

Chapter 6

Constitutional Principles Affecting a Locality’s Land Use Powers

6-100 Introduction

The power to regulate the use of land by land use laws 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:

Constitutional Principles That May Be Affected By the Exercise of Local Land Use Powers	
<ul style="list-style-type: none"> • Procedural due process • Substantive due process • Equal protection • Just compensation or takings • Establishment of religion 	<ul style="list-style-type: none"> • Free exercise of religion • Free speech • Search and seizure (see section 27-400) • Supremacy (preemption) (see chapter 7)

The many constitution principles affected by local land use powers probably inspired a United States Supreme Court justice to ask in a dissenting opinion: “[I]f a policeman must know the Constitution, then why not a planner?” *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (Brennan).

6-200 The due process clause

The Fifth Amendment to the United States Constitution provides in part that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” The Fourteenth Amendment to the United States Constitution provides in part “. . . nor shall any State deprive any person of life, liberty, or property without due process of law. . .” Article I, Section 11 of the Virginia Constitution provides in part “[t]hat no person shall be deprived of his life, liberty, or property without due process of law . . .”

The Due Process Clause		
Constitutional Principle	Rights Protected	How to Assure Compliance
Procedural due process	<p>The right to notice and the right to be heard</p> <p>The locality’s adherence to statutory time requirements</p> <p>Regulation may not be uncertain or vague; a person of ordinary intelligence must have a reasonable opportunity to know what is prohibited</p>	<p>Comply with the notice requirements in Virginia Code § 15.2-2204 and other statutes and local ordinances requiring notice and the right to a hearing; where interests affected in an adjudicative or quasi-judicial proceeding are not governed by statutory notice and hearing requirements, assure that notice and hearing is provided before property or property interests affected</p> <p>Adhere to the statutory time requirements in, <i>e.g.</i>, Virginia Code §§ 15.2-2286(A)(7) (rezonings), 15.2-2259 (final subdivision plats and site plans), 15.2-2312 (variances and appeals to the BZA)</p> <p>Read the regulation and confirm that it clearly states what you want it to state in language that a person of ordinary intelligence can understand</p>
Substantive due process	Regulation or decision may not be arbitrary or irrational, so unjustified by any circumstance, governmental interest, or facts	Confirm that the regulation forwards one of the purposes of zoning in Virginia Code § 15.2-2283, and is supported by the relevant factual considerations in Virginia Code § 15.2-2284 including, in particular, the comprehensive plan; assure that any zoning action does not deprive a landowner of all legitimate use of the property

In the context of a zoning ordinance, the due process clause assures fairness in the way in which a zoning regulation is adopted or a zoning decision is made (procedural due process), and fairness in the scope and implementation of the zoning regulation (substantive due process).

6-210 Procedural due process

Procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435 (1991). It does not apply to legislative matters. To establish a violation of procedural due process, plaintiffs must show: (1) they had property or a property interest; (2) of which the defendant deprived them; (3) without due process of law. *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (no procedural due process violation where plaintiffs received multiple hearings, and successfully obtained remedy in state court which resulted in city ultimately issuing the land use permits plaintiffs sought); *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

Procedural due process does not require certain results; it requires only fair and adequate procedural protections. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002).

6-211 The right to notice and the right to be heard

One strand of procedural due process involves the *right to notice and the right to be heard*. It is a constitutional right that applies to individuals in adjudicative or quasi-judicial proceedings. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435 (1991). Thus, principles of procedural due process apply to variance applications and appeals of official determinations to the BZA, but not to legislative matters such as zoning text amendments, rezonings and special use permits, to which only the statutory notice and public hearing requirements in Virginia Code § 15.2-2204 apply. *Southern Iron Works, supra*.

Procedural due process generally requires that a deprivation of property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), cited in *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) (no procedural due process violation in denial of building permit). To determine whether a procedural due process violation has occurred, the courts will consult the entire panoply of predeprivation and postdeprivation process provided by the state. *Tri-County Paving, Inc., supra*. The procedures due in zoning cases, and by analogy due in other cases involving the regulation of land use through general police powers, are not extensive. *Tri-County Paving, Inc., supra*.

6-212 The obligation to adhere to statutory time requirements

A second strand of procedural due process arises from the failure to adhere to *statutory time requirements*. See, *Tran v. Board of Zoning Appeals of Fairfax County*, 260 Va. 654 (2000). For example, the failure of a governing body to act on a rezoning request, or the failure of the BZA to act on an appeal of an official determination within the statutory time period, may violate procedural due process if the claiming party demonstrates that the unreasonable delay resulted in prejudice or harm. *Tran, supra* (although Virginia Code § 15.2-2312 required that a decision be rendered within 90 days, there was no due process violation even though 550 days passed before the BZA rendered a decision on an appeal because plaintiffs presented no evidence of harm or prejudice and failed to object to continuances).

6-213 The requirement that regulations not be uncertain or vague

A third strand of procedural due process requires that *regulations not be uncertain or vague*. An ordinance is unconstitutionally vague if it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435 (1991).

As the Virginia Supreme Court has explained, “the root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing . . . statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” *Flannery v. City of Norfolk*, 216 Va. 362 (1979). “The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Land use enactments are particularly resistant to facial vagueness challenges, because zoning law is often given specific content through the planning and permitting process. *Hyatt v. Town of Lake Lure*, 2004 U.S. App. LEXIS 23687 (4th Cir. 2004) (unpublished). “Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what ‘has always been an intensely local area of the law.’” *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). One’s ability to clarify the meaning of the regulation by inquiry, or by resort to an administrative process, further undermines a vagueness claim. *Village of Hoffman Estates, supra*.

In *Gwinn v. Walker*, 62 Va. Cir. 325 (2003), the landowners claimed that the zoning ordinance’s prohibition of “outside storage” was unconstitutionally vague because the county had offered no definition of the term and, therefore, provided no measurable standards against which a reasonable person could determine what constitutes “outside storage.” After examining the plain meanings of the words “outside” and “storage,” and looking at other related provisions of the zoning ordinance, the court held that the phrase was not vague because “it can be inferred that the phrase ‘outside storage’ suggests the safekeeping of items in a space or place located outdoors rather than within an enclosed structure.” Citing *Flannery, supra*, the *Gwinn* court also said that the “law does not mandate an exhaustive list of detailed items before a fair indication of proscribed conduct is conveyed.”

6-220 Substantive due process

Land use regulations and actions must substantially advance legitimate governmental interests. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) (explaining that takings jurisprudence has not supplanted substantive due process in this context, and noting that a governmental action that does not substantially advance a legitimate governmental interest is a substantive due process claim, not a takings claim); *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); see, *Clarke v. Warren County Board of Commissioners*, 150 Ohio.App.3d 14 (2002) (observing that an economic feasibility analysis has a role not only in a takings analysis, but also in a substantive due process analysis; “[w]here zoning essentially permits only one kind of development, and such development is not economically feasible, there is strong evidence that the designation bears no substantial relationship to the purposes proffered by the government”).

Substantive due process does not forbid reasonable regulation of the use of private property. *Alford v. City of Newport News*, 220 Va. 584 (1979). However, a legitimate exercise of the zoning power requires that “the means employed [must be] reasonably suited to the achievement of [the] goal.” *Alford, supra*. The boundaries of permissible action by localities are set by the law. *First Virginia Bank - Colonial v. Baker*, 225 Va. 72 (1983).

Substantive due process requires that a zoning action *not arbitrarily or capriciously deprive a person of the legitimate use of his or her property*. The mere power to enact an ordinance does not carry with it the right to arbitrarily or capriciously deprive a person of the legitimate use of his property. *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653 (1959). “Substantive due process is a far narrower concept than procedural [due process]; it is an absolute check on certain governmental actions notwithstanding ‘the fairness of the procedures used to implement them.’” *Love v. Peppersack*, 47 F.3d 120 (4th Cir. 1995). Thus, its protection covers only an action that is “so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or by any post-deprivation state remedies.” *Rucker v. Hartford County*, 946 F.2d 278 (4th Cir. 1991). Stated another way, the deprivation must fall “so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.” *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002).

Substantive due process claims are decided under different and higher standards than procedural due process claims and are more difficult to prove. In order to show that one's substantive due process rights have been violated, a plaintiff must demonstrate that: (1) he had a protected property interest; (2) defendants deprived him of that interest; and (3) defendants' actions were "so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810 (4th Cir. 1995). As for the first element, whether a property owner possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the locality lacks *all* discretion to deny issuance of the permit or to withhold its approval. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). To satisfy the second element, the plaintiff must show that the locality's decision on the land use matter "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Sylvia Development, supra* quoting *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). As for the third element, the fact that state procedures are available to correct illegal actions by the locality eliminates any substantive due process claim since a violation exists only where state courts can do nothing to rectify the injury. *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). A substantive due process claim may arise whether or not the locality acts within the scope of its enabling authority (*i.e.*, in cases where there is no violation of the Dillon Rule). *Carper, supra*.

In order to assure that a zoning action does not violate substantive due process: (1) there must be a valid purpose for the regulation; (2) the means adopted to achieve the purpose must be substantially related to it; and (3) the impact of the regulation upon the individual must not be unduly harsh. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). A locality may minimize the risk of having its zoning regulations challenged on substantive due process grounds by being certain that its regulations are enabled, established for one or more of the purposes delineated in Virginia Code § 15.2-2283, based upon the considerations listed in Virginia Code § 15.2-2284, and supported by facts in a legislative record. *See chapters 3 and 4*.

The following are cases that have rejected substantive due process claims. In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984), the Virginia Supreme Court found that Fairfax County's zoning distinction between "plant nurseries" (allowed by special use permit in a residential district) and "garden centers" (prohibited in a residential district where, in addition to plant stock, accessories such as garden tools, hoses, pottery, statues and bird baths were sold) was constitutional because the distinction was based on the county's legitimate effort to limit commercial encroachments into residential areas. In *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621 (4th Cir. 2007) (unpublished), the court held that the plaintiffs failed to establish a substantive due process violation where, after the plaintiffs' land was annexed to the village under the representation that the property's zoning would not change, the village adopted a zoning ordinance one year after annexation and established a density on plaintiffs' land that was less than what was allowed prior to annexation. At the public hearing on the adoption of the ordinance, the court noted that the concerns regarding the density were discussed. The fact that "those concerns did not carry the day cannot constitute the basis for a claim of government conduct so egregious as to amount to a violation of the Adamses' substantive due process rights." In *Dawson, LC v. Board of Supervisors of Loudoun County*, 59 Va. Cir. 517 (2001), the court rejected the landowner's claim that the board's denial of its rezoning application violated substantive due process. Even assuming that the landowner had a property interest in a reasonable zoning classification, the court held that it did not follow that the board's "denial of the particular zoning request constituted a deprivation of that interest."

However, the Virginia Supreme Court also has, on multiple occasions, found that zoning regulations that are socio-economic in nature violate substantive due process. In *Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235 (1973), the court held invalid a regulation that required certain developments having fifty or more dwelling units to build at least 15% of the dwelling units for low and moderate income housing. The court stated: "We conclude that the legislative intent was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group." In *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653 (1959), the court held invalid a zoning ordinance that established a minimum lot size of two acres in the western two-thirds of Fairfax County. The court held that the practical effect of the ordinance

was to exclude low and middle income groups from the western areas of Fairfax County. The court said that this “would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare.”

Finally, *Boggs v. Board of Supervisors of Fairfax County*, 211 Va. 488 (1971) deserves some discussion because it would likely be analyzed as a substantive due process case under current case law (assuming no state court remedy was available). The court found that the R-10 zoning classification attached to plaintiff’s land rendered the land economically unfeasible for development, and not saleable at any price. The court held that the board’s refusal to rezone the land from the single-family classification to another classification was clearly unreasonable and arbitrary. In holding that the plaintiff’s property should be rezoned to a reasonable use, the court stated that “[a] zoning of land for single family residences is unreasonable and confiscatory and therefore illegal where it would be practically impossible to use the land in question for single family residences.”

6-300 The equal protection clause

The Fourteenth Amendment to the United States Constitution provides in part “. . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” There is no specific equal protection clause in the Virginia Constitution. *Buchanan v. City of Chesapeake*, 237 Va. 50 (1989). Under the zoning enabling statutes, Virginia Code § 15.2-2282 captures equal protection concepts by requiring that all zoning regulations be uniform for each class or kind of buildings and uses throughout each district. In other words, zoning classifications must treat similarly situated property similarly.

The equal protection clause of the United States Constitution “limits all state actions, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations.” *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). Some classifications, such as those based on race and gender, are deemed inherently suspect and are subject to varying degrees of heightened scrutiny. *Plyler v. Doe*, 457 U.S. 202 (1982). However, “the vast majority of governmental action,” especially that regarding subjects of a state’s plenary police power, such as local economics and social welfare, “enjoys a strong presumption of validity and must be sustained against a constitutional challenge so long as it bears a rational relation to some legitimate end.” *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Authority*, 507 F.3d 290 (4th Cir. 2007). “It is emphatically not the function of the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” *Van Der Linde Housing, supra*.

In asserting a claim for the denial of equal protection of law, the plaintiff has the burden to demonstrate the lack of a rational basis for the asserted state action. *Sowers v. Powhatan County*, 2008 U.S. Dist. LEXIS 19112 (E.D.Va. 2008). “The burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). The relevant inquiry is “whether local officials reasonably could have believed that their action was rationally related to a legitimate governmental interest.” *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002); *Town of Front Royal, supra*. The actual motivation for the locality’s actions is constitutionally irrelevant. *Tri-County Paving, supra*. In the absence of a claim that a fundamental right has been infringed or a claim of suspect classification, the locality need only show that the challenged action is rationally related to a legitimate state interest in order to satisfy the equal protection clause. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621 (4th Cir. 2007) (unpublished).

To establish an equal protection claim comprised of a “class of one,” a plaintiff must show that she “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

The table below shows that a zoning regulation or decision may face an equal protection challenge under three typical scenarios: (1) the zoning regulations are discriminatory in the manner in which they classify

uses; see, *Bell v. City Council of City of Charlottesville*, 224 Va. 490 (1982); *County Board of Arlington v. Bratic*, 237 Va. 221 (1989); *City of Manassas v. Rosson*, 224 Va. 12 (1982); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982); *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434 (1975); (2) the zoning map is discriminatory in the manner in which the district boundaries are drawn; *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975); *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629 (1983); *Town of Vienna Council v. Kohler*, 218 Va. 966 (1978); or (3) a zoning decision is discriminatory because similarly-situated applicants are treated differently and a rational basis does not exist for the different treatment. *Board of Supervisors of Fairfax County v. McDonald's Corporation*, 261 Va. 583 (2001).

The Equal Protection Clause		
Constitutional Principle	Rights Protected	How to Assure Compliance
Equal protection	Regulation may not unjustifiably discriminate in the manner in which uses are classified	Confirm that a rational basis exists for zoning classifications (e.g., “mini-mart” stores classified differently from supermarkets because traffic impacts are different)
	Zoning map may not unjustifiably discriminate in the manner in which district boundaries are drawn	Confirm that a rational basis exists for the boundary line, based on guidelines in the comprehensive plan, property lines, physical characteristics of the land, and other factors affecting optimum geographical alignment
	Zoning decision may not unjustifiably treat similarly situated applicants differently	Confirm that a rational basis grounded on sound zoning principles exists to reach a different decision than that reached on a different application, especially when the two applications appear, at least superficially, to be similar

6-310 Classification of uses

There appear to be two types of use classification cases – those in which it is argued that a use classification is not rationally related to a permissible state objective, and those in which a denial of an application for a different use classification is alleged to be discriminatory.

In *City of Manassas v. Rosson*, 224 Va. 12 (1982), the Virginia Supreme Court rejected the plaintiff’s claim that a Manassas regulation prohibiting home occupations from having outside employees discriminated against widows, the unmarried and those without immediate families. The court first concluded that the regulation was reasonable because it was designed to control the infiltration of commercial activity in a residential zoning district. The court then found that the regulation was rationally related to a permissible state objective because it was designed to facilitate the creation of a convenient, attractive, and harmonious community.

In *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982), the Virginia Supreme Court upheld the county’s requirement that free-standing quick-service food stores be allowed only by special use permit, where many other commercial uses were allowed by right in commercial zoning districts. The court found a rational relation between the use distinction in the county’s regulations because the county demonstrated that, unlike many other commercial uses, the free-standing quick-service food stores had unique traffic impacts and they typically were on small lots with little flexibility in locating entrances and curb cuts.

6-320 Drawing of zoning district boundary lines

Boundary lines of zoning districts must be struck somewhere, and a line drawn by the most impartial arbiter is, to some unavoidable degree, arbitrary. *Board of Supervisors of James City County v. Rowe*,

216 Va. 128 (1975). In making the judgment where a district boundary line should be drawn, the governing body must consider the general boundary guidelines set forth in the comprehensive plan, the location of property lines, the physical characteristics of the land, and other factors affecting optimum geographical alignment. *Board of Supervisors of Fairfax County v. Pyles*, 224 Va. 629 (1983); *Town of Vienna Council v. Kohler*, 218 Va. 966 (1978).

In the end, courts are usually reluctant to find that the location of a particular boundary line is improperly located, recognizing that “[d]emonstrative accuracy is an impossibility.” *Rowe, supra*, quoting *West Brothers Brick Co. v. City of Alexandria*, 169 Va. 271 (1937); *but see, Kohler, supra* (under the facts, there was no rational basis to draw district boundary line along road).

6-330 Zoning decisions

If it is shown that a locality’s zoning standards are being applied in an inconsistent and discriminatory manner, a court may find that the denial of a special use permit does not have a rational basis. *Board of Supervisors of Fairfax County v. McDonald’s Corporation*, 261 Va. 583 (2001). To state a claim for a violation of the Equal Protection Clause, a person must allege sufficient material facts to support the following: (1) that the complainant has been treated differently from others who are similarly situated; (2) that the mistreatment was intentional; and (3) that no rational basis existed for the difference in treatment. *See, Sunrise Corporation v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (party claiming equal protection violation must allege it has been intentionally treated differently from others similarly situated and that there was no rational basis for the different treatment); *In re Zoning Ordinance Amendments by the Board of Supervisors of Loudoun County*, 67 Va. Cir. 462 (2004). Because zoning applications such as rezonings, special use permits and variances, all of which are evaluated on a case-by-case basis and the facts in each case are unique, the bar to establish an Equal Protection violation is high, particularly where permits, rather than more general rezonings are sought.

Although not couched as an equal protection case, the Virginia Supreme Court in *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434 (1975), overturned the board’s denial of the applicant’s request to rezone its property to a higher density which was consistent with the density recommended for the property in the comprehensive plan. The Virginia Supreme Court held that the denial of the rezoning was unreasonable. The unwritten policy of the county was to promote Reston for development first, followed by the properties on the periphery, such as the applicants’. At the time the board was denying Allman’s rezoning application, it was approving other similar rezonings in the area. The court noted that the board had denied the zoning application “primarily because of its timing, rather than because of its impact on public facilities.” *Allman* is instructive, however, to the extent that it makes it clear that if a locality uses its comprehensive plan as a basis to deny a rezoning application, it must be certain that it applies the plan in a nondiscriminatory manner.

In *McDonald’s, supra*, the restaurant sought a special use permit to allow a drive-through window. The board of supervisors had granted special use permits for drive-through windows at other businesses in the area. Nevertheless, the Virginia Supreme Court concluded that there was a rational basis for the board to deny McDonald’s permit because: (1) the McDonald’s property was much smaller than the other properties; (2) the McDonald’s property was a single-use site; the other properties were in shopping centers; (3) the McDonald’s property was directly accessed from public roads; the other properties were not; (4) the McDonald’s property had a single access; the other properties had multiple access points; (5) the access point on the McDonald’s property was much closer to an intersection than the access points on the other properties; and (6) the estimated vehicle trips per day were much higher on the McDonald’s property.

In *Sunrise, supra*, the developer claimed that equal protection was denied because its application for a high rise building was denied while other high rises were approved. The court disagreed, stating that plaintiffs had failed to show that the classification – a high rise – was the basis for the city’s decision. Instead, the court found that the project was denied because of its failure to discourage monotonous, drab or unsightly development, to conserve natural beauty, to give proper attention to exterior appearance, and properly relate to its site. In addition, the court held that the developer had failed to show purposeful discrimination, adding:

If disparate treatment alone was sufficient to support a Constitutional remedy then every mistake of a local zoning board in which the board mistakenly treated an individual differently from another similarly situated applicant would rise to the level of a federal Constitutional claim.

In *Dawson, LC v. Loudoun County Board of Supervisors*, 59 Va. Cir. 517 (2001), the court denied the landowners’ claim that it was denied equal protection when the board of supervisors denied its request to upzone its land. Under the “class of one” theory recognized in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), which allows an equal protection claim to arise where vindictiveness and ill will by state or local officials are found against a single person, the court held, in granting the county’s demurrer, that the landowners had failed to allege that the board’s decision was the product of “spite or ill will” or that the board was motivated, even in part, by an individually discriminatory intent.

6-400 The just compensation, or takings, clause

The Fifth Amendment to the United States Constitution states in part: “[N]or shall private property be taken for public use, without just compensation.” Article I, Section 11 of the Constitution of Virginia contains a similar prohibition: “The General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation.” The following table summarizes the various classes of takings requiring just compensation.

Takings			
Type	Key Elements	Circumstances When Takings Claim Typically Raised (Not Necessarily Successful)	Key United States Supreme Court Cases
Taking by physical invasion	Government requires an owner to submit to a permanent physical invasion	Law requiring landowners to allow cable companies to install cable facilities; waters behind government dam that flood private property	<i>Loretto Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982); <i>Pumpelly v. Green Bay Co.</i> , 81 U.S. 166 (1872)
Regulatory taking	Regulation or decision deprives an owner of all or substantially all economically beneficial use of the property	Regulations or decisions that thwart landowners plans to develop or use their property or significantly reduce the value of the property, e.g., denied upzonings	<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978); <i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001); <i>Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency</i> , 535 U.S. 302 (2002)
Temporary taking	Regulation or decision temporarily deprives an owner of all or substantially all economically beneficial use of the property	Moratoria that prohibit development; lengthy delays to obtain approvals	<i>Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency</i> , 535 U.S. 302 (2002); <i>First English Evangelical Lutheran Church v. County of Los Angeles</i> , 482 U.S. 304 (1987)
Categorical taking	Regulation or decision completely deprives an owner of “all economically beneficial use” of the property	Environmental regulations such as sand dune protection laws that prohibit all development and use of the property	<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)
Exaction	Locality requires dedication of land or fees as a condition of approval; the condition lacks a nexus and rough proportionality to the impacts	Conditions (proffers) associated with a rezoning or a condition to a special use permit, variance, site plan or subdivision plat	<i>Nollan v. California Coastal Commission</i> , 482 U.S. 304 (1987); <i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)

In *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), the United States Supreme Court summarized takings law as follows (with internal citations omitted):

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not “be taken for public use, without just compensation.” As its text makes plain, the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.” In other words, it “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in “barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such “regulatory takings” may be compensable under the Fifth Amendment. In Justice Holmes’ storied but cryptic formulation, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” The rub, of course, has been – and remains – how to discern how far is “too far.” In answering that question, we must remain cognizant that “government regulation – by definition -- involves the adjustment of rights for the public good,” and that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

When the government requires an owner to suffer a permanent physical invasion of her property, however minor, it must provide just compensation. *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). Likewise, when a regulation completely deprives an owner of “all economically beneficial use” of his property, the government must provide just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (referred to as “categorical” takings). As explained in *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), outside these two relatively narrow categories (and the special context of land-use exactions), regulatory takings challenges are governed by the three-pronged takings analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The *Lingle* court distinguished a taking without just compensation from a substantive due process violation as follows:

Takings Compared to Substantive Due Process Violations	
Takings	Substantive Due Process Violation
Governmental action that substantially advances a legitimate governmental interest, but deprives a landowner of all or substantially all economically beneficial use of the property, is a taking that requires just compensation.	Governmental action that does not substantially advance a legitimate governmental interest but instead arbitrarily and capriciously deprives a person of the use of their property, is a substantive due process violation that may entitle the landowner to damages.

Under the Virginia Constitution, Article I, § 11 prohibits the government from taking or damaging private property for public uses without just compensation. Property is considered taken for constitutional purposes if the government’s action deprives the property of all economic use. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997). “Property is damaged for Virginia constitutional purposes when an appurtenant right connected with the property is directly and specially affected by a public use and that use inflicts a direct and special injury on the property which diminishes its value.” *Omni Homes, supra*; *City of Lynchburg v. Peters*, 156 Va. 40 (1931). Virginia law holds partial diminution in the value of property compensable only if it results from dislocation of a specific right contained in the property owner’s bundle of property rights. *Omni Homes, supra*; *Lambert v. City of Norfolk*, 108 Va. 259 (1908). A risk or an expectation to develop one’s land in a particular manner is not a right to do so. *Omni Homes, supra*. Claimants making an inverse condemnation claim against a Virginia locality may seek a remedy under both Virginia Code

§ 8.01-187 and Article I, § 11. *Kitchen v. City of Newport News*, 275 Va. 378 (2008) (reversing trial court's grant of city's demurrer in case alleging physical invasion resulting from flood waters).

Section 6-410 examines regulatory takings, including those that are temporary in nature, under *Penn Central*. Section 6-420 examines temporary takings. Section 6-430 analyzes categorical takings under *Lucas*. Section 6-440 reviews takings that occur in the form of government impose conditions that are known as exactions. This section does not analyze takings arising from the government's physical invasion of private property.

6-410 Regulatory takings

A regulatory taking occurs when a regulation or the disapproval of a land use application interferes with a landowner's rights but does not deprive the land of all economically viable uses. *Sunrise Corporation v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005). The three-pronged test that governs regulatory takings analysis is set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) requires that the following factors be considered:

- The regulation's economic effect on the landowner;
- The extent to which the regulation interferes with reasonable investment-backed expectations; and
- The nature of the governmental action.

In *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), the court acknowledged that its "regulatory takings jurisprudence cannot be characterized as unified," but added that the analyses under *Loretto* (physical invasion authorized by regulation), *Lucas* (categorical taking) and *Penn Central* share a common touchstone. "Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle, supra*. Thus, physical takings require compensation because of the unique burden they impose – a permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests. *Lingle, supra*. For categorical takings, the complete elimination of a property's value is the determinative factor because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. *Lingle, supra*, quoting *Lucas*. Finally, the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests. *Lingle, supra*.

The *Penn Central* factors have generated significant debate and academic analysis over the years, and the United States Supreme Court has resisted establishing any "set formula" for a takings analysis. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). As one commentator has said, "regulatory takings litigation has become a snark-hunting game that has been so screwed up that by now nobody knows how to play it." Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, *The Urban Lawyer*, Vol. 30, No. 2 (1998).

The three-pronged takings analysis in *Penn Central* was explored in Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and her analysis was adopted by the majority in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Thus, a survey of the recent case law provides some useful benchmarks that may identify the parameters of the relevant analysis for each of the *Penn Central* factors. These factors are considered in terms of the "parcel as a whole." *Penn Central, supra*. They are analyzed in subsections 6-411, 6-412 and 6-413 below.

6-411 The regulation's economic effect on the landowner

A regulation's economic effect on the landowner under *Penn Central* is perhaps best understood in juxtaposition to the categorical taking under *Lucas*. If a regulation does not completely deprive the property of all economically beneficial use in order to establish a categorical taking under *Lucas*, how severe must the economic effect be in order to establish a taking under *Penn Central*? Based upon the cases below, the simple answer is that the diminution in value must be at least 90% and the residual uses must be little or none.

1. Diminution in value, standing alone, does not establish a taking

Diminution in value is measured by the difference between the fair market value of the land before and after the alleged take. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997). Contingencies to development must be excluded from the calculation. *Omni Homes, supra* (improper to consider access to property that was not a right but a "hope" or a mere "expectation" in pre-purchase value of property).

Mere diminution in value does not establish a taking. "Not all regulatory deprivations amount to regulatory takings, and a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless.'" *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (diminution in value was less than one half of one percent where industrial park's basis was \$ 407,000, comprised of the \$107,000 purchase price plus the "approximately \$ 300,000" spent in preparing the land for use as an industrial park, compared to the land's fair market value of land without sewer service of \$ 405,000; even if the diminution was calculated from the \$810,000 fair market value of the land with the sewer service provided, the reduction was still only 50 percent); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991) (neither diminution in property value nor even a substantial reduction of the attractiveness of the property to potential purchasers establishes a taking); *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902 (9th Cir. 2007) (economic impact of height and use restrictions on portion of owners' property near airport was minimal because the property in the RPZ accounted for only 5% of the owners' property, and that small portion could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot).

"Disparity in values between residential and commercial uses will always exist, yet the government is not required to maintain zoning so that a landowner may enjoy the most beneficial use of her property." *Reagan v. County of St. Louis*, 211 S.W.3d 104 (2006) (rezoning from industrial to residential zoning district imposed an insufficient economic impact to constitute a taking where the reduction in value of owner's land was \$65,300, or 30%) citing *Dorman v. Township of Clinton*, 269 Mich.App. 638 (2006); *K & K Const. v. Department of Environmental Quality*, 267 Mich. App. 523 (2005) (diminution in value of approximately 24 to 33 percent, though significant, "certainly does not weigh in favor of a finding" that the state's denial of a permit to fill in the wetland was a compensable regulatory taking); *FIC Homes of Blackstone, Inc. v. Conservation Commission*, 41 Mass. App. Ct. 681 (1996) ("A reduction in the number of houses that an owner may build is a diminution in value and not a taking"); *Carolinac Cement Co. v. Board of Zoning Appeals of Warren County*, 50 Va. Cir. 502 (1999) (BZA's denial of a variance to expand the non-conforming use of a roadway merely diminished the potential economic value of the owner's land; "such a reduction in economic value – even if dramatic – does not constitute a taking because the mere diminution in the value of the property does not constitute a taking").

2. If the land can be put to other uses, the economic impact of the regulation may be insufficient to find a taking

If the land may be or has been put to other uses, the economic effect may be insufficient to establish a taking. *Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82 (2003) (economic impact of zoning regulation on lot in owner's subdivision, which prevented it from being developed with house, was not severe enough to constitute a taking where it could still be used for forestry, agriculture, and conservation use, as well as for cluster development with contiguous lots).

Even where the only residual economic uses of land are recreational, such as camping or picnicking,

economic value may still remain. See, *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) citing *Lucas* (dissenting opinions) but also discussing the *Penn Central* factors. However, in order for other uses to be considered, they must be more than just a possibility. For example, in *Matter of Friedenborg v. New York State Department of Environmental Conservation*, 2003 NY Slip Op 18838 (N.Y. App. Div. 11/24/2003), a taking was found where wetlands regulations significantly reduced the value of the owner's land, even though possible recreational uses were considered, because it was likely that most of those recreational uses would be denied.

In *Helmick v. Town of Warrenton*, 254 Va. 225 (1997), the Virginia Supreme Court held that the town council's refusal to extend an expired site plan and to vacate a subdivision plat was not a taking where the owners did not claim that they had applied for or were denied a new site plan, or that they had complied with the requirements for the site plan extension and were denied, because under the subdivision plat they could develop their property with townhouses (the owners desired to develop apartments) and this was an economically viable use of the property.

3. A diminution in value of at least 90%, combined with the inability to put the land to other uses, may establish a taking

A diminution in value, combined with the inability to put the land to other uses, may satisfy the *economic effect* factor.

The United States Supreme Court found no takings in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the diminution in value was 75% and in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where the diminution in value was approximately 87 ½ % (from \$800,000 to \$60,000). Lower federal courts have also rejected takings claims under *Penn Central* where the diminution in value approached or exceeded 90% of the pre-regulation value. See, *Rith Energy v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (91% diminution in value; noting that even with 91% diminution, the revocation of a mining permit did not deprive the mining company of its opportunity to make a profit, it simply reduced the margin of profit); *Pompa Construction Corporation v. City of Saratoga Springs*, 706 F.2d 418(2^d Cir. 1983) (approximately 90%, though unspecified); *Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (95% diminution in value; reduction in value from \$2,000,000 to \$100,000).

A taking was found in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) where the diminution in value was 99.5%. A taking was also found in *Matter of Friedenborg v. New York State Department of Environmental Conservation*, 2003 NY Slip Op 18838 (N.Y. App. Div. 11/24/2003), where there was a diminution in value of 92 to 95%, almost the entire parcel was designated as tidal wetlands, and it was likely that a number of recreational uses would be denied.

In *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997), Omni alleged that Prince William County's purchase of property adjoining its proposed subdivision constituted an uncompensated taking. In order for Omni to develop its property as it desired, its development plan included providing road, sewer and water access through and in conjunction with the adjoining property. Omni and the prior owner of the adjoining property had had an informal understanding that if Omni developed its property as a subdivision (the property was already zoned R-10), the prior owner of the adjoining property would allow Omni to piggyback on its plans so that the road access and public sewer and water could run through the adjoining property to Omni's property. Omni obtained neither a written agreement pertaining to these understandings nor easements over the adjoining property. While Omni's preliminary plat was pending, the county purchased the adjoining property and Omni's desired plan for development was thwarted.

The *Omni Homes* court considered the first two prongs of the *Penn Central* analysis. In considering the economic impact of the county's action, the court said that a taking may occur only if there is a *significant* diminution in the value of the land. Omni paid \$436,000 for the land. It was later valued at \$450,000. If the access through the adjoining property was included, the land was valued at \$1,200,000. After the county purchased the adjoining property, Omni's property was valued at \$360,000. The court held that the economic

impact of the county's action had to be measured by the difference between the land before and after the alleged take, and that the value of the land before the county's action was based on the value of the land itself, and did not include Omni's mere "contingency" that it might have access through the adjoining property. "To base a property value on a factor which is required to develop the property, but which never existed in fact or in law, distorts the fair market value analysis." *Omni Homes, supra*. The court then concluded that the county's action did not result in a significant diminution in value because, at most, it resulted in a decrease of approximately \$100,000.

6-412 The extent to which the regulation interferes with reasonable investment-backed expectations

The degree of interference with *reasonable investment-backed expectations* is the second factor considered in determining whether a governmental regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (O'Connor, concurring). The factors that shape an owner's reasonable expectations include the state of regulatory affairs at the time of acquisition, the purposes served, as well as the effects produced, by a particular regulation, and the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant. *Palazzolo, supra*. Despite *Penn Central's* use of the term "investment-backed" expectations, a takings claim should not be defeated simply because of the lack of a personal financial investment by one who acquires the property after the adoption of the regulations, such as a donee, heir, or devisee. *Palazzolo, supra*. Instead, the analysis focuses on those circumstances which are probative of what fairness requires in a given case. *Palazzolo, supra*. A failure to prove investment-backed expectations can be fatal to a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

In order to understand what "reasonable investment-backed expectations" may be, one must go well beyond what the owner expects to do with the property.

1. Reasonable investment-backed expectations are not necessarily frustrated when land use regulations and policies are amended and become more restrictive

Reasonable investment-backed expectations are subject to the government's power to regulate for the public interest. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997). Investment-backed expectations are not frustrated when an owner buys a piece of land expecting to develop it in a certain manner and the locality subsequently enacts a zoning regulation seriously restricting those plans. *See, Agins v. Tiburon*, 447 U.S. 255 (1980) (holding that regulation did not diminish a property owner's reasonable investment-backed expectations to the extent necessary to establish a regulatory taking); *see Zanghi v. Board of Appeals of Bedford*, 61 Mass. App. Ct. 82 (2003) (zoning change after owner acquired property that prevented development of single parcel in owners' subdivision did not interfere with owner's investment-backed expectations to an unreasonable extent; owner had "profited from building homes on other lots in the subdivision"). Stated another way, the fact that a landowner is denied "the ability to exploit a property interest that they heretofore had believed was available for development," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), does not result in a taking.

When evaluating reasonableness, the government's right to modify zoning ordinances to benefit the public must be considered. *Reagan v. County of St. Louis*, 211 S.W.3d 104 (2006). It is not reasonable for an owner to presume that the zoning on his or her property will remain indefinitely. *Reagan, supra*. The government is permitted to change zoning to prohibit particular contemplated uses of property if it reasonably concludes that the "health, safety, morals, or general welfare" would be promoted by doing so. *Reagan, supra* (industrial zoning of owner's property was inconsistent with the residential nature of the surrounding neighborhood; "[t]he County had the right to promote the general welfare by rezoning Landowner's property to make it compatible with the uses adjacent to it").

Zoning regulations that limit the extent to which an owner's land may be developed also do not interfere with an owner's reasonable investment-backed expectations where the land significantly appreciates in value

between the date of purchase and the date of the regulations. *See, Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621 (4th Cir. 2007) (unpublished) (affirming summary judgment for village; property appreciated from a purchase price of \$56,500 to a selling price of \$3.7 million; the “property was worth that much because it could still be developed, just not quite to the extent that it could have been before the Village adopted its zoning ordinance”). In *Greenspring Racquet Club, Inc. v. Baltimore County*, 2000 U.S. App. LEXIS 27207 (4th Cir. 2000) (unpublished), the court held that a county zoning regulation that established height and density restrictions on property operated as a tennis club, which thwarted the owner’s plans to redevelop the property with a five-story building, a six-story building and a parking garage, was not a taking. After finding that the ordinance advanced legitimate state interests, the court found that the owner could not state a takings claim because it could not prove that it had been denied the economically viable use of its land since the tennis club was currently in use and the owner could construct new buildings within the limits of the ordinance. In *G.W.G. Development Corp. v. City of Norfolk*, 13 Va. Cir. 274 (1988), the owners alleged that a zoning amendment constituted an illegal downzoning, and thus a taking of their property without compensation, because it not only conflicted with the city’s comprehensive plan but also because there were no changed circumstances that might justify the downzoning. The court stated that no facts were alleged to show that an illegal downzoning had occurred and that no facts showed a conflict with the city’s comprehensive plan. The court held that zoning “restrictions as to density of units per acre” were not a taking of property without just compensation.

Some state courts will dismiss an owner’s claim of frustrated reasonable investment-backed expectations if they owned the property for an extended period of time before the locality adopted the more restrictive regulations. *See, e.g., W.R. Grace & Co. v. Cambridge City Council*, 56 Mass. App. Ct. 559 (2002). However, two commenters have observed that there does not appear to be any basis in federal law for the “delay building and you lose your expectations” rule. Breemer and Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Southwestern University Law Review 101 (2005).

2. Reasonable investment-backed expectations are not necessarily frustrated when land use regulations are not amended or land use applications are denied that would enhance the value of the property

The government is under no obligation to enhance the value of an owner’s property through its regulations or land use decisions. Thus, an owner’s reasonable investment-backed expectations are not frustrated when the government merely refuses to enhance the value of real property. *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998) (reversing grant of summary judgment to plaintiff industrial park and dismissing claim; town’s refusal to install sewer collector lines, even under court order, was not a taking because nothing prevented the owner from installing the lines itself and seeking recovery of the costs from the town).

In *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587 (2007), the appellate court affirmed a jury verdict in favor of the city, holding that the city’s denial of the owner’s application to rezone property to more than double the permitted density did not frustrate the owner’s reasonable investment-backed expectations where the land had been zoned for 1-acre minimum lots for more than 30 years before the owner purchased the property. In *Martin v. Board of Supervisors of Hanover County*, 57 Va. Cir. 546 (2001), the board of supervisors’ denial of a rezoning of a portion of a 31.3 acre tract from A-1 to AR-1 to allow an approximately 8.248 acre portion to be divided into 6 lots was not a taking where, under its present zoning, the 31.3 acre tract could be developed into three 10-acre lots. The court said that “The Defendant Board’s actions did not deprive Plaintiffs of the value of their property; Plaintiffs bought the property on the speculation that they could enhance its value by rezoning and selling it. They could not enhance their ‘bet’ by obtaining a rezoning contingency when they purchased the property.” In *Patrick v. McHale*, 54 Va. Cir. 67 (2000), the denial of a rezoning from Agricultural to Residential did not frustrate the owner’s investment-backed expectations where the property was zoned Agricultural when it was acquired, and the owner did not buy the property in reliance on a state of affairs that did not include the challenged regulatory regime. The court also noted that the evidence established that the property was suitable for farming or cultivating timber, and that the property had significant value as an investment since its value had increased steadily since it was acquired by the owner’s family.

Lastly, an owner must actually act on their expectations. Merely having an expectation that the property might someday be developed to another use without taking investment action on those expectations is not relevant to the *Penn Central* analysis, even if the expectations are reasonable. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (although the city gave the owner some indications that residential development would be allowed at some point in the future and the owner's expectations in that regard may therefore have been reasonable, the owner was unable to demonstrate that it made any specific investment in the property with the expectation that the city would support such development).

3. **Reasonable investment-backed expectations are defined in part by existing zoning, actual uses, and the character of the neighborhood surrounding the property**

The zoning designation and actual uses surrounding the subject property are factors considered in determining the reasonableness of the owner's investment-backed expectations. *Reagan v. County of St. Louis*, 211 S.W.3d 104 (2006) (rezoning of owner's property from industrial to residential did not unreasonably frustrate the owner's expectations where the abutting lands were zoned residential and developed with dwellings; proposed office building allowed in an industrial district would have been inconsistent with the existing development); *Dorman v. Township of Clinton*, 269 Mich.App. 638 (2006) (“[a] simple visual inspection of the area would have placed [landowner] on notice that his proposed development was inconsistent with the character of the neighborhood”).

Owners are charged with knowledge of those existing regulations and conditions. *Hannon v. Metropolitan Development Commission of Marion County*, 685 N.E.2d 1075 (1997); *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217 (2000) (town's refusal to install municipal utility services for a particular parcel was not a taking because plaintiff had no reasonable investment-backed expectations, adding that property owners are charged with knowledge of ordinances that affect their property). In addition, the owner's knowledge and experience must be taken into account when determining the his or her reasonable investment-backed expectations. *K & K Const. v. Department of Environmental Quality*, 267 Mich. App. 523 (2005) (developers' reasonable investment-backed expectations were tempered by the fact that they were experienced developers, they had notice of the wetlands regulations, and they knew the size of the wetlands on their property).

Two commentators have examined Justice O'Connor's reference in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) to the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant, and they have said:

This . . . consideration presumably means that a landowner's development expectations will be protected when the owner seeks to engage in a use of land that is comparable to that which has been permitted to neighboring landowners. . . . Justice O'Connor appears to have imputed this thinking into her reasonable expectations analysis in directing courts to compare the nature and extent of already permitted development with that denied to takings claimants as part of expectations analysis. Under this view, a landowner has a reasonable expectation to use property in the same manner as similarly situated landowners. Conversely, if a claimant's proposed land use has not been permitted to other, similarly-situated owners, the reasonableness of the claimant's expectations may be diminished. . . . Her opinion does, however, note that courts must generally 'attend to those circumstances which are probative of what fairness requires in a given case.' This principle leaves room for identification of additional specific expectations considerations, which, while impossible to confidently identify in whole, might include: (1) what the government told the landowner about the property before it was purchased and how it reacted to the owner's plans during and immediately after the land use application process; (2) whether the proposed land use is consistent with the general zoning and planning scheme; (3) whether the projected rate of growth for the subject locality suggests that development will be possible; (4) whether the government allowed the landowner to take

concrete steps toward the desired use before stepping in and prohibiting it; and (5) whether the property owner is permitted to continue an existing, profitable use of property.

Breemer and Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Southwestern University Law Review 101 (2005).

One who buys with knowledge of a restraint must assume the risk of economic loss. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997); see, *Lasalle National Bank v. City of Highland Park*, Case No. 2-02-1021 (Ill. App. 2003) (“while knowledge of a regulation at the time of ownership is not an absolute bar to a zoning challenge, it is proper to consider that the zoning restriction existed at the time of the plaintiff's acquisition in determining whether the plaintiff's investment-backed expectations have been met”).

In *Omni Homes, Inc.*, *supra*, Omni alleged that Prince William County's purchase of property adjoining its proposed subdivision constituted an uncompensated taking. In order for Omni to develop its property as it desired, its development plan included providing road, sewer and water access through and in conjunction with the adjoining property. Omni and the prior owner of the adjoining property had had an informal understanding that if Omni developed its property as a subdivision (the property was already zoned R-10), the prior owner of the adjoining property would allow Omni to piggyback on its plans so that the road access and public sewer and water could run through the adjoining property to Omni's property. Omni obtained neither a written agreement pertaining to these understandings nor easements over the adjoining property. While Omni's preliminary plat was pending, the county purchased the adjoining property and Omni's desired plan for development was thwarted.

In considering whether Omni's reasonable investment backed expectations were frustrated by the county's action, the court first noted that the primary purpose of this factor was to ensure that owners seeking compensation for an alleged taking bought their property in reliance on a state of affairs that did not include the challenged governmental action. *Omni Homes, supra*. The court said that the state of affairs relative to Omni's development of its property as it desired always included the requirement that it have adequate road and utility access. However, the court said that securing this access was not an expectation under the state of affairs, but a *risk*, and Omni's mere hope of its informal understanding with the prior owner of the adjoining land could not transform that risk into an investment backed expectation. The court concluded that the state of affairs existing when Omni purchased its property included the risk of not securing adequate road and utility access, and that this risk was not imposed by the county.

In *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266 (2006), the Virginia Supreme Court held that the board's denial of a preliminary subdivision plat because the developer failed to provide a letter from a utility that water and sewer would be provided as required by the subdivision ordinance was not an unconstitutional taking. The court said that there was no taking because the developer did not allege that it lost all economic use of its property, and from the time the developer acquired an interest in the property to the present the property was subject to the utility letter requirement:

To establish an unconstitutional taking, a landowner must suffer either a categorical or a regulatory taking. . . . A regulatory taking deprives owners of less than all economic value, but interferes with their “investment-backed expectations;” in other words, owners bought the property ‘in reliance on a state of affairs that did not include the challenged regulatory regime.’ *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 68, 481 S.E.2d 460, 465 (1997) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994)). Greengael did not allege that it lost all economic use of its Property, and its pleadings show that the Property was zoned R-4 at the time Ashmeade Company, L.L.C., purchased it and when Greengael became the contract purchaser. Thus, the Property was always subject to the utility letter requirement, and Greengael cannot assert it bought the Property relying on a regulatory scheme apart from the one it now challenges.

4. **Reasonable investment-backed expectations are defined in part by the nature of the proposed use and expectations to engage in a highly regulated use may not be reasonable**

Participation in a traditionally regulated industry greatly diminishes the weight of an owner's reasonable investment-backed expectations. *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007) (statute outlawing video gaming machines was not a taking); *Carolina Water Serv. v. City of Winston-Salem*, 1998 U.S. App. LEXIS 22130 (4th Cir. 1998) (unpublished) (in action brought by private water company, city ordinance requiring customers to connect to city water system did not constitute a taking because the private water company "could not have harbored a reasonable investment-backed expectation that the City would never take this action," particularly since the state and local governments in North Carolina have highly regulated the water service industry); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124 (2007) (considering the lengthy history of zoning restrictions on adult entertainment establishments in North Dakota and other states, the owner's investment-backed expectations to offer exotic dancing in a bar were neither legitimate nor reasonable); *Town of Georgetown v. Sewell*, 786 N.E.2d 1132 (2003) (waste dumps are heavily regulated for the protection of human health and the environment).

Similarly, the importance of the public policy justifying the regulation affects one's reasonable investment-backed expectations. *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902 (9th Cir. 2007) (interference with reasonable investment-backed expectations was minimal because the regulation furthers an important public policy of airline safety and because the initial development of the airport predated the acquisition of the property).

5. **Reasonable investment-backed expectations are defined in part by what the owner may do with the land by right and the extent to which permits and other approvals are required before the use is possible**

The courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's "primary expectation concerning the use of the parcel." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991) (state coastal act did not damage reasonable investment-backed expectations because the owners were allowed to continue the existing use of their property and dwellings in the same manner they could have prior to the enactment of the coastal act; the act merely diminished the owners' discretion to rebuild a structure in the speculative event of its virtually complete destruction); *Shankel v. City of Canton*, 2006 Ohio 4070 (Ohio App. 8/7/2006) (at the time owners purchased property, they could not use it for proposed use for single family residences; although owners could seek permits, they could not be certain of success, and thus, they could have no reasonable investment-backed expectation to develop each lot).

The need for permits and other approvals before the use is possible diminishes an owner's reasonable investment-backed expectations. Thus, an owner has no reasonable investment-backed expectation that he may develop his property where he never had an absolute right to do so without a governmental permit. *Planned Invs. Corp. v. Incorporated Village of Massapequa Park*, 2004 NY Slip Op 51174(U) (NY 8/5/2004) (granting village's motion for summary judgment; denial of variance to allow construction of a single family dwelling on a substandard lot was not a taking; the fact that an owner is denied "the ability to exploit a property interest that they heretofore had believed was available for development" was not a taking, citing *Penn Central*); *but see, Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135 (2004) (denial of a conditional use permit to operate a gravel permit may be a taking if the effect of denying the permit is to leave the property economically idle).

Hope or optimism that a landowner could secure the required access to its property cannot transform a risk of development into an investment-backed expectation supported by the state of regulatory affairs existing at the time of purchase. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997) (landowner's knowledge that the requirement of adequate road and utility access was not an expectation but a risk the landowner was aware of and accepted when it purchased the property; there was no assurance that access would be available); *but see, Deyeso v. City of Alamo Heights*, 594 S.W.2d 123 (1979) (owner's hope to

receive variances similar to those granted in favor of a previous owner of the property or neighboring property owners qualifies, in and of itself, as a distinct investment-backed expectation).

“A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party’s gamble does not result in its favor.” *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997) quoting *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704 (1995).

6-413 The character of the government regulation

In her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), Justice O’Connor explained the *character of the government regulation* standard as follows:

The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. [citation omitted] (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner’s use of the property”).

“[G]arden-variety zoning based on the need to control growth, preserve small-town atmosphere, and maintain a low tax rate” is a legitimate use of the zoning power. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), cited in *Adams v. Village of Wesley Chapel*, 2007 U.S. App. LEXIS 28621 (4th Cir. 2007) (unpublished) (affirming summary judgment for village) .

An amendment to a comprehensive plan does not significantly diminish an owner’s investment-backed expectations where the owner was able to develop its property under the existing zoning, which was unchanged. *AEL Realty Holdings, Inc. v. Board of Representatives of the City of Stamford*, 82 Conn. App. 613 (2004). Similarly, an announcement by a state agency that the owner’s property was one of three sites for a proposed use was not a taking because the announcement was not a physical invasion of the property; it was merely a first step towards what might eventually result in a physical taking of the property; and the announcement was quickly withdrawn. *Santini v. Connecticut Hazardous Waste*, 342 F.3d 118 (2^d Cir. 2003).

Showing possible future street alignments on various public documents such as a comprehensive plan is not a taking, provided that the government does not correspondingly restrict the use of the affected lands. *See, e.g., Auerbach v. Department of Transportation for the State of Florida*, 545 So. 2d 514 (1989) (state department of transportation’s administrative planning actions, which of necessity required public hearings, did not constitute a taking sufficient to enable the property owner to maintain an inverse condemnation action); *City of Chicago v. Loitz*, 61 Ill.2d 92 (1975) (the general rule followed in Illinois and most other jurisdictions is that mere planning or plotting in anticipation of a public improvement does not constitute a taking or damaging of the property affected).

Identifying land for condemnation is not a taking. *See, e.g., Bartz v. Board of Supervisors of Fairfax County*, 237 Va. 669 (1989) (the government’s filing of condemnation proceedings does not constitute a taking requiring just compensation); *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448 (1992) (publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on the use of the property); *National By-Products v. City of Little Rock by & Through Little Rock*, 323 Ark. 619 (1996). Sound public policy supports this rule:

Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible, hindering public debate and increasing waste and inefficiency.

Westgate, supra.

6-420 Temporary takings

Temporary takings that deny a landowner the use of its property are not different in kind from permanent takings. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Temporary, but total, regulatory takings may be compensable. *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998).

The three-pronged test announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), not the categorical taking rule in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is the applicable test. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). The focus is not exclusively on the property during the period during which the owner is unable to develop it because to do so would ignore the United States Supreme Court's admonition in *Penn Central* to focus on the parcel as a whole. *Tahoe-Sierra, supra* (when considering the "parcel as a whole," both the geographic and temporal aspects of the restriction must be considered).

A temporary taking may be claimed to occur either as a result of the locality's adoption of unlawful regulations or as a result of an unlawful land use decision. However, the mere denial of a particular development application, whose effect is to merely fail to enhance the value of real property, is not compensable. *Front Royal, supra*. Indeed, most courts have concluded that a temporary taking does not occur when a land use regulation or decision is held by a court to be unconstitutional or invalid, and the landowner is unable to make use of the land during the time the court action is pending. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003).

Unreasonable delays in the land use approval process may constitute a temporary taking if the delay is "extraordinary." There is no bright-line test to determine whether a delay is extraordinary, and the determination is made on a case-by-case basis. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003). Delays of two to seven years have been held not to be extraordinary. *Sunrise Corporation v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (nearly seven year delay from date of city's decision (held to be lawful) on its application until resolution by appellate court was not extraordinary where application made it through the city review in three to four months, and there was no evidence that the city could control or attempted to delay the judicial process); *Philric Associates v. South Portland*, 595 A.2d 1061 (Me. 1991) (two years to consider subdivision application); *1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575 (1992) (five year delay held to be cost of doing business in regulated society). In most cases, prolonged governmental decision-making that temporarily deprives a landowner of the use of its property has been held not to be an extraordinary delay. Mandelker, *Land Use Law*, 5th ed., § 2.22 (2003).

Assuming that the *Penn Central* factors are satisfactorily addressed by the owner, a temporary taking requires just compensation for the period during which the taking was effective. *First English, supra* (temporary taking found to exist where the county adopted a regulation prohibiting the church from rebuilding a church camp after it was washed away during a flood; however, when the case was remanded to the California Court of Appeals, that court held that the county was not required to pay compensation because the regulation was adopted for reasons of public safety); *Naegle Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988). The measure of just compensation is the same as for a permanent taking – fair market value of all that was taken which, in the case of a temporary taking, is fair rental value. *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481 (1947); *see also, First English, supra* (the government must pay the landowner for the value of the use of the land during this period). The correction of the decision or the discontinuation of the unlawful regulations does not relieve the locality of its duty to provide compensation for the period during which the taking was effective. *First English, supra*; *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991).

6-430 Categorical takings

The three-pronged test announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) does not apply when a governmental action "denies all economically beneficial or productive use of the

land.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), cited in *City of Virginia Beach v. Bell*, 255 Va. 395 (1998). In that circumstance, the governmental action has “gone too far” and a “categorical taking” has occurred.

In *Lucas*, the owner of two beach front lots challenged a state law intended to protect the shore line that precluded the owner from constructing permanent structures on his lots. The state conceded that the regulation denied all economically beneficial or productive use of the land. Not surprisingly, the United States Supreme Court held that a regulation resulting in the complete deprivation of all economic enjoyment in a property constituted a taking. However, the loss of the ability to develop or use property as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner’s desired use. *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59 (1997). Thus, “action which limits the ability to develop or use land as originally intended or in a manner producing the largest return on investment does not qualify as a categorical taking if another economic use for the land is available.” *Omni Homes, supra*. The proper inquiry is whether the action complained of stripped *the land* of all economic uses. *Lucas, supra; Omni Homes, supra*. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the United States Supreme Court held that the state’s wetlands regulations, which had been applied to prohibit the owner from developing his land as he desired, did not categorically take the land because the land retained \$200,000 in development value. If the land could develop as the owner desired, the owner claimed that the land’s value was more than \$3,000,000. The court said that a “regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Palazzolo, supra*.

Even when there is a categorical taking, the taking itself may not be compensable if the nature of the owner’s property interest does not include the use that is now being prohibited by the challenged governmental action. *Lucas, supra*. Under this rule, a property owner was entitled to compensation for a categorical taking only if the state is prohibiting the exercise of a property right that was included in the *bundle of rights* the owner acquired with the title to the property. *City of Virginia Beach v. Bell*, 255 Va. 395 (1998). In *Lucas*, the owner purchased the beach-front lots prior to the effective date of the regulation restricting the use of his property. Thus, the regulation directly affected his bundle of rights which, at the time of their purchase, included the right to develop his property freely. In *Palazzolo*, this rule was made less certain. The individual owner in *Palazzolo* acquired title to the land from the dissolved corporation in which he was the sole shareholder after the state’s wetlands regulations were adopted. The court held that the regulations were not necessarily part of the bundle of rights included when the individual owner acquired title, stating that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law [*i.e.*, part of the bundle of rights acquired with the title to the property] by mere virtue of the passage of title.” *Palazzolo, supra*. In *Bell*, after the city had adopted an ordinance implementing the Coastal Primary Sand Dune Protection Act, the owners acquired two lots from the dissolved corporation in which they had a 50% interest. Although the Virginia Supreme Court held that the Act precluded the owners from developing their lots, that result is less certain after *Palazzolo*.

6-440 Exactions

When a locality seeks the dedication of land or other property (such as fees) as a condition of a land use approval, such as in a proffer associated with a rezoning or a condition to a special use permit, variance, site plan or subdivision plat, it must be certain that these conditions of approval: (1) have a nexus that is related to the impact of the proposed development; and (2) are roughly proportional to the extent of the impact. *Nollan v. California Coastal Commission*, 482 U.S. 304 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Nollan*, the California Coastal Commission demanded that the owners allow public beach access across their property in return for a building permit to replace their bungalow with a larger house. The United States Supreme Court struck down this exaction as not being reasonably related to the burden imposed by the development. In the majority’s opinion, it was “impossible to understand” how public access could help remedy the burden imposed by the proposed development.

In *Dolan*, the city conditioned the owners' proposed reconstruction of their commercial building on their dedicating land for a bicycle path and a greenway within the floodplain. Although the majority of the United States Supreme Court held that the city could require the owners to dedicate land in the floodplain in order to handle increased stormwater runoff from the development, the court invalidated the city's requirement that the floodplain corridor be opened to public access for the greenway and bike path, holding that the city had failed to show that either the floodplain or the transportation impact of the expanded business was reasonably related in "rough proportion" to the requirement of public access.

The Virginia Supreme Court addressed the exaction question in *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984) (special use permit condition), where the question was whether the county could impose a condition on a special use permit that required the dedication of land for public road improvements. The court held that the county was not enabled to impose such a condition, adding that if the condition was allowed to stand, it amounted to a taking because the proposed use would add only a very limited amount of traffic to the adjacent public road and the need for the improvements was substantially generated by the existing traffic.

In *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166 (1995), affirmed 1996 U.S.App. LEXIS 18838 (4th Cir. 1996) (unpublished), the home builders challenged the county's cash proffer policy on the theory that it could never be applied in a way to ensure rough proportionality between the amount of the cash proffer and the actual increased cost in capital improvements the proffered cash was intended to address. The policy used a methodology designed to calculate the average impact of new residential development on the county's cost of providing new capital facilities such as schools, roads, libraries and parks. The policy also placed a cap on the maximum per unit cash proffer the county would accept. The district court held that the county's policy survived a facial attack on its constitutionality because there was "no reason apparent on the face of the policy why any proffer could not be determined in an amount roughly proportional to the impact of the proposed development." On appeal, the home builders contended that the rough proportionality test required the county to make more stringent individualized determinations before calculating a cash proffer amount. The court of appeals rejected this argument because such a requirement approached "exact proportionality," which was not required under the Constitution.

In *Dawson, LC v. Board of Supervisors of Loudoun County*, 59 Va. Cir. 517 (2001), the circuit court sustained the board of supervisors' demurrer to a landowners' claim that its proposed proffered fees accompanying its denied rezoning application were tantamount to unconstitutional exactions because the proffer statement unequivocally proclaimed that the proffers were voluntary.

6-500 The establishment and free exercise clauses

The First Amendment to the United States Constitution mandates that "Congress shall make no law respecting an establishment of Religion or prohibiting the free exercise thereof . . ." Article I, Section 16 of the Constitution of Virginia contains a similar prohibition. See also, *Virginia Code §§ 17.1-406 and 57.2-02* (restating an individual's freedom of religion and prohibiting a locality from unduly burdening that right).

The Establishment and Free Exercise Clauses		
Constitutional Principle	Rights Protected	How to Assure Compliance
Establishment clause	Regulation may not prefer one religious denomination over another, or sponsor or interfere in a religion	<p>Confirm that the regulations applicable to religious institutions and activities pertain to the purposes of zoning and that they regulate secular land use issues rather than religion</p> <p>Confirm that the regulations treat religious and nonreligious assemblies and institutions equally, and do not discriminate against assemblies and institutions on the basis of religion</p>

The Establishment and Free Exercise Clauses		
Constitutional Principle	Rights Protected	How to Assure Compliance
Free exercise clause	Regulation may not burden the free exercise of religion by prohibiting all religious uses in the locality, preventing the use of certain property having particular religious significance, or curtailing particular uses having special religious significance	<p>Confirm that the regulations applicable to religious institutions and activities pertain to the purposes of zoning and that they regulate secular land use issues rather than religion.</p> <p>Confirm that the regulations do not make religious exercise effectively impracticable; and do not totally exclude religious assemblies, or unreasonably limit religious assemblies</p>

The *establishment* and *free exercise* clauses each present a separate framework for analyzing religious freedom issues. These clauses need to be considered when zoning regulations are adopted and applied to religious institutions and religious activities.

Every land use regulation or decision that may affect the establishment or free exercise of religion must also be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). If applicable, RLUIPA imposes more stringent standards on the permissible regulation of religious institutions by localities. RLUIPA is analyzed in section 7-1600.

6-510 The establishment clause

The establishment clause was designed to stop the government from asserting a preference for one religious denomination or sect over others. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Rehnquist, J., dissenting) cited in *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995). *Establishment* connotes sponsorship, financial support, and active involvement of the state in a religious activity. *Walz v. Tax Commission*, 397 U.S. 664 (1970). Recognizing that “this Nation’s history has not been one of entirely sanitized separation between Church and State,” the United States Supreme Court has noted that it “has never been thought either possible or desirable to enforce a regime of total separation.” *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, must be delicately drawn both to protect the free exercise of religion (see section 6-520) and to prohibit its establishment.

In order to satisfy the establishment clause, zoning regulations must: (1) promote the health, safety and welfare of its citizens; (2) have a primary secular effect by regulating appropriate land use, rather than advancing or inhibiting religion; and (3) avoid any entanglement with religion by relating to zoning issues only. *First Assembly of God, Alexandria v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984). The establishment clause may also prevent a locality from determining what uses are or are not customary or incidental to a church. Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 Boston University Law Review 767 (1984).

6-520 The free exercise clause

The free exercise clause provides certain protections for the practice of religion. *Christian Fellowship Church v. Fairfax County Board of Zoning Appeals*, 22 Va. Cir. 537 (1988). While the freedom to believe is absolute, the freedom to act upon those beliefs may be subject to the legitimate police power (including zoning) of the government to regulate secular activities in a reasonable and non-discriminating manner. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the free exercise clause prohibits local governments from making discretionary (*i.e.*, not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. Under *Hialeah*, a law is not “neutral” if “the object of [the] law is to infringe upon or restrict practices

because of their religious motivation.” See section 7-1620 for a discussion of religious exercise under RLUIPA and the free exercise clause.

Zoning regulations and decisions might burden the free exercise of religion by absolutely preventing the use of any land within the locality for a religious purpose, by preventing the use of certain property having particular religious significance, or possibly by curtailing particular uses having special religious significance. *Christ College, Inc. v. Board of Supervisors of Fairfax County*, 944 F.2d 901 (4th Cir. 1991) (unpublished). However, the legitimate application of a locality’s zoning power does not necessarily burden the exercise of religion. See, *Christian Fellowship Church, supra* (“The County has not prevented the congregation from practicing its beliefs since the Church currently has an active house of worship, albeit smaller, near the proposed site. The BZA has simply decided that the development plan proposed by the Church does not comply with the Zoning Ordinance. . . The BZA based its decision solely on legitimate zoning issues.”). Thus, zoning regulations that limit the operation of religious institutions to a specific area of the locality or require a special use permit impose only a minimal burden on the free exercise of religion. *Tran v. Gwinn*, 262 Va. 572 (2001) (upholding zoning regulation that required a special use permit to use property in a residential district for group uses, including uses as a synagogue, temple, church or other place of worship).

6-600 The free speech clause

The First Amendment to the United States Constitution provides in part that “Congress shall make no law . . . abridging the freedom of speech . . .” Article I, Section 12 of the Constitution of Virginia contains a similar prohibition that “the General Assembly shall not pass any law abridging the freedom of speech . . .” The free speech clause is typically at issue when zoning regulations attempt to regulate signs and billboards or the location of adult-oriented businesses.

The Free Speech Clause		
Constitutional Principle	Rights Protected	How to Assure Compliance
Free speech clause	Regulations pertaining to signs may regulate the time, place and manner in which a sign is established, but may not regulate the content of the sign	Confirm that sign regulations are content neutral by imposing only reasonable time, place and manner restrictions that: (1) further a substantial governmental interest (<i>i.e.</i> , aesthetics, safety); (2) are narrowly tailored to further the interest; and (3) leave open ample alternative channels of communication
Free expression clause	Regulations pertaining to adult-oriented businesses may regulate the time, place and manner of the activities, but may not regulate the content of the activities that are considered expression, or the content of materials other than obscene materials and expression, which are not entitled to constitutional protection	Confirm that regulations are content neutral time (<i>e.g.</i> , hours of operation), place (<i>e.g.</i> , certain zoning districts; spatial requirements) and manner (<i>e.g.</i> , licensing requirements)

6-610 Signs

Signs take up space, obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). This section provides a very brief summary of some the law related to the regulation of signs.

It is within the constitutional power of a locality to improve its appearance. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Arlington County Republican Committee v.*

Arlington County, 983 F.2d 587 (4th Cir. 1993). Localities “have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.” *Taxpayers for Vincent, supra*.

Commercial speech is “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). It does no more “than propose a commercial transaction.” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). *Noncommercial speech* is speech that is not commercial speech. The First Amendment protection accorded commercial speech is significantly less than that accorded noncommercial speech.

The case law regarding signs and billboards is constantly evolving and, according to some sign law experts, commercial speech protections appear to be increasing.

6-611 Content neutral time, place and manner regulations are permitted

The key issue when analyzing a sign regulation is whether it is content based or content neutral. In most cases, whether a regulation benefits or burdens speech by referring to content on its face determines whether it is content based or content neutral. *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001).

If a regulation is determined to be content based, two standards apply: (1) for commercial speech, the locality must show that it has a substantial interest in the regulation, the regulation directly advances that interest, and the regulation is not more extensive than necessary to serve that interest, *Central Hudson supra*, cited in *American Legion Post 7, supra*; (2) for noncommercial speech, the locality must show that the regulation is necessary to serve a compelling state interest. *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1980), cited in *American Legion Post 7, supra*. In all likelihood, if a sign regulation is found to be content based, the regulation – and possibly the locality’s entire set of sign regulations – will be found to be unconstitutional.

If a regulation is determined to be content neutral, reasonable time, place and manner restrictions may be imposed on commercial or noncommercial signs, and those restrictions are valid if the regulations:

- **Furthers a substantial governmental interest**: A locality has a substantial governmental interest in preserving its aesthetic character and promoting traffic safety. *Arlington County Republican Committee, supra*; *American Legion Post 7, supra*.
- **Is narrowly tailored to further that interest**: A regulation is narrowly tailored if the governmental interest promoted would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), cited in *American Legion Post 7, supra* (preserving aesthetic character would be undermined by exempting flags or noncommercial entities from regulations).
- **Leaves open ample alternative channels of communication**: Whether the regulation leaves open ample alternative channels of communication depends on the scope of the regulation and the nature and location of the sign. See, *American Legion Post 7, supra*, comparing the permissible regulation of signs on public property, on private property, and residential private property.

6-612 Classification by sign type may be permitted as a content neutral regulation

An emerging line of cases has taken a very strict view of what is a content neutral regulation, and have held that sign regulations that distinguish signs by their purpose – such as *real estate sale* signs, *subdivision* signs and *directory* signs – are content based and unlawful. See, e.g., *North Olmsted Chamber of Commerce v. City of North Olmsted*, 86 F.Supp.2d 755 (N.D. Ohio 2000).

Other courts have rejected this strict approach, provided that the regulations are *viewpoint* neutral. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, has taken this approach provided that

certain criteria are met. *See, Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007), *certiorari denied* at ___ U.S. ___ (2008) (holding that city’s classification of signs by whether they were on-site or off-site was a content neutral regulation). Quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the *Covenant Media* court noted that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys” and that “[g]overnment regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.” The *Covenant Media* court added that the Supreme Court has explained that a regulation is not a content based regulation of speech if: (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government’s interests in the regulation are unrelated to the content of the affected speech. *Hill v. Colorado*, 530 U.S. 703 (2000); *see Satellite Broadcasting & Communications Association v. FCC*, 275 F.3d 337 (4th Cir. 2001) (“First, we must examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates. If it does not, we then ask whether the regulation’s manifest purpose is to regulate speech because of the message it conveys”). Based on these criteria, the *Covenant Media* court concluded that North Charleston’s sign regulation was not a content based regulation because the city was not concerned with the message that a sign conveyed but, instead, was concerned with where particular signs were located. “A city can regulate the location of a particular type of signs, as long as the type of signs are not distinguished by the messages they convey.” *Covenant Media, supra*.

The *Covenant Media* court then observed that the city’s sign regulation also defined and distinguished between different types of signs such as directional signs, memorial signs, and public signs. While acknowledging that distinguishing between different types of signs and where those signs may be located may also, in effect, distinguish where certain content may be displayed, the court again quoted the Supreme Court in *Ward*: “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” The court then concluded that the city’s sign regulation did not regulate the location of different types of signs based on the ideas or views expressed, and the fact that the sign regulation required looking generally at what type of message a sign carries to determine where it can be located “did not make the regulation content based.” The fact that the city’s sign regulation was to address problems caused by signs rather than to regulate any message conveyed was a critical factor in the court’s analysis.

6-620 Adult-oriented businesses

Sexually explicit printed materials, such as books, magazines, movies and videos may fall under the First Amendment’s speech and press protections. Nude dancing is expressive conduct, but “it falls only within the outer ambit of the First Amendment.” *City of Erie v. PAP’s A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The First Amendment protects the sale, lease or rental of sexually explicit materials or services that may be indecent, but are not obscene, under existing community standards. *Miller v. California*, 413 U.S. 15 (1973).

Obscene materials and expression are not protected speech under the First Amendment. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). *Obscenity* was defined in *Miller*, and can be summarized as material that: (1) depicts specific sex acts in a patently offensive way; (2) appeals to the prurient interest in sex as a whole; and (3) lacks serious literary, artistic, political or scientific value. Obscene materials and child pornography may be prohibited based on their content alone, without the need to prove that they cause specific harms.

Numerous studies have identified increased crime as a secondary effect of adult-oriented businesses, and these studies have provided the justification for regulating these businesses. Adult-oriented businesses are typically regulated through content neutral zoning and licensing regulations. A content neutral regulation is one whose “justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside the adult movie theaters” *Boos v. Barry*, 485 U.S.

312 (1988). For example, an ordinance that prohibits public nudity regulates conduct alone; it does not target nudity that contains a particular message (e.g., an erotic message). *City of Erie, supra*.

There is no doubt that a content neutral regulation will have an incidental impact on expression that is protected by the First Amendment. See, e.g., *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). Because of this impact, a regulation must satisfy the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968) in order to comply with the First Amendment: (1) the regulation must be within the constitutional power of the government; (2) the regulation must further an important or substantial governmental interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest.

Generally, the locality's power to control crime and to create a safe, attractive and harmonious community supports the first three prongs of this test. The fourth prong requires that the locality address the problem through *time, place, and manner* regulations. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *Time* regulations limit the hours of operation. *Place* regulations restrict the use to certain zoning districts and typically require that the adult-oriented business be separated by a specified distance from other sexually oriented businesses and from delineated protected uses such as residences, churches, and schools. *Manner* regulations impose licensing requirements and restrictions on how the business may be conducted (e.g., if video viewing booths are allowed, they must have at least one open side which is visible from the manager's office).

6-700 Search and seizure

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by the government. Article I, Section 10 of the Constitution of Virginia contains a similar prohibition. These constitutional protections apply to zoning inspections even when zoning violations are enforced in a civil, rather than criminal, proceeding.

Search and seizure in the context of zoning enforcement is discussed in section 27-400.

6-800 Preemption

Preemption derives from the constitutional principle that the federal law is the supreme law of the land and trumps any 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 any laws of a locality that are inconsistent with the state law. *Virginia Code § 1-13:17*.

Preemption is discussed in chapter 7.