vacated the variance grant.<sup>87</sup> The court cited the standard given in *Cochran* and held that unnecessary and undue hardship only exists when an ordinance “interfere[s] with all reasonable beneficial uses of the property, taken as a whole.”<sup>88</sup> The court explained that variances are only permitted when “zoning restrictions are so constitutionally impermissible that there is a hardship approaching confiscation.”<sup>89</sup>

#### IV. HOUSE BILL 2326’S EFFECT ON COCHRAN

In response to this strict interpretation of “unnecessary hardship,” the General Assembly amended the language of the statute governing BZAs evaluation of variance petitions.<sup>90</sup> The Supreme Court of Virginia relied upon the previous code section to evaluate variance decisions in *Cochran*.<sup>91</sup> The impact of deleting two words from the Code has profound implications for the administration and review of variances. Alternatively, the various bodies that make zoning appeals decisions may nullify the impact of removing these two words. The following discussion argues that deleting the words “approaching confiscation” impacts variance administration and review by decreasing the degree of hardship applicants must show.

##### A. Does House Bill 2326 Revert Variance Practice to Pre-*Cochran*?

For most of the twentieth century, petitioning landowners received variances without much difficulty, aside from presenting their case.<sup>92</sup> In Virginia, the Virginia Supreme Court ended variance abuse with the *Cochran* case.<sup>93</sup> The court’s heightened standard in *Cochran*, however,

86. *Id.* at 91.

87. *Id.*

88. *Id.* at 92 (citing *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 766, 594 S.E.2d 571, 577 (2004)).

89. *Id.* at 93 (citing *Packer v. Hornsby*, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

90. See H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

91. See *Cochran*, 267 Va. 756, 594 S.E.2d 571; see also *Cherrystone Inlet, LLC v. Bd. of Zoning Appeals*, 271 Va. 670, 628 S.E.2d 324 (2006); *Bd. of Supervisors v. Bd. of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004).

92. See, e.g., Roderick M. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287, 292–94 (1966); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 K.Y. L.J. 273, 320–21 (1961); Owens, *supra* note 2, at 295–96. The approval rate raised concern that the merits of each individual case may not satisfy the purpose of variances. *Id.* at 297–98.

93. *Cf. Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

may have gone too far.<sup>94</sup> The General Assembly's amendment removed an important phrase:<sup>95</sup> two words that make variance hardship less stringent.

Removing the phrase “approaching confiscation” alters the *Cochran* analysis directly because it undermines *Cochran*'s rule of law. The *Cochran* court demanded that the threshold question of BZA variance petitions be whether the zoning ordinance “interferes with all reasonable beneficial uses of the property, taken as a whole.”<sup>96</sup> The court arrived at that proposition because the language of the statute commanded demonstration of an “unnecessary hardship” by showing how a variance would “alleviate a clearly demonstrable hardship *approaching confiscation*.”<sup>97</sup> Virginia courts and BZAs should now recognize the legislative intent in removing these two crucial words. If takings jurisprudence is no longer the fall line,<sup>98</sup> then the statutory command of “unnecessary hardship” must be something short of the “no reasonable use” test.<sup>99</sup>

#### B. The New Meaning of “Unnecessary Hardship”

In the near future, the Supreme Court of Virginia and Virginia circuit courts will be forced to interpret the new meaning of “unnecessary hardship.” Before that review, BZAs will apply the revised law. When courts review variance cases concerning whether the landowner demonstrated “unnecessary hardship,” the *Cochran* standard should be considered too restrictive. Because of the recent legislative changes, courts should move toward a definition of “unnecessary hardship” that is less stringent than *Cochran*'s rule.

94. *Cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (borrowing Oliver Wendell Holmes's famous phrase “[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”).

95. H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

96. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

97. *Id.* at 765–66, 594 S.E.2d at 577 (emphasis added).

98. The line of cases decided by the Supreme Court of the United States includes: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

99. The *Cochran* court cited to *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to support the takings test of interference “with all reasonable beneficial uses of the property, taken as a whole.” *Cochran*, 276 Va. at 764–65, 594 S.E.2d at 576 (citing *Commonwealth v. County Utils.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)) (emphasis removed).

Before *Cochran*, the Virginia Supreme Court recognized the use of a variance as a flexible tool to avoid constitutional issues.<sup>100</sup> In *Azalea Corp. v. City of Richmond*,<sup>101</sup> a landowner sought a variance to construct roadways across residentially zoned property for its commercial operation.<sup>102</sup> The City of Richmond denied the landowner a variance because the city thought the requested roads would violate the zoning ordinance.<sup>103</sup> The BZA and circuit court affirmed the variance denial.<sup>104</sup> The Virginia Supreme Court reversed and issued a variance for the road construction.<sup>105</sup> The court recognized that without commercially supportable road access, the landowner's property would lose substantial real estate value and the grant of road access to the landowner would not damage the value of residences in the surrounding area.<sup>106</sup> For these reasons, the Virginia Supreme Court found the grant of a variance "would do substantial justice."<sup>107</sup>

The court's language in *Azalea* is unlike that of *Cochran*. But the issues faced, between a substantial loss in value in *Azalea* and a major inconvenience in *Cochran*, are similar. *Azalea* demonstrates the court's desire to recognize certain factors as important in a variance request and appreciate those factors as an "unnecessary hardship."

*Packer* followed *Azalea* by twenty years, but forms a bridge between the reasoning and language of *Azalea* and *Cochran*.<sup>108</sup> *Packer* involved a landowner wishing to build an addition within a setback area.<sup>109</sup> The BZA granted the landowner's variance.<sup>110</sup> The circuit court reversed the BZA and denied the variance.<sup>111</sup> The Virginia Supreme Court affirmed, finding that the BZA abused its discretion and the landowner failed to demonstrate the required hardship.<sup>112</sup> *Packer*'s significance comes more from its recognition that "[a] statute may... authorize variances in cases where an ordinance's application to particular property is not

100. Drinard, *supra* note 2. A granted variance would not stand if the record was devoid of evidence or the decision was arbitrary and capricious. *Id.* at 1640.

101. 201 Va. 636, 112 S.E.2d 862 (1960).

102. *Id.* at 637, 112 S.E.2d at 863. The property in question was both in Henrico County and the City of Richmond. *Id.*

103. *Id.*

104. *Id.* at 638, 112 S.E.2d at 864.

105. *Id.* at 643-44, 112 S.E.2d at 867-68.

106. *Id.* Without road access, the value of the property would decline from \$729,000 to \$202,000, or a 72% decrease. *Id.* at 643, 112 S.E.2d at 867.

107. *Id.* at 644, 112 S.E.2d at 867.

108. See *Packer v. Hornsby*, 221 Va. 117, 267 S.E.2d 140 (1980).

109. *Id.* at 119-20, 267 S.E.2d at 141.

110. *Id.* at 120, 267 S.E.2d at 141.

111. *Id.*

112. *Id.* at 120, 123, 267 S.E.2d at 141, 143.

unconstitutional.”<sup>113</sup> This finding recognizes that the language of the statute, specifically “approaching confiscation,” was commensurate with takings jurisprudence. While the landowner’s variance petition in *Packer* would likely still fail today for other reasons, a court could not discount all hardship because some hardship existed.<sup>114</sup> In other words, section 15.2-2309(2)’s “unnecessary hardship” is not the same degree as before.

The Virginia Supreme Court’s language used in the *Azalea* and *Packer* decisions suggests that some law exists to consider section 15.2-2309(2)’s “unnecessary hardship” as less than *Cochran*’s “no reasonable use” standard. In fact, some jurisdictions do not use the language “unnecessary hardship,” using instead the language “practical difficulties” to evaluate granting a variance.<sup>115</sup> “Practical difficulties” is clearly not the standard in Virginia, but this standard helps realize the boundaries of “unnecessary hardship.” Jurisdictions using the “practical difficulties” standard apply the test by asking whether an “affected property or structure cannot, as a practical matter, be used for a permitted purpose under the applicable zoning classification.”<sup>116</sup> An affirmative answer to the “practical difficulties” inquiry warrants a variance.<sup>117</sup>

The General Assembly’s revision of section 15.2-2309(2) reflects a move to decrease scrutiny and evaluate hardship less stringently.<sup>118</sup> A less stringent approach to variance administration promotes fairness and flexibility.<sup>119</sup> Variances prove more cost-effective than either amending ordinances upon request or through rezoning.<sup>120</sup>

Even *Cochran* assists in determining what the court views or should view as demonstrated hardships satisfying section 15.2-2309(2).<sup>121</sup> In

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113. *Id.* at 122, 267 S.E.2d at 142.

114. *Id.* “[T]he Packers do not face a ‘hardship approaching confiscation,’ nor has their use of their land been effectively prohibited or unreasonably restricted.” *Id.* at 122, 267 S.E.2d at 142–43 (language stricken to reflect the H.B. 2326 revision). This statement loses its value with the removal of “approaching confiscation.” *Packer* is not the best example case because the landowners spoke about, and the court grasped onto, a desire to expand their home for better views and because everyone else was encroaching setbacks. *Id.* at 119–22, 267 S.E.2d at 141–43.

115. See Bryden, *supra* note 92, at 323.

116. 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.14[1][b] (2008); see also Bryden, *supra* note 92, at 324.

117. See POWELL, *supra* note 116; see also Bryden, *supra* note 92, at 324.

118. See Owens, *supra* note 2, at 290 (citing *Simplex Tech., Inc. v. Town of Newington*, 766 A.2d 713, 717 (N.H. 2001)).

119. See Dickson, *supra* note 3, at 411.

120. See Owens, *supra* note 2, at 317.

121. *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 767, 594 S.E.2d 571, 578 (2004).

*Cochran*, the court mentioned the following facts of the three cases as providing compelling reasons: taxes, aesthetic improvements, landowner planning to mitigate effects, neighbor support and/or opposition, landowner expense, and personal need.<sup>122</sup> The court did not classify these factors as hardships but commented on them as deserving of attention.<sup>123</sup> Although *Cochran*'s main proposition no longer guides variance decisions, these factors help to decipher the requirements necessary to satisfy "unnecessary hardship."

### C. What Cases Should Pass the New "Unnecessary Hardship" Test?

When considering the impact of the new hardship standard, it will help to review a set of facts and determine whether the landowner demonstrated "a clearly demonstrable hardship" satisfying "unnecessary hardship." The Virginia Beach and Pulaski cases from *Cochran* may have turned out differently if the revised section 15.2-2309 applied.<sup>124</sup> The Pulaski case involved a garage siting with various factors posing a hardship, but not enough for an undue hardship approaching confiscation.<sup>125</sup> Based upon the court's opinion, the landowner may have satisfied the new hardship standard because it would be more expensive to build the garage to code, the topography of the property justifies its location, and alternative placement would most likely weaken or destroy a retaining wall.<sup>126</sup> An ordinance prohibiting a landowner from building a garage may satisfy an "unnecessary hardship" requirement short of the no reasonable use determination. Requiring an individual to construct a garage that costs more, creates other issues, and presents a design conflict would most likely constitute a hardship that a variance could alleviate.

The Virginia Beach case involved the desire to build a storage shed.<sup>127</sup> The landowner's desired shed was only a few hundred square feet in excess of the limitation.<sup>128</sup> The purpose of the shed was to hold belongings so that a family member could assist a seriously ill and

122. *Id.* Other factors considered include: "reasonable return, inability to sell, financial loss, the effect of adjacent uses, the effect of heavy traffic, or the shape, size, or grade of the property." POWELL, *supra* note 116.

123. *Cochran*, 267 Va. at 767, 594 S.E.2d at 578.

124. *Id.* at 761-64, 594 S.E.2d at 574-76. The Fairfax case, doomed by the statement "curb appeal," should still fail "unnecessary hardship." *Id.* at 759-61, 594 S.E.2d at 573-74.

125. *Id.* at 761-62, 594 S.E.2d at 574-75.

126. *Id.* at 762, 594 S.E.2d at 575.

127. *Id.* at 762-64, 594 S.E.2d at 575-76.

128. *Id.*

disabled family member.<sup>129</sup> The personal needs of this family alone might not constitute an “unnecessary hardship,” but considering the lack of community opposition, these facts could be classified as a hardship that a variance could alleviate.<sup>130</sup>

#### D. Jurisdictions, Administrators, and Neighbors Should Welcome the New “Unnecessary Hardship” Standard

The General Assembly revised only two words in Virginia Code section 15.2-2309;<sup>131</sup> the majority of the statute remains intact with established judicial interpretations and precedent.<sup>132</sup> Petitioners still are required to satisfy other factors.<sup>133</sup> The statute commands BZAs to make three findings.<sup>134</sup> The standards require the BZA to record its findings based upon the applicant’s presentation, and the BZA’s report creates a record for courts to consider and ensures that variance power is not abused.<sup>135</sup> This change will not cause variance petitions to run rampant, but now petitioning landowners will no longer have to meet the standard of takings—the “no reasonable use” test—to justify their area variance.

#### E. What Cases Should Fail?

To address the community concerns of possible arbitrary and capricious variance administration, revisiting some case law should calm interested parties. The Fairfax County case in *Cochran* would still be denied by the BZA and the judiciary.<sup>136</sup> The landowner’s frivolous desire to construct a home may not constitute a satisfactory hardship, but it does conflict with the language of section 15.2-2309, which prohibits

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129. *Id.* at 763–64, 594 S.E.2s at 576.

130. *See id.*

131. *See* H.B. 2326, ¶ 1, § 15.2-2309 (enacted as Act of Mar. 27, 2009, ch. 206).

132. *See id.*; *see also* *Steele v. Fluvanna County Bd. of Zoning Appeals*, 246 Va. 502, 507, 436 S.E.2d 453, 457 (1993) (holding that a landowner cannot create their own hardship).

133. *See* VA. CODE ANN. § 15.2-2309(2).

134. *Id.* § 15.2-2309(2)(a)–(c) (“That the strict application of the ordinance would produce undue hardship relating to the property; that the hardship is not shared generally by other properties in the same zoning district and the same vicinity; and that the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.”).

135. *See* Drinard, *supra* note 2, at 1641.

136. *See* *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 759–61, 594 S.E.2d 571, 573–74 (2004).

variances for special privilege.<sup>137</sup> In *Packer*, the issue of consistency extinguishes the landowner's chance of variance.<sup>138</sup> The landowner attempted to show a hardship by virtue of other properties not satisfying setbacks along the waterfront, which the BZA accepted.<sup>139</sup> Even where facts point to other violations, no BZA should grant, nor should a court affirm, a variance because the hardship is generally shared.<sup>140</sup> House Bill 2326's revisions do not grant BZAs unfettered discretion. The rule of law developed by the Virginia Supreme Court will still guide BZAs and judicial variance review.

#### V. CONCLUSION

The new legislative changes to section 15.2-2309(2) suggest that BZAs should no longer inquire whether a zoning ordinance "interferes with all reasonable beneficial uses of the property, taken as a whole." Instead, BZAs should apply a less restrictive threshold question, adopting a standard which reflects the General Assembly's decision to remove "approaching confiscation" from section 15.2-2309(2) and scrutinize variance petitions less. Virginia courts should also recognize the departure from a high hurdle of hardship and find more factors and circumstances deserving of an area variance. The hardship required to satisfy variance petitions no longer requires the deprivation of all reasonable use. A demonstration short of the *Cochran* test should now satisfy law.

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137. See VA. CODE ANN. § 15.2-2309(2); *Cochran*, 267 Va. at 760, 594 S.E.2d at 574.

138. See *Packer v. Hornsby*, 221 Va. 117, 119–20, 267 S.E.2d 140, 141 (1980).

139. *Id.* at 122, 267 S.E.2d at 143.

140. See VA. CODE ANN. § 15.2-2309(2)(b).