

Albemarle County's Planning and Land Use Powers, Policies, Regulations, and Procedures

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This outline examines Albemarle County's planning and land use powers, policies, regulations, and procedures.

Land use planning, zoning, and related land use decisions are vitally important functions of local governments such as the County.

The Fourth Circuit of the United States Court of Appeals, whose jurisdiction includes Virginia, has said that "[l]and use planning and the adoption of land use restrictions constitute *some of the most important functions performed by local government.*" *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603 (4th Cir. 1997) (italics added). The Fourth Circuit has further explained:

Indeed, land-use decisions are a *core function of local government*. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community. The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it. Further, community input is inescapably an integral element of this system.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 67 (4th Cir. 1992) (italics added).

"We can conceive of *few matters of public concern more substantial than zoning and land use laws.*" *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) (overruled in part on other grounds by *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996)). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall dissenting) ("Zoning . . . may indeed be the most essential function performed by local government, for it is *one of the primary means by which we protect that sometimes difficult to define concept of quality of life*") (italics added).

This outline is for educational purposes only. A more in-depth examination of Virginia land use law may be found in the Albemarle County Land Use Law Handbook, which is available online at: <http://www.albemarle.org/departement.asp?departement=ctyatty&relpage=3190>.

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1.

The Grant of Power and Limitations on the Exercise of Power

Counties, like cities, are subordinate agencies of the state government and are invested by the General Assembly with subordinate powers of legislation and administration relative to local affairs within their prescribed areas. *Murray v. City of Roanoke*, 192 Va. 321, 324 (1951). This section examines the State's grant of power to localities and the limitations on the exercise of those powers.

1-100 The Grant of Power from the State to the Board of Supervisors

Under the Virginia Constitution, all county powers are delegations of authority granted by the General Assembly and, unless otherwise indicated by statute or the constitution, are vested in the board of supervisors. *Constitution of Virginia, Art. VII, § 3; Virginia Code § 15.2-1401*. With respect to the regulation of land use, the General Assembly has granted counties numerous powers to provide for comprehensive planning and to regulate the use and development of land by adopting zoning and subdivision ordinances. *Virginia Code § 15.2-2200 et seq.*

1-200 Limitations on the Exercise of Power

The exercise of powers granted to localities under the state planning, zoning, subdivision, and stormwater laws, though very broad in some respects, is always subject to overarching principles and laws that may restrict the exercise of those powers. The Dillon Rule, federal and state statutes that pre-empt local regulations, and several provisions of the Constitution, may impose limitations on the exercise of the powers otherwise granted to localities. The key provisions of the United States Constitution that may apply to local planning, zoning, and subdivision issues are addressed below.

Of course, any power may be exercised only in a manner that is reasonable and is not arbitrary or capricious.

1-210 The Dillon Rule

The Dillon Rule¹ is a rule of statutory construction that was first recognized in Virginia in *City of Winchester v. Redmond*, 93 Va. 711 (1896). The rule has a profound effect on whether, and to what extent, a locality may address land use issues through zoning and other regulations.

Under the Dillon Rule, the board of supervisors has only those powers *expressly granted* by the General Assembly, powers *necessarily or fairly implied* from the express powers, and *powers that are essential and indispensable*. *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511 (2011). An *express grant* of power is found in, for example, Virginia Code § 15.2-2280(1), which provides in part that a locality may regulate the “use of land” and the “size, height, area, [and] bulk” of structures.

If a power is not expressly granted, then the question is whether the power is *necessarily or fairly implied* from the powers expressly granted, or whether the power is *essential and indispensable*. This is the most difficult part of a Dillon Rule analysis. “To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.” *Commonwealth v. County Board of Arlington County*, 217 Va. 558 (1977). An example of a *necessarily or fairly implied* power is the power to enter into a contract to exercise a power expressly granted. However, the existence of another means to achieve a particular legislative end may mean that a power may not be necessarily implied. For example, there are multiple ways in which a locality may

¹ John Forrest Dillon was the chief justice of the Iowa Supreme Court in the mid-1800's. In their article *Why Does Dillon Rule? Or Judge John's Odd Legacy* appearing in *Nice & Curious Questions*, Edwin S. Clay III and Patricia Bangs explain that Dillon's perspective was the result of the rise of the city as a service provider that resulted from the shift from an agrarian to a more urbanized society in the post-Civil War era, and the corruption that consumed many city governments. The rule is the result of Dillon's distrust of city government.

protect agricultural land from development, *e.g.*, through open space easements, conservation easements, and agricultural and forestal districts. Thus, additional powers will not be implied.

The Dillon Rule not only operates to determine whether a locality has a particular power, but also *how that power may be exercised* if the power exists. Some statutes may grant a power and also specify the manner in which the authority is to be exercised. In those cases, the manner specified in the statute is *the only way in which the power may be exercised*. Other statutes are silent about the manner in which the power is to be exercised, and the local governing body may choose the manner provided that the choice is reasonable. These rules apply regardless of whether the power is express or implied.

1-220 State and Federal Preemption of Local Law

At the federal level, preemption derives from the constitutional principle that the federal law is the supreme law of the land and supersedes the laws of a state or locality that are inconsistent with a federal law. *United States Constitution, Article VI*. At the state level, a state law preempts the laws of a locality that are inconsistent with the state law. *Virginia Code § 1-13:17; West Levinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259 (2005).

When considering whether a state or federal law preempts local regulation², the first consideration is whether the state or federal law *expressly preempts* local regulation. For example, the Telecommunications Act of 1996 expressly preempts localities from considering radio frequency emissions in their wireless siting decisions if the proposed facility's emissions meet federal emissions standards.

The second way in which a state or federal law will preempt local regulation is if that law *occupies the entire field* of regulation. Virginia's regulation of the land application of biosolids (sewage sludge) is an example of a body of state law that has occupied the entire field of regulation with the exception of limited and specific grants of local power.

The third way in which a state or federal law will preempt local regulation is if the local regulation *conflicts* with the state or federal law, the laws cannot be harmonized, and compliance with both the local regulation and the state or federal is not possible.

1-230 Constitutional Limitations on the Exercise of Power

The power to regulate the use of land is a legislative power, residing in the state, which must be exercised in accordance with constitutional principles. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982). A locality's exercise of its land use powers, particularly the zoning power, invokes numerous constitutional principles, and the key principles are addressed here.³

1-231 The First Amendment: Religion and Speech

The Establishment and Free Exercise Clauses of the First Amendment⁴ to the United States Constitution are in play when religious institutions and persons desiring to engage in religious exercise are involved. The Establishment Clause prohibits the government from asserting a preference of one religious denomination or sect over others or otherwise becoming entangled in religious matters. Thus, for example, a zoning ordinance that allows one of the

² The analyses for state and federal preemption of local regulations are actually slightly different from one another, but the differences have been harmonized for this writing.

³ Other than the Fourteenth Amendment's Equal Protection Clause, the Virginia Constitution has similar constitutional protections of substantive and procedural due process. In the zoning context, concepts of equal protection are found in Virginia Code § 15.2-2282's requirement that regulations for each class of building or use throughout a particular zoning district be uniform.

⁴ The First Amendment to the United States Constitution states: "Congress shall make no law respecting an *establishment of religion*, or prohibiting the *free exercise* thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (italics added)

major religions by right in all zoning districts, but requires a special use permit or prohibits any other religion, would violate the Establishment Clause. The Free Exercise Clause confers rights to practice religion and prohibits the government from substantially burdening religious exercise by its laws and decisions. For example, a special use permit condition that restricts the number of weddings or baptisms a particular religious institution may conduct, or the hours in which they may be held, may violate the Free Exercise Clause if those ceremonies are religious exercise.

The Free Speech Clause applies when localities regulate signs, music, or other forms of speech, including that related to adult-oriented businesses. Although localities have fairly broad authority to regulate the time, place, and manner of that speech, their regulations must be justified by a substantial governmental interest such as promoting aesthetics, preserving land values, or protecting traffic safety. A locality may not regulate the content of noncommercial (*e.g.*, political speech, protest speech) in the absence of a compelling governmental interest.

1-232 The Fifth Amendment: Takings

The Fifth Amendment to the United States Constitution states in part that “nor shall private property be *taken* for public use, without just compensation.” (italics added) The Takings Clause establishes a right in a property owner to be compensated by the government if it physically invades private property (such as by eminent domain) or regulates it to such an extent that there is no reasonable use of the property.

A takings analysis also applies when a locality approves a project and either accepts proffers in approving a rezoning, or imposes conditions in approving a special use permit, that lack a reasonable nexus and rough proportionality to the impacts to be addressed. Conditions such as these are referred to as *exactions*. A takings analysis also applies if the locality disapproves a rezoning or special use permit, but the reason for doing so is the applicant’s refusal to provide proffers or accept conditions that are later determined to lack the requisite nexus and rough proportionality.

1-233 The Fourteenth Amendment: Due Process and Equal Protection

Under the Fifth and Fourteenth Amendments to the United States Constitution, the government may not deprive a person of life, liberty, or property, without *due process of law*. Under the Fourteenth Amendment, the government also may not deprive a person within its jurisdiction the *equal protection of the laws*.

The Due Process Clause has both procedural and substantive elements to it. *Procedural* due process establishes rights of fairness in land use decisions, including the right to notice and the right to be heard in quasi-judicial matters⁵, the right that land use regulations, particularly those that may be enforced in a criminal proceeding, not be unduly vague or lacking in any rational basis, and the right to have those regulations fairly administered. *Substantive* due process establishes a minimum constitutional threshold that any regulation or decision not be arbitrary or irrational, or be so unjustified by any circumstance, governmental interest, or facts.

The Equal Protection Clause prohibits discrimination in zoning classifications, district boundaries, and land use decisions between similarly situated properties unless a rational basis for different treatment exists.

Due process and equal protection violations are very rare because the standards to establish a violation are so high and because statutory remedies exist to address lesser violations.

⁵ The Constitution does not require procedural due process for legislative matters. Thus, the notice and public hearings required for legislative matters such as comprehensive plan amendments, zoning text amendments, subdivision text amendments, and many special use permits are required by state statute, but are not constitutionally compelled.

2.

The County's Decision-Makers

This section provides a brief review of the county's key decision-makers on land use matters – the composition of those that are public bodies, and their general powers and duties.

2-100 The Board of Supervisors

Unless expressly provided otherwise, all powers granted to localities are vested in their respective governing bodies. *Virginia Code § 15.2-1401* (applicable to all counties). The powers of the county as a *body politic and corporate* are vested in the board of supervisors. *Virginia Code § 15.2-502* (applicable to counties such as the County of Albemarle that have adopted the county executive form of government). Under the county executive form of government, the Albemarle County board of supervisors is the policy-making body of the county and is vested with all policy-making powers and responsibilities conferred by general law upon county governing bodies.

The board is empowered to make all of the legislative decisions pertaining to land use, and this power may not be delegated to other boards, commissions, or employees in the absence of express statutory authority. *Sinclair v. New Cingular Wireless*, 283 Va. 567, 581 (2012). Thus, the board makes the final decision on those land use matters that are legislative in nature – comprehensive plan amendments, zoning text amendments, zoning map amendments, special use permits, special exceptions, and subdivision text amendments. An example of where the delegation of a legislative power is expressly authorized is found in Virginia Code § 15.2-2309(6), which enables a governing body to authorize a board of zoning appeals (“BZA”) to review and approve special use permits. In Albemarle County, the board has delegated to the BZA the authority to issue special use permits for electric message signs and off-site signs.

In Albemarle County, subdivision plats and site plans may be considered by the board on appeal by the applicant from a decision by the planning commission. When the board is acting on a subdivision plat or a site plan, it is acting in a ministerial capacity, and its role is merely to determine whether the subdivision plat or site plan meets the minimum requirements of the applicable regulations.

2-200 The Planning Commission

The Albemarle County planning commission is an eight-member administrative body established by the board of supervisors pursuant to Virginia Code § 15.2-2210 *et seq.* Planning commissions are part of the locality and operate under the authority granted to planning commissions under state law. Seven of the members are voting members and, of those seven, six represent each of the County's six magisterial districts, and the seventh is an at-large member. The eighth member is a non-voting member representing the University of Virginia.

The planning commission has specific powers related to individual land use matters. On legislative matters such as comprehensive plan amendments, zoning text amendments, zoning map amendments, special use permits, and subdivision text amendments, the commission is advisory to the board of supervisors and makes recommendations to the board. (*Virginia Code §§ 15.2-2223 (comprehensive plan), 15.2-2285 (rezonings), 15.2-2286 (rezonings and special use permits), 15.2-2253 (subdivision text amendments)*). On ministerial matters such as subdivision plats and site plans, the subdivision and zoning ordinances may designate the planning commission as the decision-making body.

In Albemarle County, subdivision plats and site plans may be considered by the commission on appeal by the applicant from a decision by the subdivision agent or the site plan agent. When the commission is acting on a subdivision plat or a site plan, it is acting in a ministerial capacity, and its role is merely to determine whether the subdivision plat or site plan meets the minimum requirements of the applicable regulations.

The planning commission's duties also include: (1) serving as an advisory body to the board of supervisors; (2) at the discretion of the board of supervisors, or on its own initiative, preparing and revising a capital improvement

program based on the comprehensive plan; (3) preparing reports related to its activities; and (4) conducting investigations. *Virginia Code § 15.2-2221*.

2-300 The Architectural Review Board

The Albemarle County architectural review board (“ARB”) is a five-member administrative body appointed by the board of supervisors and established pursuant to Virginia Code § 15.2-2306.

The ARB has the power and duty to administer the entrance corridor overlay district⁶ (Albemarle County Code § 18-30.6), which includes promulgating appropriate design guidelines that must be ratified by the board of supervisors, and considering requests for certificates of appropriateness. A certificate of appropriateness is a certification by the ARB that a proposed development is consistent with the ARB’s design guidelines.

2-400 The Board of Zoning Appeals

The Albemarle County board of zoning appeals (“BZA”) is a five-member public body established by the board of supervisors but whose members are appointed by the circuit court pursuant to Virginia Code § 15.2-2308.

The primary powers and duties of the BZA are to hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of the zoning ordinance, to hear and decide applications for variances from certain requirements (*e.g.*, setbacks) of the zoning ordinance, and to hear and decide applications for special use permits for electric message signs and off-site signs. *Virginia Code § 15.2-2309; Albemarle County Code § 18-34.1 et seq.*

2-500 The Zoning Administrator

The zoning administrator is an officer appointed by the board of supervisors. *Virginia Code § 15.2-2286(A)(4)*. In Albemarle County, this office is within the county’s department of community development.

The primary powers and duties of the zoning administrator are to: (1) interpret the zoning ordinance; (2) administer the zoning ordinance by making determinations and decisions as provided therein; (3) ensuring compliance with the zoning ordinance; (4) ordering the abatement of any use or structure determined to be in violation of the zoning ordinance; (5) making vested rights determination with concurrence of the county; and (6) interpret proffers. *Virginia Code § 15.2-2286(A)(4); Albemarle County Code § 18-31.1*.

2-600 The Subdivision Agent and the Site Plan Agent

The subdivision agent and the site plan agent are offices within the county’s department of community development established in the zoning (site plan agent) and subdivision (subdivision agent) ordinances. The persons assigned to those offices are the director of community development and his designees. *Albemarle County Code §§ 14-200, 18-32.3.1*.

The primary powers and duties of the subdivision and site plan agents are to administer the county’s site plan and subdivision regulations and to review and act on site plans and subdivision plats. *Albemarle County Code §§ 14-200, 18-32.3.1*.

⁶ The entrance corridor overlay district exists along certain arterial streets in the county identified in the zoning ordinance. These streets are “significant routes of tourist access” to the county or to designated historic landmarks, buildings, structures, or districts in the county or in a contiguous locality.

2-700 The Program Administrator

In Albemarle County, the county engineer is the program administrator who administers the county’s water protection ordinance. *Albemarle County Code § 17-201.*

The program administrator’s powers and duties are to administer and enforce the county’s erosion and sediment control and stormwater management programs, and to exercise all powers and perform other duties as specifically provided in the water protection ordinance. *Albemarle County Code § 17-201.* Some additional county officers and employees are expressly designated some additional tasks in order to assist the program administrator in administering the water protection ordinance. *Albemarle County Code § 17-201.*

Roles of the Albemarle County Board of Supervisors, Planning Commission, and Architectural Review Board on Various Land Use Matters			
Land Use Matter	Board of Supervisors	Planning Commission	Architectural Review Board
Comprehensive plan amendments	Final action	Recommendation to BOS	Advisory on matters within the Entrance Corridor Overlay District (“ECOD”)
Zoning text amendments	Final action	Recommendation to BOS	Advisory on matters within the ECOD
Zoning map amendments (rezonings)	Final action	Recommendation to BOS	Advisory on matters within the ECOD
Special use permits	Final action (except those delegated to the BZA)	Recommendation to BOS (except those delegated to the BZA)	Advisory on matters within the ECOD
Special exceptions	Final action	Recommendation to BOS if referred to PC	Advisory on matters within the ECOD
Variances	None	None	Advisory (to BZA) on matters within the ECOD
Site plans	Final action if appealed from PC decision (if disapproved by PC)	Final action unless appealed to BOS (if disapproved by PC)	Advisory on matters within the ECOD
Subdivision plats	Final action if appealed from PC decision (if disapproved by PC)	Final action unless appealed to BOS (if disapproved by PC)	Advisory on matters within the ECOD
Certificates of appropriateness	Final action if appealed from ARB decision	None	Final action unless appealed to BOS

Note: Site plans and subdivision plats are approved administratively. Site plans and subdivision plats disapproved by the agent, or approved with objectionable conditions, may be appealed by the developer to the commission and thereafter to the board. Disapproved site plans and subdivision plats may be challenged in circuit court in lieu of pursuing administrative appeals.

3.

The County's Planning Documents and Development Regulations

This section provides a very brief summary of the legal nature of the County's key planning documents and development regulations – the comprehensive plan, the zoning ordinance (which includes the County's site plan regulations), the subdivision ordinance, and the water protection ordinance.

3-100 The Comprehensive Plan

A comprehensive plan is a *plan* for the physical development of the territory within the locality's jurisdiction. *Virginia Code § 15.2-2223*. It provides "a guideline for future development and systematic change, reached after consultation with experts and the public." *Town of Jonesville v. Powell Valley Limited Partnership*, 254 Va. 70, 76 (1997). A comprehensive plan is general in nature, and with its accompanying maps, plats, charts, and descriptive information, shows the locality's long-range recommendations for the general development of the territory. *Virginia Code § 15.2-2223*.

A comprehensive plan is adopted or amended only after careful and comprehensive surveys and studies of the existing conditions, trends of growth, and the probable future requirements of the area. *Virginia Code § 15.2-2223*. The subject of these surveys and studies may include the use of land, the preservation of agricultural and forestal land, characteristics and conditions of existing development, natural resources, dam break inundation zones, and other matters. *Virginia Code § 15.2-2224(A)(1)*. A comprehensive plan is a product of the state statutory scheme that assures that these changes are not "made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning." *Board of Supervisors of Fairfax County v. Snell Construction Corp.*, 214 Va. 655, 658 (1974).

The purpose of the comprehensive plan is to guide and accomplish a coordinated, adjusted, and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity, and general welfare of the inhabitants, including the elderly and persons with disabilities. *Virginia Code § 15.2-2223*.

A comprehensive plan does not have the status of a zoning ordinance. *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434 (1975). A comprehensive plan is *advisory* only. *Allman, supra*; *Board of Supervisors of Stafford County v. Safeco*, 226 Va. 329 (1983). Nonetheless, a comprehensive plan may properly form the basis to approve or deny a rezoning or a special use permit. *Board of Supervisors of Loudoun County v. Lerner*, 221 Va. 30 (1980) (rezoning); *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89 (1986) (special use permit). In guiding zoning decisions, the comprehensive plan is one of approximately ten relevant factors required to receive "reasonable consideration" by the planning commission and the locality's governing body. *Virginia Code § 15.2-2284*; *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629 (1983).

3-200 The Zoning Ordinance

Zoning is the process of classifying land in a locality into districts and establishing in each district regulations concerning building and structure location and design and the uses to which land, buildings, and structures may be put. *Virginia Code § 15.2-2201*.

The purpose of zoning is "to promote the health, safety, morals, and general welfare of the community, to protect and conserve the value of buildings, and encourage the most appropriate use of the land." *City of Richmond v. Board of Supervisors of Henrico County*, 199 Va. 679, 686 (1958); *see also Southern Railway Co. v. City of Richmond*, 205 Va. 699, 707 (1964) ("the purpose of zoning is in general two-fold: to preserve the existing character of an area by excluding prejudicial uses, and to provide for the development of the several areas in a manner consistent with the uses for which they are suited").

Zoning regulations strive to achieve these purposes by regulating or restricting the use of property within the zoning area. *Blankenship v. City of Richmond*, 188 Va. 97, 105 (1948). *Virginia Code § 15.2-2280* is the primary grant of

authority to regulate or restrict the use of property through zoning regulations, and it provides:

Any locality may, by ordinance, *classify the territory* under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

1. The *use of land, buildings, structures* and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;
2. The *size, height, area, bulk, location*, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
3. *The areas and dimensions of land*, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used; or
4. The excavation or mining of soil or other natural resources.

This grant of authority is very broad. “Local governing bodies, because of their knowledge of local conditions and needs of their individual communities, are allowed wide discretion in the enactment . . . of zoning ordinances.” *Byrum v. Board of Supervisors of Orange County*, 217 Va. 37, 39 (1976). The Virginia Supreme Court has repeatedly acknowledged that a locality’s governing body is in the best position to determine the proper uses of land within its jurisdiction. See *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 423-424 (1981) and *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 282 (1937).

The General Assembly has curtailed the zoning authority of localities in various laws over the years, such as the laws that restrict regulating farm wineries, the state’s preemption of the land application of biosolids, and the exemption from local zoning that electric transmission lines over 138 kilovolts enjoy.

3-300 The Subdivision Ordinance

While zoning regulations delineate the uses and the permissible ways in which land may be developed, subdivision regulations identify the procedures for dividing land and impose requirements for providing public infrastructure and other improvements when the land is developed. *Virginia Code §§ 15.2-2200, 15.2-2240; 1989 Va. Op. Atty. Gen. 100*. Thus, subdivision regulations are different from zoning regulations, and are not substitutes for zoning regulations. *1985-86 Va. Op. Atty. Gen. 90*.

Among the key concerns addressed by subdivision ordinances are the coordination of existing and planned streets, the provision of adequate water, sewerage and drainage systems, the extent and manner in which streets are to be improved, the dedication of rights-of-way for public use, and the dedication of other site-related improvements. *1989 Va. Op. Atty. Gen. 100*.

A locality’s authority to regulate the division of land is limited. *County of Chesterfield v. Tetra Associates, LLC*, 279 Va. 500, 506 (2010). The exercise of powers under a subdivision ordinance must be authorized by the subdivision-enabling statutes in Virginia Code § 15.2-2240 *et seq.* See *National Realty Corp. v. Virginia Beach*, 209 Va. 172 (1968). Virginia Code § 15.2-2241 prescribes the mandatory provisions that *must* be included in a subdivision ordinance, and Virginia Code §§ 15.2-2242 prescribes the optional provisions that *may* be included in a subdivision ordinance. Additional mandatory and discretionary provisions pertaining to certain public facilities, dams, family subdivisions, and stormwater management facilities are found in Virginia Code §§ 15.2-2243 through 15.2-2245.1. A locality may not enact a subdivision ordinance that is more expansive than the enumerated requisites contained in Virginia Code §§ 15.2-2241 through 15.2-2245.1. See *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999).

3-400 The Water Protection Ordinance

In Albemarle County, precipitation that neither evaporates nor soaks into the ground is considered stormwater runoff, which flows overland into natural waterways or into constructed conveyance systems, and eventually to the Chesapeake Bay. Forests, wetlands, and other naturally vegetated areas slow stormwater runoff and absorb water and pollutants. Unmanaged stormwater can cause erosion and flooding. When stormwater flows across roads, rooftops, yards, farms, golf courses, parking lots, and construction sites, it picks up nutrients, sediment, phosphorous, nitrogen, pesticides, dirt, trash, motor oil, bacteria from animal waste, deposits from airborne pollutants, and other pollutants. This can be harmful to aquatic life and contribute more sediment and other pollution to the county's streams, the Chesapeake Bay, and its tributaries.

The county's water protection ordinance implements the Virginia Stormwater Management Act (Virginia Code § 62.1-44.15:24 *et seq.*), the Erosion and Sediment Control Law (Virginia Code § 62.1-44.15:51 *et seq.*), and limited optional provisions of the Chesapeake Bay Preservation Act (Virginia Code § 62.1-44.15:67 *et seq.*). The primary focus of the water protection ordinance is to address how stormwater is to be managed while land is being developed and after construction is completed. There are two primary programs to manage stormwater – erosion and sediment control and stormwater management:

- *Erosion and Sediment Control:* The Virginia Department of Environmental Quality explains that an erosion and sediment control program helps prevent destruction of property and natural resources caused by land disturbing activities that results in soil erosion, water pollution, flooding, stream channel damage, decreased ground water storage, slope failures, and damage to adjacent or downstream properties. These types of problems can be minimized by implementing erosion and sediment control measures on construction sites. These measures include prompt soil stabilization, establishing permanent vegetative covers, and constructing sediment basins and traps. These measures help prevent soil movement or loss, enhance project aesthetics, and eliminate appreciable damage to off-site receiving channels, property, and natural resources.
- *Stormwater Management:* The Virginia Department of Environmental Quality describes “nonpoint source pollution” as water pollution caused by stormwater runoff that is not confined to a single source. A single source discharger, including such things as a wastewater treatment plant or industrial discharge pipe, are separately regulated under a Clean Water Act permitting program. The county's stormwater management program manages the quantity and quality of stormwater runoff on construction sites, as well as on a regional or watershed basis. As pervious surfaces are converted to impervious surfaces, the amount of stormwater runoff increases, which may cause erosion, localized flooding, and property damage. The quantity of stormwater runoff can be controlled by measures such as detention basins that control the peak stormwater discharge. Because stormwater runoff from both pervious and impervious surfaces may carry large amounts of pollutants when it rains, the quality of stormwater runoff must be managed by measures such as permeable pavement, grass channels, bioretention, and constructed wetlands.

The water protection ordinance also has other water-related programs that include regulations protecting stream buffers, prohibiting illicit discharges and related acts, and the groundwater monitoring program.

4.

The Land Use Matters Considered by the Board, the Planning Commission, the Architectural Review Board, and by County Staff

This section reviews twelve land use matters pertaining to the comprehensive plan, zoning, subdivision, and water protection regularly considered by the board of supervisors, the planning commission, the architectural review board, and by county staff.

4-100 Amendments to the Comprehensive Plan

Nature of the Matter: The comprehensive plan is the plan for the physical development of the locality. It may be amended from time to time and must be reviewed at least once every 5 years to determine whether it is advisable to amend the plan. Although the comprehensive plan is significant in most, if not all, zoning decisions, the plan itself is not regulatory in nature but, instead, is considered to be *advisory* when applied to those zoning decisions.

Commission Role: The commission holds a public hearing and makes a recommendation to the board on the proposed amendment.

Board Role: The board holds a public hearing and is the decision-making body on the proposed amendment.

Board Act: Action to amend or not amend, or to remand to the commission for further consideration.

Nature of the Act: Legislative.⁷

Considerations: The following statement is from Virginia Code § 15.2-2223, which is a summary of the considerations for the adoption of a comprehensive plan, but which could be applied to amendments as well: “The comprehensive plan shall be made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants, including the elderly and persons with disabilities.”

4-200 Reviewing a Proposed Public Feature under Virginia Code § 15.2-2232 (“2232 Review”)

Nature of the Matter: Proposed public features (generally, some type of public facility such as a street, park, public area, public building, public utility facility, or public service corporation facility (other than a railroad facility or certain underground facilities)) must be reviewed under Virginia Code § 15.2-2232 if they are not shown on the comprehensive plan and not part of a proposed subdivision, site plan, or plan of development.

Commission Role: The commission holds a public hearing, is the decision-making body, and reports its decision, with reasons stated, to the board.

⁷ A legislative act has been explained by the Virginia Supreme Court to involve balancing the consequences of private conduct against the interests of public welfare, health, and safety. In general, a legislative body exercises a legislative power when it prescribes a course of conduct. Legislative acts are presumed to be reasonable, correct, and constitutionally valid. In the land use arena, actions on comprehensive plan amendments, ordinance text amendments, special use permits, special exceptions, and certificates of appropriateness are legislative acts.

Board Role: The board receives the commission’s report of its decision and may decide whether to take further action.

Nature of the Act: Legislative.

Considerations: Whether the proposed public facility’s location, character and extent are *substantially in accord* with the comprehensive plan. Generally, “substantially” means “largely, but not wholly.”

4-300 Zoning Map Amendments

Nature of the Matter: The entire county is classified into more than 20 zoning districts. The regulations for each zoning district delineate the uses that are allowed by right and by special use permit, and establish other standards such as minimum lot sizes, the minimum and maximum setback of structures from property lines, and maximum building heights. A zoning map amendment, also known as a *rezoning*, changes the zoning district in which the land is located, or amends previously approved application plans or codes of development, or previously accepted proffers.

Commission Role: The commission holds a public hearing and makes a recommendation to the board on the proposed amendment. The commission’s recommendation may be a recommendation that the applicant’s land be rezoned to a district designation other than the one requested by the applicant.

Board Role: The board holds a public hearing and is the decision-making body on the proposed amendment.

Board Act: Action to amend or not amend, or to remand to the commission for further consideration. If the board decides to amend the zoning map, it adopts an ordinance.

Nature of the Act: Legislative.

Considerations: For *zoning map amendments to conventional and planned development zoning districts and amendments thereto:* Virginia Code § 15.2-2284 provides that one or more of the following factors are to be considered when developing zoning regulations and drawing zoning district boundaries:

- The existing use and character of property.
- The comprehensive plan.
- The suitability of property for various uses.
- The trends of growth or change.
- The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.
- The transportation requirements of the community.
- The requirements for airports, housing, schools, parks, playgrounds, recreation areas, and other public services.
- The conservation of natural resources.
- The preservation of flood plains.
- The protection of life and property from impounding structure failures.
- The preservation of agricultural and forestal land.
- The conservation of properties and their values.
- The encouragement of the most appropriate use of land throughout the county.

Additional considerations for zoning map amendments establishing a planned development zoning district in Albemarle County: (1) whether the proposed planned development satisfies the purpose and

intent of the planned development district; (2) whether the area proposed to be rezoned is appropriate for a planned development under the comprehensive plan; and (3) the relation of the proposed planned development to major roads, utilities, public facilities, and services.

Additional considerations for zoning map amendments amending a planned development zoning district in Albemarle County: (1) whether the proposed amendment reduces, maintains, or enhances the elements of a planned development; and (2) the extent to which the proposed amendment impacts the other parcels within the planned development district.

4-400 Zoning Text Amendments

Nature of the Matter: A zoning text amendment amends the zoning ordinance.

Commission Role: The commission holds a public hearing and makes a recommendation to the board on the proposed amendment.

Board Role: The board holds a public hearing and is the decision-making body on the proposed amendment.

Board Act: Action to amend or not amend, or to remand to the commission for further consideration. If the board decides to amend the zoning text, it adopts an ordinance.

Nature of the Act: Legislative.

Considerations: *Consideration of the purposes of zoning.* Virginia Code § 15.2-2283 requires that zoning regulations be designed to give reasonable consideration to each of the following purposes:

- Provide for adequate light, air, convenience of access, and safety from fire, flood, impounding structure failure, crime, and other dangers.
- Reduce or prevent congestion in the public streets.
- Facilitate the creation of a convenient, attractive, and harmonious community.
- Facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports, and other public requirements.
- Protect against the destruction of or encroachment upon historic areas.
- Protect against the overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic, or other dangers.
- Encourage economic development activities that provide desirable employment and enlarge the tax base.
- Provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment.
- Protect approach slopes and other safety areas of licensed airports, including United States government and military air facilities.
- Promote the creation and preservation of affordable housing suitable for meeting the current and future needs of the locality, as well as a reasonable proportion of the current and future needs of the planning district within which the locality is situated.
- Provide reasonable protection against encroachment upon military bases, military installations, and military airports and their adjacent safety areas, excluding armories operated by the Virginia National Guard.

The 12 factors in Virginia Code § 15.2-2284 that apply to zoning map amendments, delineated in section 4-300, also apply to drawing district boundaries in zoning map amendments.

4-500 Special Use Permits

Nature of the Matter: Zoning district regulations delineate those uses allowed by right and those allowed by special use permit. Special uses are generally consistent with the purposes of the zoning district and the uses allowed by right, but they tend to have impacts that warrant case-by-case review so that conditions may be imposed to address those impacts.

Commission Role: The commission holds a public hearing and makes a recommendation to the board on the proposed special use permit. The commission's recommendation also includes a recommendation on any proposed conditions to be imposed in conjunction with the special use permit.

Board Role: The board holds a public hearing and is the decision-making body on the proposed special use permit.

Board Act: Action to approve or deny the special use permit, or to remand to the commission for further consideration. If the board decides to approve the special use permit, it adopts a resolution. The board may impose reasonable conditions to address the impacts from the special use.

Nature of the Act: Legislative.

Considerations: Albemarle County Code § 18-33.8 provides that the following factors are to be considered: (1) the use will not be of substantial detriment to adjacent property; (2) the character of the district will not be changed by the proposed use; (3) the use will be in harmony with the purpose and intent of the zoning ordinance, with the uses permitted by right in the district, the regulations provided in section 5 of the zoning ordinance, and with the public health, safety, and general welfare; and (4) the use will be consistent with the comprehensive plan.

4-600 Special Exceptions

Nature of the Matter: *Special use permits* and *special exceptions* are used throughout the Commonwealth to often mean the same thing. In Albemarle County, special exceptions serve a different purpose than special use permits because special exceptions merely allow certain regulations pertaining to the size, height, area, bulk, or location of structures, and other similar types of standards, to be modified, waived, or varied, and do so only when they are expressly authorized in the zoning ordinance.

Commission Role: The commission considers only those applications for special exceptions for which staff does not recommend approval. When the commission considers those applications, it makes a recommendation to the board. The commission's recommendation also includes a recommendation on any proposed conditions to be imposed in conjunction with the special exception. An even limited number of special exceptions require a public hearing before the commission when there is a proposed change in use or an increase in the bulk of a building by more than 50% (two issues generally not allowed by special exception under the zoning ordinance), where the parcel is located within one-half mile of a boundary of an adjoining locality.

Board Role: The board is the decision-making body, and most special exceptions are considered on the board's consent agenda. If a public hearing is required (see explanation in "Commission Role" above), the board first holds a public hearing before making a decision.

Board Act: Action to approve or deny the special exception, or to refer or remand to the commission for further consideration. If the board decides to approve the special exception, it adopts a resolution. The board may impose reasonable conditions to address impacts from the exception.

Nature of the Act: Legislative.

Considerations: The factors, standards, criteria, and findings, however denominated, in the applicable sections of the Zoning Ordinance allowing the modification, waiver, or variation.

4-700 Certificates of appropriateness

Nature of the Matter: In Albemarle County, a number of streets and highways have been identified as significant routes of tourist access to the county and to designated historic landmarks, structures, or districts within the county or in contiguous localities. Structures and site improvements along and visible from these *entrance corridors* that are established, changed, or reconstructed must obtain a *certificate of appropriateness* unless they are exempt (exempt structures include primary and accessory dwelling units and structures for agricultural or forestal uses if a site plan is not required). The certificate of appropriateness is a decision by the architectural review board (“ARB”) that the proposed structure or site improvement is consistent with the applicable design guidelines for the entrance corridor.

ARB Role: The ARB is the decision-making body. In issuing a certificate of appropriateness, the ARB may impose reasonable conditions to ensure that the structures and site improvements are consistent with the applicable design guidelines.

Commission Role: The commission has no role in a certificate of appropriateness application or appeal.

Board Role: The board may consider appeals from the decision of the ARB filed by the applicant, any person aggrieved, the zoning administrator, or the county executive.

Board Act: The board may affirm, reverse, or modify in whole or in part the decision of the ARB.

Nature of the Act: Legislative.

Considerations: Under Albemarle County Code § 18-30.6.4, the decision whether a proposed structure or site improvement is consistent with the applicable design guidelines considers architectural features such as structure height, scale, mass, roof forms, building materials and colors, the arrangement of structures, the location and configuration of parking areas and landscaping, proposed landscaping, the preservation of existing vegetation and natural features, the appearance of signs, and the location, type, and color of all fencing. Albemarle County Code § 18-30.6.8 provides that, on appeal, the board “shall give due consideration to the recommendations of the [ARB] together with any other information it deems necessary for a proper review of the appeal. When considering an appeal pertaining to a public safety facility, the board may issue a certificate of appropriateness if it finds that the facility is a public necessity.”

4-800 Subdivision Text Amendments

Nature of the Matter: Amend the subdivision regulations.

Commission Role: The commission holds a public hearing and makes a recommendation to the board on the proposed amendment.

- Board Role:* The board holds a public hearing and is the decision-making body on the proposed amendment.
- Board Act:* Action to amend or not amend, or to remand to the commission for further consideration. If the board decides to amend the subdivision text, it adopts an ordinance.
- Nature of the Act:* Legislative.
- Considerations:* Whether the proposed regulation is enabled by Virginia Code §§ 15.2-2241 through 15.2-2245.1.

4-900 Subdivision Plats

- Nature of the Matter:* Subdivision plats are schematic drawings that show how land will be divided into 2 or more lots, and show the location and nature of required improvements.
- Commission Role:* The commission considers only appeals by the subdivider from the disapproval of a subdivision plat by the county's subdivision agent, or the approval of a preliminary subdivision plat with conditions to which the subdivider objects. The commission's sole role is to determine whether the plat satisfies the minimum requirements of the subdivision ordinance. The commission may approve or disapprove the plat, and it may approve a preliminary plat with the conditions to which the subdivider objects if they are required to satisfy an express requirement.
- Board Role:* The board considers only appeals by the subdivider from the commission's disapproval of the subdivision plat or its approval of a preliminary plat with conditions to which the subdivider objects. The board's sole role is to determine whether the plat satisfies the minimum requirements of the subdivision ordinance.
- Board Act:* Action to approve or disapprove the plat, and it may approve a preliminary plat with the conditions to which the subdivider objects if they are required to satisfy an express requirement.
- Nature of the Act:* Ministerial.⁸
- Considerations:* The Subdivision Ordinance, and any other regulations that must be satisfied under the Subdivision Ordinance.

4-1000 Site Plans

- Nature of the Matter:* Site plans are schematic drawings that show how land will be developed but not subdivided, including the location and nature of required improvements. Site plans are required for new developments, with limited exceptions for: (1) establishing not more than two single family dwellings on a single lot; (2) most agricultural activities; and (3) changes or expansions of uses that do not affect parking, access, or ingress or egress.

⁸ A ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one's own judgment upon the propriety of the act being done. An act is ministerial even though an officer has to determine the existence of the facts that make it necessary for him to act. Once an applicant has complied with all requirements, the function of approval becomes ministerial, and the application must be approved. Unlike legislative acts, ministerial acts have no presumptions of reasonableness or correctness. Actions on subdivision plats and site plan are ministerial acts.

- Commission Role:* The commission considers only appeals by the developer from the disapproval of a site plan by the county's site plan agent, or the approval of an initial site plan with conditions to which the developer objects. The commission's sole role is to determine whether the site plan satisfies the minimum requirements of the site plan regulations in the zoning ordinance. The commission may approve or disapprove the site plan, and it may approve the initial site plan with the conditions to which the developer objects if they are required to satisfy a requirement.
- Board Role:* The board considers only appeals by the developer from the commission's disapproval of the site plan or its approval of the initial site plan with conditions to which the developer objects. The board's sole role is to determine whether the site plan satisfies the minimum requirements of the site plan regulations in the zoning ordinance.
- Board Act:* Action to approve or disapprove the site plan, and it may approve an initial site plan with the conditions to which the developer objects if they are required to satisfy a requirement.
- Nature of the Act:* Ministerial.
- Considerations:* The site plan regulations in the zoning ordinance, and any other regulations that must be satisfied under the site plan regulations.

4-1100 Variations from and Exceptions to Subdivision or Site Plan Requirements

- Nature of the Matter:* The *general regulations* of the subdivision ordinance or the site plan regulations in the zoning ordinance may be varied or waived.
- Commission Role:* Certain variations and exceptions pertaining to requirements for improvements are considered by the commission in the first instance while others are considered by the county's subdivision agent or the site plan agent (the "agent"); those variations or exceptions considered by the agent may be considered by the commission on appeal by the subdivider or developer (the "applicant") from the agent's disapproval of a variation or exception or the approval of a variation or exception with conditions to which the applicant objects.
- Board Role:* The board considers only appeals by the applicant from the commission's disapproval of the variation or exception or its approval of the variation or exception with conditions to which the applicant objects. On appeal, the board determines whether the applicant should be permitted to vary or to be excepted from one or more of the otherwise applicable minimum requirements.
- Board Act:* Approval, with or without reasonable conditions, or disapproval.
- Nature of the Act:* Administrative.⁹
- Considerations:* Whether there are unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.

⁹ Administrative acts are those that may be delegated to a subordinate official such as the subdivision or site plan agent. These acts require the exercise of discretion where the decision-maker must determine whether the performance standards stated in the ordinance have been satisfied. The nature of the power delegated has been described as "more essentially ministerial than legislative." *Ours Properties, Inc. v. Ley*, 198 Va. 848, 852 (1957). The delegation of authority to a subordinate is long-recognized in Virginia and has been described as "essential to carry out the legitimate functions of government." *Bell v. Dorey*, 248 Va. 378, 379 (1994).

4-1200 Erosion and Sediment Control and Stormwater Management

Nature of the Matter: In conjunction with the land development process, and unless otherwise exempt, the disturbance of 10,000 square feet or more of land requires that the owner obtain approval of a stormwater management (VSMP) permit under the water protection ordinance. This permit will include, in most cases, approval of erosion and sediment control and stormwater management plans. The VSMP permit is reviewed and acted on by the county engineer, who is designated as the administrator of the county's VSMP program.

Commission Role: None.

Board Role: The board considers only appeals of certain actions or inaction by the administrator: (1) the disapproval of an erosion and sediment control plan or VSMP permit; (2) the approval of an erosion and sediment control plan or VSMP permit with conditions the owner objects to; (3) the disapproval of a variance or exception; (4) any determination made under sections 17-300 through 17-306; (5) any state permit decision made by the administrator; (6) any enforcement decision made by the administrator; (7) the failure of the administrator to act within the time periods required by the water protection ordinance; and (8) the approval of an erosion and sediment control plan or VSMP permit where the issue is compliance with state law (an appeal of number (8) may be brought by a downstream landowner).

Board Act: Affirm, reverse, or modify the action of the administrator, or take any action the administrator failed to take.

Nature of the Act: Quasi-judicial or ministerial, depending on the subject matter of the appeal.

Considerations: Whether the administrator's decision was correct under the water protection ordinance.