

Court leaves planning commissions “dead in the water”
written by Newspark Team | January 28, 2012

Just weeks after the Virginia Supreme Court ruled that planning commissions do not have the authority to grant zoning ordinance waivers, the planning process in Charlottesville and Albemarle County has been thrown into disarray.

Each locality’s planning commission has seen a significant part of its docket stall now that *Sinclair v. New Cingular et al.* struck commissioners’ authority to grant waivers, which they have done for decades, leaving them in what Albemarle commissioners called a “paradox” and a “constitutional predicament.”

“The decision comes as a surprise without a doubt,” said Richard Harris, deputy city attorney for Charlottesville. “This is a big deal ... [It’s] going to affect a tremendous number of localities.”

The ruling determined that planning commissions may only have an advisory role, and that granting waivers constituted an unauthorized legislative power. Similar decisions can only be made by zoning administrators, boards of zoning appeals and elected bodies.

While the effects of the decision are far-ranging, the case itself was homegrown. The *Sinclair* case stemmed from a dispute over a 103-foot telephone tower on a piece of land regulated by Albemarle’s critical slopes ordinance.

Kent Sinclair, the owner of an adjacent piece of property, had argued against a waiver permitting the tower during the review process, but the county’s ordinance left him no way to appeal the decision after the Planning Commission approved it.

Instead, Sinclair, a law professor at the University of Virginia, took to an arena he knows well — the courts.

The Virginia Supreme Court accepted Sinclair’s argument that because Virginia is a Dillon Rule state, planning commissions would require enabling legislation from the General Assembly in order to grant waivers. With no such legislation, the Albemarle County Planning Commission’s ruling was found to be void.

The city’s director of neighborhood development services, Jim Tolbert , said that for the time being, anyone proposing a land use plan requiring a waiver would be unable to proceed.

“Essentially, what it’s done is anybody that brings in a site plan that needs a waiver — say a critical slopes or anything else — is dead in the water right now because they cannot get the waiver, because [the Planning Commission has] no authority to grant the waiver,” Tolbert said.

Tolbert has sent a resolution to the City Council to fully study the zoning code for possible solutions.

Albemarle’s Planning Commission also found itself in an awkward situation at its most recent meeting. The commission was forced to deny several applications in order to give them a chance of being approved.

The *Sinclair* decision left the commission unable to approve these cases, so applicants’ only way to win

approval is to appeal a denial decision to the Albemarle County Board of Supervisors. Despite its own denial of the applications, the Planning Commission recommended that the board approve them.

The commission later voted on a resolution of intent asking the supervisors to modify the county's zoning ordinance to render such workarounds unnecessary. The modifications would give the board the authority to decide matters — such as waivers — that historically went before the Planning Commission.

Greg Kamptner, deputy county attorney, said at the meeting that this was only a “short-term fix” and that it would take more action within the zoning ordinance or at the state level to “get us back on track.”

Both the city and county alluded to the possibility of the General Assembly passing legislation that would explicitly allow planning commissions to grant waivers. This would remove the legal basis for the Sinclair ruling and return the status quo.

However, Del. Rob Bell, R-Albemarle, and aides of Del. David J. Toscano, D-Charlottesville, both said they have not heard of any such legislation being introduced, and noted that this year's deadline for introducing bills has already passed.

The county, which was a co-defendant in the Sinclair case, may also be trying for another round in court.

County Attorney Larry Davis recently gave written notice that Albemarle will file a petition for rehearing for the Sinclair case.

“We don't think they were fully aware of what the impact of their decision will be [on localities],” Davis said in an interview. He noted, however, that it is “rare” for the court to reverse itself in re-hearings.

In any case, it will be a while before things return to normal, leaving planning commissioners unable to perform many of their typical duties.

“I know you're just dying to look at critical slopes waivers,” Tolbert joked. “You just won't have any for a couple of months. Sorry.”