

STAFFORD COUNTY BOARD OF ZONING APPEALS
November 30, 2021

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) of Wednesday, November 30, 2021, was called to order with the determination of a quorum at 7:01 PM by Chairman Dean Larson in the Board of Supervisors Chambers of the George L. Gordon, Jr., Government Center.

MEMBERS PRESENT: Dean Larson, Steven Apicella, Kecia Evans, Dana Brown, Robert Gibbons (*Alternate*), Jon Ireland

MEMBERS ABSENT: John Harris, Jeffrey Spinnanger, Robert Grimes (*Alternate*)

STAFF PRESENT: Douglas Morgan, James Staranowicz

DECLARATIONS OF DISQUALIFICATION

Dr. Larson: Okay, so I had my mic off. So having just completed the roll call, we have no applications or appeals tonight. No Unfinished Business. Zoning Administrator's Report.

APPLICATIONS AND APPEALS

NONE

UNFINISHED BUSINESS

NONE

ZONING ADMINISTRATOR'S REPORT

Mr. Morgan: Thank you, Mr. Chairman. I do have just a brief report. The ongoing search for a Deputy Zoning Administrator is underway. Applications have been received and we do have a pool of those. So we will be conducting interviews. So hopefully in the next month or so, we might be able to present you with a new Deputy Zoning Administrator. And that's the only update I have.

Dr. Larson: Okay, thank you.

Ms. Brown: Any cases for next month? Applications?

Mr. Morgan: We have no applications for next month.

ADOPTION OF MINUTES

1. September 28, 2021

Dr. Larson: Okay, minutes, adoption of the minutes. Does anybody have any comments on the September 28th minutes?

Ms. Brown: I'll make a motion to approve.

Ms. Evans: I second.

Dr. Larson: Okay, the motion to approve and second. All those in favor say aye.

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All members: Aye.

Dr. Larson: Any opposed? Okay, they pass. Okay. And I assume Andrew, you'll have a public portion of your presentation?

OTHER BUSINESS

Mr. McRoberts: Yeah. I'll briefly talk about the materials and how they all work together. And then we can go into closed session and y'all can ask me anything you want.

Dr. Larson: That sounds good. Okay. Please proceed.

Ms. Brown: Excuse me, Mr. Chairman? You skipped on one item and I had a comment.

Dr. Larson: I'm sorry, what was it?

Ms. Brown: You skipped on the Declarations of Disqualification. I have asked like for four meetings if we could correct that, say "or" instead of "of" because that sounds like I'm... every time we say that I've gone to visit someone that I'm disqualifying myself. And I would always... we forget that. It's just a technical thing, but.

Dr. Larson: Did staff make a note?

Mr. Apicella: So, I actually think our counsel might be able to help us with that. We don't have to declare that we've gone anywhere. That's just something that came up at one of the meetings, and then it just kind of had a life of its own.

Mr. McRoberts: What's the question? I'm sorry.

Mr. Apicella: You do not have to declare that you went to somebody's house, or that you met with somebody; you only have to declare under the conflict of interest rules, that you have a potential conflict of interest.

Mr. McRoberts: Well, that's right. I mean, it's not... I mean, I know that's been y'all's practice for many years, you know, it's a matter of transparency. But it's certainly not a legal requirement. I agree.

Ms. Brown: Right. I just wanted to change... I think it's just a typo. It says Declarations of Disqualifications. I always thought it should say Declarations or Disqualifications.

Mr. Apicella: No, it's Declarations of Disqualification. That's, that's what the Board does, that's what the Planning Commission does. That's what we do. It's not Declarations or, it's Declarations of.

Ms. Brown: I'm glad you said that, because we're gonna do like the Board does. We'll do that on other things, too.

Mr. McRoberts: Yeah, it's...

Mr. Apicella: No, I'm just saying...

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Mr. McRoberts: What it is, is...

Mr. Apicella: ... that's the legal, that's the legal requirement to give a declaration of...

Mr. McRoberts: If you are disqualified because you have a conflict on the Conflicts Act, that's your time to declare what it is. Because under the Conflicts of Interest Act, if you have a conflict, you have to declare and, you know, not participate. Or there are actually a whole category of things where you can disclose, disclaim the fact that it's really going to affect what you do, and then you can go ahead and participate, but only if you disclose it at the beginning.

Ms. Brown: Right. Which is why I think it should be or. Well, every time he reads that, and then I say yes, I went and I talked to the applicant, that's under Declarations of Disqualifications. That's when I have to say it though.

Mr. Apicella: But you don't have to say it at all.

Ms. Brown: I want to say it. I want to say it.

Mr. Apicella: I understand. But that's... the right terminology is Declarations of Disqualification. That's what I'm saying, the legal standard.

Dr. Larson: How about when you make your statement, just say I'm not disqualifying myself, but I'd like to mention whatever it is you want to mention.

Ms. Brown: Okay, that's fine. But we've talked about this for I don't know how many meetings we said we're going to correct it, correct it. This never came up until tonight, so. I don't like that. I really don't. I feel like that says that I am... because it's... you ask for does anybody have any, and that's the time when I can say it. There's no other time that I can say that, yeah, I want to say that I went to the applicant's house. There's no other place for here. So it has to go under that. And so it just, if you're just reading that when you read the minutes, that's what I read. Every time I read the minutes, I'm like, is this Declarations of Disqualifications; I'm not declaring that I'm disqualified.

Mr. Morgan: You're declaring. You're declaring of your disqualifications. You're not declaring or disqualifying yourself. You're making your own declaration that you're disqualified. So if you want to speak on behalf of what you have seen and what you have done in your site visit, it is very customary for BZA staff, especially once a property is posted throughout the Commonwealth of Virginia to visit the sites. They have knowledge firsthand. Many instances and in previous, I used to take the BZA members in a van to each site before the meeting. So that is something that is very customarily done in the Commonwealth of Virginia through other localities. What I think Mr. McRoberts and Mr. Larson are trying to say is that your declaration of disqualifications is something that would be a conflict of why you would have a bias decision on it.

Ms. Brown: I understand that, but I'm not doing that, but I am just disclosing. Because sometimes I have to say that, you know, I'm in Tricia Healy's district when we have a case with her firm, you know, same thing kind of thing.

Mr. McRoberts: Sounds like we're talking past one another.

Mr. Morgan: Yes.

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Mr. McRoberts: I mean, because I think, I think Steven's talking about a disqualification declaration under the Conflicts Act and you're talking about simply a disclosure.

Ms. Brown: Correct.

Mr. McRoberts: I went and talked to the guy.

Ms. Brown: Right, which is why if we say, declarations, which I'm declaring I went...

Mr. McRoberts: It really two different things.

Ms. Brown: ... or disqualifications which I could be doing a disqualification, that's why I think or, because then it'll cover me for a disclaimer or disclosure. That's, that was why I...

Dr. Larson: That's, that's the section that you do that.

Ms. Brown: Right.

Dr. Larson: And we've customarily done it. I think it'll be crystal clear in the minutes that you're not disqualifying yourself. I don't ever... I've never heard you say anything to it to that effect when you're saying you went to the applicant's home.

Ms. Brown: No, I know. But that's why I've always said we should fix that. And everybody says, oh, yeah, we will and then we never do. And then now, now it's an issue, so. I don't know why it can't say or because it's a declaration, which I'm, I'm disclosing, or maybe we should say disclosures or declarations of disqualification. I don't know, just whenever I disclose something, it's going under a disqualification. And I'm not disqualifying myself, so.

Dr. Larson: I'm agnostic on this. If the Board of Supervisors has the same wording, I don't think that there's a reason why we should change it.

Ms. Brown: I've not seen that on their agendas. You've seen this phrase on their agenda?

Mr. Apicella: It's a requirement on every public body, I think, to disclose whether or not they're disqualified. It's under the Conflict of Interest.

Ms. Brown: I don't see this on their agendas. Maybe we could pull an agenda while we're doing this. I'll do that. Because I don't ever remember seeing that on the Supervisors agenda.

Mr. Apicella: It's still two entire... no matter what we do, I'm not... I'm... I don't have a problem with declaration of disqualification because that is a definite discrete activity.

Ms. Brown: Well, can we say disclosure? Or declarations of...?

Mr. Apicella: It's not a disclosure.

Ms. Brown: No, but that's the time when I do my disclosure. That's the only time I have that in there to do that.

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Mr. Apicella: I think if the Chairman wants to say Declarations of Disqualification, or any disclosures, I don't have a problem with that.

Ms. Brown: That's fine.

Mr. Apicella: But I don't want to say Declarations or Disqualification.

Ms. Brown: That's fine. So can we say...

Mr. Apicella: They're two entirely different things.

Ms. Brown: ... disclosures or declarations of disqualification? Would that do it? That's what you just said. That's exactly what you just said.

Mr. Apicella: I don't have a problem with them. I personally don't think it's, I don't think you need to disclose. That's, that's something as an individual you may choose to do. If I go visit every single property and/or meet with every single applicant, I don't have to disclose that. It's not a requirement. You choose to do it. You don't have to state it. It's not an agenda item. It's something you choose to do. I appreciate that you want to do it. It's not a requirement. This is a requirement.

Ms. Brown: I'm not the only one that discloses that.

Mr. Apicella: I understand that. I'm just saying it is not... this is a requirement you have to do.

Ms. Brown: And I'm not saying take it out; I'm saying then let's just add the word disclosures at the front or the back.

Mr. Apicella: It's got to be its own separate... if we're going to do it, and I don't think we need to, and I'm gonna vote against it if it comes up, it should be its own separate item. Because it's... *inaudible, being talked over.*

Ms. Brown: I'm fine with it being its own separate item. I'm fine with it being its own separate. That's right. It's a completely different activity. That's my point. That is my point.

Dr. Larson: Is there a motion?

Mr. Morgan: There's a motion on the floor.

Ms. Brown: Inaudible, two talking over each other.

Mr. Morgan: There's a... there's a motion on the floor for the minutes to be approved.

Ms. Brown: We already, we voted that already.

Mr. Morgan: Six – zero, you're correct.

Dr. Larson: Is there a motion for this item we're discussing now?

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Ms. Brown: Yes. I want a motion to add another line for disclosures. So that way Steven will still have his thing intact.

Mr. Apicella: It's not my thing. It's a legal... *inaudible*.

Ms. Brown: Okay, whatever.

Dr. Larson: Is there a second to the motion?

Dr. Larson: I'll second it. Those in favor say aye.

Ms. Brown: Aye.

Dr. Larson: Aye. Any opposed?

Mr. Apicella: Nay.

Mr. Ireland: Nay.

Dr. Larson: Kecia?

Ms. Evans: Oh, sorry, I was looking at the agenda for the Board of Supervisors.

Dr. Larson: You're the tie-breaking vote.

Ms. Evans: I abstain. I don't care what, like... it doesn't matter to me. I don't care.

Dr. Larson: Alright.

Ms. Evans: So I abstain because, I mean, like, I don't care.

Mr. Ireland: Is there time for discussion... *inaudible*.

Ms. Brown: I'll tell you what, we can talk about it at our next meeting. How about that?

Dr. Larson: Let's do it at the next meeting.

Ms. Brown: When we have everybody here.

Dr. Larson: Okay.

Ms. Evans: Thank you.

Dr. Larson: That's fine. Staff, would you put that on the agenda for next time, please? That we'll discuss the agenda items.

Mr. Apicella: That we're going to add agenda items?

Dr. Larson: Yes.

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Mr. Apicella: I do have one that I'd like to chat about at some future meeting. We talked about it about whether or not persons who are not the applicant are truly testifying, or whether they're just giving their comments, which in my opinion, are two entirely different things. We briefly talked about it at the last meeting.

Dr. Larson: Okay. We can talk about that later.

Mr. Morgan: I would be glad to add that to the agenda after you have your closed meeting and discussion with Mr. McRoberts.

Mr. Apicella: We're not going to do it tonight.

Dr. Larson: We're not doing it tonight.

Mr. Morgan: No, but what I'm saying is, I'd be glad to add that to another agenda.

Dr. Larson: That would be great.

Mr. Morgan: If you guys so choose after this meeting, send me an email, that'd be fine.

Mr. Apicella: Okay.

Dr. Larson: Yeah, send him an email.

Mr. Morgan: Because you might, you might have your answers during the meeting.

Dr. Larson: Okay, are we ready for the closed, or the open... the public part of Andrew's presentation?

Mr. McRoberts: Well, good evening, everyone. Thank you for inviting me back. I'm very glad this time, there's not litigation and subpoenas and whatever else hanging over our heads. And that's a very positive step. But I appreciate you being proactive and seeking to get information that's very helpful. First, I just wanted to give a real brief overview of the materials I brought and a little bit about the Freedom of Information Act itself and the records retention requirements of the state. Before you are a number of documents, one is something entitled Chapter 29. Meeting Procedures and the Freedom of Information Act. This is actually a chapter pulled from the Albemarle County Land Use law handbook, written primarily by my friend Greg Kempner, the County Attorney there and updated by him and his staff over the years. It's very helpful. It used to be Chapter 10 last time I stood before you. For some reason, it's gravitated to Chapter 29. But in any event, and this is the current most up-to-date version of that chapter. Also, before you are a bunch of information related to the Library of Virginia retention requirements. And we'll be talking a little bit about that. But the record retention requirements are mandatory under state law; however, there's no penalty for violation thereon. But they are the law of the Commonwealth. So it's good to know about for various reasons. There is no records reten... and the records retention basically says, the Act itself says go do what the Library of Virginia says. The Library of Virginia says do what's in these record retention schedules. I've given you a couple of them. They're available online. One is the general county and municipal governments, it deals with things like, you know, how long do you keep minutes. Forever. You know, how long do you keep, you know, your personal notes that you sort of scratch down for your own personal use. Throw them away whenever you feel like it. And in between, there's a lot of other periods of time. Things you need to keep a year. Things you need to keep three years. And the records retention schedules are all in there. And then of

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course, the Freedom of Information Act. This is the current act, Chapter 37 of Title 2.2 of the Virginia Code. I will not be reading all of it, but I will summarize the sort of most relevant details for you. First of all, the Freedom of Information Act is divided into two major parts. One deals with documents and how you deal with your public documents, and identifies what public documents are, what you need to do with them when somebody asks, what types of things you don't have to give them even if you have them. And then there's another second part that deals with meetings, and how you do public meetings and how you have to keep them open with open doors, how you have to let people know that you are meeting, the requirement of keeping minutes, things like that. And so those are the two parts that we'll be talking about. First, I'd like to talk about meetings. Meetings is probably one of the easiest ones just because primarily as a public body appointed in a fairly sophisticated jurisdiction, like Stafford, you've got staff to handle most of what's required for the meetings. So the advertisements, the you know, keeping the open doors, having a comfortable place for people to come and see what you're doing, etc. A couple of highlights I would point out on the public meetings. The public meetings requirement is an access requirement. It's not a public hearing requirement. So you won't find anywhere in the Virginia Freedom of Information Act that says, you shall open the floor to public comment, or you shall have them participate in your meeting. This is your meeting. It's the Board of Zoning Appeals meeting. It's not the public's meeting, although they're entitled to attend. And so I think that's an important thing. Now, what could be confusing to many people...

Ms. Evans: I'm sorry, just really quick, because we were supposed to do this in the beginning. I'm sorry, we're supposed to do the resolution to authorize the closed meeting, right?

Mr. Apicella: We're not in the closed... inaudible.

Ms. Evans: Oh, so we're not in the closed meeting? So then which one...?

Mr. McRoberts: We're just in a public meeting right now so.

Ms. Evans: Okay, so you didn't want me to read this one.

Mr. Morgan: Yeah, I do want you to read that when you go to the... yes, yes.

Ms. Evans; Okay. Sorry sir.

Mr. McRoberts: No problem.

Mr. Morgan: That's my bad.

Ms. Brown: *Inaudible, microphone not on.*

Mr. McRoberts: Not a public hearing requirement. Now, of course, there are other requirements of the law. I mean, you are a Board of Zoning Appeals. Primarily you meet to hear cases. The requirements of Title 15.2 require public hearings for your cases. They have to be advertised, there has to be a public hearing, etc. You know, but that's not in the Freedom of Information Act. And that's the point that I made. So we could have our meeting today. And we could not have a public hearing component, for example, because that's, that's not required under the Freedom of Information Act. Another thing about meetings is, is sort of the definition of meeting. And this is the only part of it that gets really complicated. When you're coming in here and you're having a scheduled meeting, we all know that your meeting is not a problem. But what happens when three of you gather on a corner or in an event, and you say,

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Gosh, let's talk about that case that we're having next, next Thursday. Well, that – or Tuesday – then that could be in fact, a meeting. In fact, it would be because you're gathering in excess of two people to discuss the business of the Board of Zoning Appeals on which you're appointed. So it's important to realize that you can have a meeting outside of this room. And if it is, then all the requirements of the meetings portion of the Virginia Freedom of Information Act apply. Now, just because there are three, now there are exceptions to all of that. One of the major exceptions is if there's two people, that's not a meeting unless it happens to be a quorum of another public body. For example, if y'all were to appoint three people to a subcommittee to, you know, work on amendments to the by-laws of the BZA, just an example, and two of them got together and said, let's talk about the by-laws. Well, then that would be a meeting, even though it's only two members of the BZA, but it's a quorum, or a majority of that subcommittee and each subcommittee or committee is in fact, also a public body. Another exception would be three or more people from the BZA could get together, not related to public business of this body, for example, y'all could get together at a political function, or at a community function, where the purpose of that event is certainly not to discuss BZA business. It's to watch the school play or to hear what the political party has to say or whatever the purpose is. As long as you're doing that, then that's certainly not a meeting and you don't have to worry about the minutes, etc. Just make sure that three of y'all don't get together in the corner of that event and start discussing BZA business. That's my only caution. That's really all I really need to say about meetings. Just be careful that you don't sort of unintentionally trigger a meeting, because you certainly don't want to do that, because then that triggers all the other requirements in the meetings portion, including notice, you know, open doors, minutes, etc.

Dr. Larson: Andrew, I wanted to know if I could ask a question about meetings while we're here.

Mr. McRoberts: Sure.

Dr. Larson: We had a discussion, a pretty long one, three years ago on email, and email discussions among board members. Could you talk about that?

Mr. McRoberts: Sure, sure. Yeah, the Supreme Court has weighed in on this, and so has the FOIA counsel. Emails themselves are not meetings. And because they aren't actually a immediate, sustainable interaction between people as simultaneous as in a meeting. And where they've drawn the line is, if you are doing the equivalent of a meeting, like you're doing a Zoom meeting, or something that's relatively simultaneous where you're literally having a discussion electronically, even if it happens to be over electronic means, then that would also be a meeting. But emails themselves, even if they're just separated by a few seconds, is, in fact, not a meeting. It's a discussion electronically on email. Now, there's a whole nother portion that I'm about to get to about public documents, that gets triggered. And those emails are, in fact, public documents, because they are, you know, documents that are produced, they're in your possession, regarding the business of this body. So you do need be careful about what those emails say. And as we get into the documents, I'll discuss some ideas about how best you can manage that. But, but that's really not a meeting.

Dr. Larson: A follow-on question. From the BZA perspective, we've been very cautious about due process type issues where, you know, we, we have all of the information presented to us at the meeting when both sides, if there are two sides, are present so that everybody has a fair opportunity to hear everything that we're hearing so that they can respond to it, and make arguments, etc. If the BZA had an email discussion among themselves about, say, an upcoming case, or maybe one that had been continued to the next meeting, would we run into due process problems with that?

Mr. McRoberts: I don't see it as a due process problem.

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Dr. Larson: Okay.

Mr. McRoberts: Because the procedural due process requirements of this body are the same ones that are required by the statute. And the Supreme Court has said that procedural due process is the same as statutory due process. So as long as you're still opening the public hearing, you're still hearing from everyone allowing the applicant to speak, you're following all those procedural requirements of the BZA statute, then you are not tripping over due process. Now, there could be a perceived fairness issue or transparency issue. I'll leave that to y'all. But that's not really going to be tripping over a due process issue.

Dr. Larson: Okay.

Mr. McRoberts: Now, I'm going to transition now to talking about documents. Documents is the other sort of second half of the Freedom of Information Act. I guess it actually is the first because it comes first in the act. But it says essentially that all public records are open to the public, and they get to see them. And that's the general rule. And if there's any exception, the exceptions are read narrowly, they are construed against the public body, etc. Well, first of all, what's a public record? Well, most everything that has anything to do with what you're doing as a BZA member, and that means things that you may create personally, things that you may have on a personal server or personal email account or a personal computer, or even a handheld device. Wherever those documents may be found, if they are, in fact, documents that are created for or in furtherance of the public duties of the BZA, then they are in fact public documents. The Freedom of Information Act says that those documents are available to the public. Any citizen of the Commonwealth or a media that does business in Virginia can ask for a copy and they are entitled to a copy. Now there are very specific rules on how fast they get them, et cetera. Stafford has a FOIA officer, you probably ought to direct, I guess, questions specifically about how Stafford handles things to them. I know to some extent, there's an unusual sort of divide between how the board and the Stafford staff do things and how the BZA does things. But in this case, the legal requirements are the same. And so just be aware that if somebody asks you for a document that's a public record, you need to find a way to comply with it. Because you have the requirement under the Freedom of Information Act to comply. It's not sort of a general county government requirement, it's you took an oath to be on this body, you are required to comply with the Freedom of Information Act. And so that's why I think this kind of training is very helpful. The next thing on documents is if someone asks, they don't have to ask in writing, they can ask verbally, they can ask in any form; it can be an email, it could be a phone call, it could be a request in this meeting. If they have that, if they requested verbally, it may be a good practice to confirm in writing exactly what they're asking for, just so there's not confusion, but it's not a requirement to trigger their rights under the act. They do get it and then there are timeframes involved. Five business days basically is the primary rule. There are some exceptions and extensions you can get if it's not reasonably practicable to do it, you can ask for more time, etc.

Ms. Brown: I have a question on the timeframe.

Mr. McRoberts: Yes.

Ms. Brown: Is that okay? When does the clock start? Now does it start... it's five days... does it start the next business day? From the day it was raised on Tuesday sometime? Does it start next Wednesday or the next day? Or when I get it from the county FOIA officer, am I already, you know, short time because she's got five days and now she gave it to me one or two days later. Do... am I only left with two or three days? And the reason I'm asking this is because I went to a hearing. You all read about this in the paper. One of our former government officials sued on a FOIA thing, went to court over it anyway.

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And the judge ruled – I was shocked by this – that the clock starts when the FOIA officer received it. Even though it was in spam and timestamped, the judge said it didn't start until she retrieved it, and I wrote that down. So how does that work? And how does that work for me when I get it?

Mr. McRoberts: Well, I will say that, you know, judges can rule any way they want to and until the Supreme Court actually decides that, I don't know if that's the law or not. It certainly was in that case.

Ms. Brown: So how about... so she gets it on a Tuesday... *inaudible, being talked over.*

Mr. McRoberts: Well, the general rule is that when the request is made, and it's received by the person who is the custodian of the record, then that's when the five days start, and you're number of five days begins the next day. So you receive it on a Monday, you have until the end of the following Monday, because the Monday you receive it doesn't count. So you get Tuesday, Wednesday, Thursday, Friday, the following Monday to respond. So essentially, you get a week.

Ms. Brown: And if I don't get it from the FOIA officer for two days, then we're, it's not five days from when I got it like what I was just saying. That's where I'm asking.

Mr. McRoberts: Well, that's an interesting question. And I don't really know the answer without knowing more about how Stafford handles things. If in fact, the FOIA officer is appointed as sort of your agent to receive FOIAs, then I think an argument can be made that it begins the time the FOIA officer gets it, even if the FOIA officer is dilatory in getting to you. But I think an argument can also be made well, she's not the custodian of the record, I'm the custodian of the record. And until I get the FOIA request, it's not really a FOIA request to me. In fact, the act itself says that if you receive a request, and you're not the custodian, but you know who has the record, you have an obligation under the Act to basically let them know who has the record and turn it over, you know, make sure it gets to the right person.

Ms. Brown: So, should I ask for an extension? Or should I just live with the two days I have left to produce everything?

Mr. McRoberts: Well, it depends. I mean, can you reasonably do it in two or three days? If so, I'd say go ahead and do it. You know, if you can't, then there is an exception that says if you can't, it's not reasonably practicable to respond in the time allotted, you can give them a written notice and say, I can't do this in a reasonable period of time in the time allotted. Here's the reason; you have to have a good reason.

Ms. Brown: Is it because I didn't get the request till three days later... *inaudible, being talked over.*

Mr. McRoberts: Right. You know, I didn't get it until this; I need, I need more time.

Ms. Brown: I need five days.

Mr. McRoberts: Yeah, I mean, often it's, you know, oh, the people who have the records are on vacation, or, gosh, my Gmail, have you seen my Gmail, it is so full of stuff, I have to go through everything. And so it could just be that you need to have time to go look through everything. Whatever the reason is, you can ask for more time. The key is within the five workdays, the original five days you have to give that notice and say I need more time.

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Ms. Brown: When I get a FOIA request, I don't think, and maybe I'm wrong, but I don't think I've ever gotten the original FOIA request, I just get a request from the FOIA officer. So I don't know when the clock really started. You know what I mean?

Mr. McRoberts: Well, yeah, I mean, again, I'm not exactly sure how Stafford handles it by policy. So I would sort of suggest maybe a follow-up discussion with the FOIA officer might be helpful on that. Because, you know, if, in fact, it's just, you know, my only experience was, I think, three years ago, when we had all those subpoenas and all that stuff. And at that time, I think the county took the position that the BZA was a separate body from the county. And so they weren't responsible for responding on behalf of the BZA. And that's why we got involved. But...

Dr. Larson: Andrew, we're having some side discussion here, we're trying to figure out what is appropriate for the open meeting and when it's appropriate for the closed meeting.

Mr. McRoberts: Ah.

Dr. Larson: Would, would it be better since there is no matter... member of the public here, we just go into the closed meeting and continue?

Mr. McRoberts: That's fine, that's fine. If you want to make the motion, we'll, we'll continue there. But I was really going about to conclude anyway, and maybe in closed session we can get into more depth in Dana's question. But really, the on the documents, the only last thing is Freedom of Information Act itself has no retention requirement. So what you're required to do is turn over the documents that exist that are in your custody, that you have reasonable access to. You know, for example, if you've turned the records over to, you know, someone else to hold for you, for example, you still have to provide... produce that document even though you don't currently have it. But you know who does and they're holding it for you. You need to go and get that document because it's reasonably available to you. But it doesn't have a retention requirement. So if you've destroyed a document, because the record retention Act allows you to destroy it, or you've messed up and destroyed it anyway, even though it's violated the retention requirements, because that does happen from time to time. But there's no penalty and under the Freedom of Information Act. There's nothing that says, well, you have to turn it over. And but if you can't use you have to pay a fine or something. There's nothing, there's no penalty under the Freedom of Information Act for not turning over documents that do not exist. Under the record, the document production requirements, there's only four requirements of what you need to say, within those five days or within an extension. One is I don't have it, the document doesn't exist. That is an adequate answer under FOIA. And if it's true, then that is in fact, an adequate response. And that ends your responsibility under the act. The second one is here is the documents, or the document or documents you requested. Here they are. That's the second possible response under FOIA. The third one is, well, here's most of what you wanted but not everything. Because either it doesn't exist, or I'm exercising exemption. And then the last one is, you're not getting anything because it's exempt. And I think there's probably very few things that the BZA has that probably meet that. Counsel discussions perhaps would be one of the few. Okay, well, with that I was going to conclude. And that's all I really had to say in the public presentation.

Dr. Larson: I think I have a question we can still have in the open public. The Library of Virginia does have retention requirements. Are those laws?

Mr. McRoberts: The record retention Act is a law. And the schedules are mandated by the Library of Virginia. And so they are by reference the law. But there is no legal penalty that I've been able to find

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for a violation of the retention schedule. That doesn't mean that it's not the right thing to do. Doesn't mean it's not the law. It is. And there are situations we could discuss in closed session, I could discuss with you on why it's probably a good idea to comply with it. But there is nothing within the act or in the schedules that says there's a fine or a penalty if you don't comply with it.

Dr. Larson: Thank you.

Ms. Brown: Has anyone ever been fined?

Mr. McRoberts: No, not under the records retention requirements. The records retention requirements were really not written for the same reason as the Freedom of Information Act at all. It's really more of a historical interest. That's why the Library of Virginia is responsible. It's like well, we don't want somebody who's created historical documents that are important to the Commonwealth destroying them before we have a chance to archive them at the Library of Virginia. So that's how that all began. And that's primarily what they're interested in. That's why things like minutes are important.

Dr. Larson: If nobody else has any public meeting type questions to pose to Andrew, I'd like to have the Secretary read a motion to go into closed session. Once we manage all that, I'd like to adjourn to the conference room to the side here for the closed session.

Ms. Evans: Alright. So resolution to authorize closed meeting, is there a motion?

Ms. Brown: Motion to go into closed session.

Mr. McRoberts: I think we need to read...

Dr. Larson: Actually I have...

Ms. Evans: I was about to say whereas.

Dr. Larson: Yeah, okay.

Ms. Evans: I'll say whereas pursuant to Virginia Code 2.2-3711(A)(7), the BZA desires to discuss in Closed...

Mr. McRoberts: It's actually (A)(8), to receive advice of legal counsel.

Ms. Evans: What is it?

Mr. McRoberts: (A)(8).

Ms. Evans: Oh, (A) (8), the BZA desires to discuss in Closed Meeting legal advice, and Whereas such discussions may occur in closed meeting, Now, Therefore, be it resolved that the Stafford County Board of Zoning Appeals on this 30th day of November, 2021, does hereby authorize discussions of the aforestated matter in closed meeting. Is there a motion?

Ms. Brown: Yes... *inaudible, two talking at once.*

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Mr. McRoberts: Yeah, there needs to be in the motion though a subject matter. So we'll discuss Freedom of Information Act and record retention requirements.

Dr. Larson: Okay?

Ms. Brown: Yes. Do I need to say that?

Dr. Larson: Yes, please.

Ms. Brown: I motion to go into closed session so we can discuss FOIA requirements and records retention from our attorney.

Dr. Larson: Is there a second? I'll second. Those in favor say aye.

All members: Aye.

Dr. Larson: Any opposed? Okay, we'll go into closed session and adjourn to the conference room to the left.

2. Closed Meeting – Legal Advice

Dr. Larson reconvened meeting.

Ms. Evans read a Resolution to certify the actions of the Stafford County Board of Zoning Appeals in a Closed Meeting on November 30, 2021.

Mr. Apicella made the motion.

Ms. Brown seconded.

The motion passed 6-0.

ADJOURNMENT

With no further business to discuss, the meeting was adjourned at 9:01 PM.