

Chapter 8

The Differences Among Legislative, Discretionary, Quasi-judicial, and Ministerial Acts

8-100 Introduction

This chapter examines the nature of the legislative, quasi-judicial, discretionary and ministerial acts taken in the adoption and implementation of a zoning or subdivision ordinance. The distinctions are important because, among other things, legislative acts are cloaked with a presumption of reasonableness, quasi-judicial acts are presumed to be correct, and various state and federal immunities exist that may follow from the consequences of these acts. Ministerial acts do not have such presumptions and may not be afforded the immunities provided to the other classes of actions.

The following table summarizes the varying nature and their key qualities.

| The Different Nature of Various Land Use Decisions | | | | |
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| Act | Types of Land Use Decisions | Key Qualities | Effect of Being Classified As Such | Presumptions |
| Legislative | CPAs ZTA ZMAs Special exceptions Special use permits | Legislative acts are made only by governing body (exception for SUPs delegated to the BZA); prescribe a course of conduct by establishing policy or law; balances private conduct against the public health, safety and welfare | Broad discretion; broad range of immunities attach to decision makers; exempt from due process challenges (though statutory procedures must be complied with) | Acts presumed to be correct, reasonable and constitutional |
| Ministerial | Site plans Subdivision plats | Implements policy or law by applying the facts in the particular circumstances to the law or policy | When the requirements of the law or policy have been satisfied, approval is required; no discretion to deny | No presumption that decision-maker acted correctly; failure to act correctly will be found to be arbitrary and capricious |
| Discretionary | Waivers Modifications | Limited discretion delegated by governing body to lower body or officer to apply specific standards to a set of facts; standards must be as reasonably precise as the subject matter requires or permits | Decision must be based only on the standards specified by the governing body; exercise of discretion must be reasonable | No presumptions; exercise of discretion must be reasonable or it will be found to be arbitrary and capricious |
| Quasi-judicial | Variances Official determinations Appeals | Grants or denies a privilege or benefit | Factual determinations are critical, and findings of fact must be made to allow judicial review | Factual determinations presumed correct; no presumption of correctness for legal conclusions |

8-200 Legislative acts

“The power to exercise legislative authority may not be removed from the control of the local legislative representatives of the people.” *County of Fairfax v. Fleet Industrial Park Ltd. Partnership*, 242 Va. 426 (1991); *see, Mumpower v. Housing Authority*, 176 Va. 426 (1940); *Laird v. City of Danville*, 225 Va. 256 (1983). A legislative function can be exercised only by a locality’s governing body. *Fleet Industrial Park, supra*. Nonetheless, certain functions of the zoning power may be delegated under specific circumstances enabled by the General Assembly. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637 (1959).

The exercise of legislative power involves the “balancing of the consequences of private conduct against the interests of public welfare, health, and safety.” *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). The Virginia Supreme Court has recognized that it is not always easy to determine when a legislative body is acting in a legislative or some other capacity. *Blankenship v. City of Richmond*, 188 Va. 97 (1948). In general, a legislative body exercises a legislative power when it prescribes a course of conduct. *Blankenship, supra* (distinguishing legislative acts from quasi-judicial acts). In other words, legislative acts create new laws; ministerial acts generally implement existing laws. *Helmick, supra*.

8-210 Acts that are legislative

Generally, zoning is a legislative power that has been delegated from the state to Virginia’s localities by express enabling authority. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637 (1959). Within the context of land use decisions, there are a number of acts that the courts have found to be legislative in nature:

- Comprehensive plan adoption and amendments: Amendments to the comprehensive plan are legislative acts. *See, Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70 (1997).
- Zoning text and zoning map adoption and amendments: Ordinances that regulate or restrict conduct with respect to property are purely legislative and, therefore, zoning text and zoning map amendments are legislative acts. *Renkey v. County Board of Arlington County*, 272 Va. 369 (2006) (rezoning); *Helmick v. Town of Warrenton*, 254 Va. 225 (1997); *City Council of Virginia Beach v. Harrell*, 236 Va. 99 (1988); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982). Thus, when two reasonable zoning classifications apply to a property (the existing and proposed zoning classifications), the governing body has the legislative prerogative to choose between those reasonable zoning classifications. *Board of Supervisors of Fairfax County v. Miller & Smith, Inc.*, 242 Va. 382 (1991). Moreover, when the governing body considers the many factors when taking zoning actions, the weighing of those factors is a legislative function. *Miller & Smith, supra*.
- Special exceptions and special use permits: Acting on a request for a special exception or a special use permit is also a legislative act. *Richardson v. City of Suffolk*, 252 Va. 336 (1996); *Bollinger v. Board of Supervisors*, 217 Va. 185 (1976). This rule applies even when the special exception or special use permit is essentially a waiver of a regulation by the governing body permitted under the zoning regulations. *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525 (2004) (special exception allowed by zoning regulations to allow a “deviation” from setback regulations).
- Certificates of appropriateness: Action by a governing body on a certificate of appropriateness under the locality’s historic resources regulations (Virginia Code § 15.2-2306) is a legislative act. *Norton v. City of Danville*, 268 Va. 402 (2004) (treating the decision on the certificate of appropriateness as similar to a special exception; holding that the city council’s denial of the certificate was unreasonable).
- Setting rates and fees for certain services: Setting rates and fees for sewer or water services is a legislative function. *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603 (2006); *City of South Boston v. Halifax County*, 247 Va. 277 (1994).
- Vacation of subdivision plat: Action by a governing body on a request to vacate a subdivision plat is a legislative act. *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). The determination of whether to vacate a subdivision plat, like the decision regarding the grant or denial of a special use permit, is a decision which regulates or restricts the use of property. *Helmick, supra*.

A planning commission does not act in a lawmaking capacity when it considers matters for recommendation to the governing body that are legislative in nature. However, in making its recommendation, the commission considers the same factors and matters of public policy as the governing body. Neither the BZA

nor an architectural review board exercises legislative powers except when the BZA considers special use permits where the power has been expressly delegated by ordinance to the BZA.

8-220 Effect of act being classified as legislative

A legislative act is presumed to be reasonable. *Renkey v. County Board of Arlington County*, 272 Va. 369 (2006); *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525 (2004); *Ames v. Town of Painter*, 239 Va. 343 (1990); *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982); *Helmick v. Town of Warrenton*, 254 Va. 225 (1997). A legislative act is also presumed to be constitutionally valid. *Richardson v. City of Suffolk*, 252 Va. 336 (1996); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984). If challenged in court by probative evidence that the decision was unreasonable, the governing body need only produce sufficient evidence of reasonableness to make the issue fairly debatable; if the issue is fairly debatable, the legislative decision must be sustained. *Renkey, supra*; *Robertson, supra*; *Richardson, supra*.

Because a legislative act requires the exercise of discretion, members of the governing body are immune from liability under Virginia law from any suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *See, for example, Virginia Code § 15.2-1405 (official immunity for members of board of supervisors)*. Members of the governing body are also immune from suit and liability in actions brought under 42 U.S.C. § 1983 arising from their legislative decisions. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (in the land use context, absolute immunity exists when local legislative officials are acting in their legislative, as opposed to administrative or executive, capacities).

Finally, legislative actions are not subject to procedural due process claims arising from alleged deficiencies in the notice or hearings. A locality is only required to satisfy statutory notice and hearing requirements. *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435 (1991) (procedural due process is a constitutional right which applies to individuals in adjudicative or quasi-judicial proceedings, not legislative proceedings).

8-300 Ministerial acts

Ministerial acts are at the other end of the spectrum of classes of land use decisions from legislative acts.

A ministerial act is one performed under a given set of facts and in a prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, one's own judgment upon the propriety of the act being done. *Richlands Medical Association v. Commonwealth ex rel. State Health Commissioner*, 230 Va. 384 (1985). A duty is ministerial even though an officer has to determine the existence of the facts that make it necessary for him to act. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582 (1976).

In contrast to a legislative act that establishes a policy or law, a ministerial act implements that policy or law by applying the facts in the particular circumstances to the law or policy. When all of the requirements of a statute or ordinance are satisfied, an action that was once discretionary becomes ministerial and mandatory, and the application must be approved. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70 (1997) (once zoning requirements were satisfied, and building permit application otherwise satisfied USBC requirements, issuance of building permit was ministerial and mandatory).

An ordinance may authorize conditions to be imposed in carrying out a mandate. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319 (1987).

8-310 Acts that are ministerial

The approval of site plans and subdivision plats are ministerial acts. At an early point in the site plan process, a locality may have the discretion to deny a plat or plan, but once the applicant has complied with all

existing ordinances the function of approval becomes ministerial, and the plat or plan must be approved. *Board of County Supervisors of Prince William County v. Hylton Enterprises, Inc.*, 216 Va. 582 (1976); *Planning Commission of City of Falls Church v. Berman*, 211 Va. 774 (1971); compare *Umstattd v. Centex Homes*, 274 Va. 541 (2007) (determination of whether a subdivision application was complete was not ministerial such that a subdivider was entitled to mandamus; the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist). The ministerial nature of site plans and subdivision plats is best reflected in the requirement that if a plan or plat is denied, a locality is required to identify for the applicant the particular requirement that is unsatisfied, and explain what the applicant must do to satisfy that requirement. *Virginia Code* §§ 15.2-2259(A) (final), 15.2-2260(C) (preliminary).

The ultimate question is not whether a site plan or subdivision plat *should* be approved or denied as a policy matter, but whether the plan or plat will be approved or denied upon a determination as to whether it satisfies the applicable ordinances. For what it is worth, one trial court has stated that, as a general proposition, the approval of a site plan is more ministerial than the approval of a subdivision plat. *Mountain Venture Partnership Lovettsville II v. Planning Commission of the Town of Lovettsville*, 26 Va. Cir. 50 (1991). The court did not explain why it thought this to be so.

8-320 Effect of an act being classified as ministerial

In contrast to a legislative act that establishes a policy or law, a ministerial act implements that policy or law by applying the facts in the particular circumstances to the law or policy. When all of the requirements of a statute or ordinance are satisfied, an action that was once discretionary becomes ministerial and mandatory. *Town of Jonesville v. Powell Valley Village Limited Partnership*, 254 Va. 70 (1997).

Site plan and subdivision plat regulations should not inject the process with discretionary or policy considerations. For example, in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999), the county denied a subdivision master plan, relying on a provision of its subdivision ordinance that allowed the board to deny a plat if, in its opinion, the land was unsuitable for subdivision. The ordinance also provided that land was deemed unsuitable for subdivision if it would not preserve a “rural environment.” As another example, site plan review should not include a determination of consistency with the comprehensive plan because at the site plan or subdivision plat stage, the comprehensive plan is irrelevant. *See, e.g., Rackham v. Vanguard Limited Partnership*, 34 Va. Cir. 478 (1994) (the comprehensive plan may not be a basis for denying a subdivision which is otherwise in conformity with duly adopted standards, ordinances, and statutes). The ultimate question for the decision-maker should be whether the site plan or subdivision plat will be approved or denied upon a determination that it satisfies the applicable regulations, not whether the plan should be approved or denied as a policy matter.

Unlike legislative and quasi-judicial actions, the presumptions of reasonableness and correctness do not attach to the performance of ministerial duties. *But see, West v. Mills*, 238 Va. 162 (1989) (“[w]e keep in mind that the members of the planning commission are presumed to have acted correctly”). If a ministerial duty is not performed as required by law, a court would likely find the decision to be arbitrary and capricious and issue a writ of mandamus compelling the ministerial duty to be performed. *Phillips v. TELUS, Inc.*, 223 Va. 585 (1982). An arbitrary and capricious act is one taken by an administrative agency that is “willful and unreasonable . . . without consideration or in disregard of facts or without determining principle.” *School Board of City of Norfolk v. Wescott*, 254 Va. 218 (1997).

The official immunity afforded to a locality’s officers and employees under Virginia law does not exist for the performance of a ministerial duty. *Heider v. Clemons*, 241 Va. 143 (1991). In civil rights actions under 42 U.S.C. § 1983, the absolute immunity that attaches to legislative acts does not attach to ministerial acts. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Likewise, the qualified immunity that may be readily available for legislative acts does not exist for the improper performance of a ministerial duty if the law governing the rights that have been violated is so clear, at the time of their conduct, that a reasonably competent

person, in their position, would not have believed the conduct to be lawful. *See, Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987).

8-330 Guidance for considering and acting on a site plan or subdivision plat

The most relevant issue when a site plan or subdivision plat is considered is whether the site plan satisfies the requirements of the zoning ordinance or whether the plat satisfies the requirements of the subdivision ordinance. Whether the particular proposed use is consistent with the comprehensive plan, is otherwise appropriate for the neighborhood, and other policy issues, are not relevant. The determination of the appropriate use of the land is a discretionary legislative determination reserved to, and previously made by, the governing body.

There are many situations where the exercise of discretion may be required in conjunction with a site plan or subdivision plat. A zoning or subdivision ordinance may allow an applicant to request waivers or modifications of various regulations, and the regulations may confer some discretion on the decision-maker to exercise some discretion in acting on the waiver or modification, as explained in section 8-400. The approval of these requests may be a prerequisite to the action on the site plan or subdivision plat, and are separate and distinct from the ministerial nature of the commission's review of a site plan or subdivision plats.

One question that occasionally arises is whether a site plan or subdivision plat may be denied on health, safety or nuisance grounds, even though the plan or plat meets all of the express requirements of the applicable regulations. General statements in land use regulations setting forth their general purposes of protecting the public health, safety, and welfare or preventing nuisances, do not themselves provide a basis to deny a site plan or a subdivision plat. *See, Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999) (Virginia Code § 15.2-2200 is merely a statement of purpose and intent, and is not a source of power). Within the scope of the enabling authority, the applicable land use regulations are supposed to address health, safety and nuisance issues through specific and comprehensive regulations.

8-400 Discretionary acts that are neither legislative nor quasi-judicial in nature

An officer is engaged in a discretionary act “[w]here the official duty involves the necessity on the part of the officer to make some investigation, to examine evidence and form his judgment thereon.” *Umstatted v. Centex Homes*, 274 Va. 541 (2007) (mandamus denied because determining whether an application is complete is a discretionary act).

Although zoning is a generally legislative power that has been delegated from the state to Virginia's localities by express enabling authority that must be exercised by the governing body, certain functions of the zoning power may be delegated under specific standards. *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637 (1959). “Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative.” *Gavis v. Board of Zoning Appeals of City of Winchester*, 1985 WL 306753 (Va. Cir. Ct. 1985).

A discretionary act that is not a legislative act described in section 8-200 is occasionally required to be taken as a condition precedent to a primary legislative, quasi-judicial or ministerial act.

8-410 The required delegation of discretion to make factual determinations

The ability of a governing body to delegate discretionary authority is limited. The governing body must provide, by ordinance, “uniform rules of action, operating generally and impartially, for enforcement cannot be left to the will or unregulated discretion of subordinate officers or boards.” *Andrews v. Board of Supervisors of Loudoun County*, 200 Va. 637 (1959). In other words, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits. *Andrews, supra* (standard of “whether [a] proposed use would be desirable or advantageous to the neighborhood or the community or the county at large

. . . [required to comply] to the minimum requirement for the promotion of the public health, safety, convenience and general welfare” found “too general and wholly vague”).

The governing body may delegate to the planning commission, the architectural review board, or an officer the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law exist. *Ours Properties, Inc. v. Ley*, 198 Va. 848 (1957). In *Ours Properties*, the Virginia Supreme Court upheld an ordinance vesting discretion in zoning officials to grant an application for an industrial establishment if “satisfactory evidence is presented that such establishment will not adversely affect any contiguous district through the dissemination of smoke, fumes, dust, odor, or noise or by reason of vibration and that such establishment will not result in any unusual danger of fire or explosion.” A delegation of the power to exercise discretion based upon a finding of facts is not of itself an arbitrary or capricious delegation. *Ours Properties, supra*.

When a discretionary approval includes the authority to impose conditions, the purpose of a particular regulation may imbue the decision making body with the discretion to impose particular conditions that address the purposes of the regulation. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319 (1987).

8-420 Acts that are discretionary

Waivers from, and modifications to, otherwise applicable regulations are the typical discretionary acts delegated by a governing body to the planning commission or an officer. For example, a modification or waiver requiring the exercise of some discretion may be required before a site plan or subdivision plat may be approved. Assuming that the consideration of the modification or waiver requires the exercise of some discretion, approval of the site plan or subdivision plat is discretionary, rather than ministerial, until the waiver or modification is approved (assuming all other applicable requirements are satisfied). *See, Planning Commission of City of Falls Church v. Berman*, 211 Va. 774 (1971) (once the applicant has complied with all applicable regulations, approval of the site plan is no longer discretionary but ministerial and mandatory; planning commission could not deny a site plan for a reason other than failure to comply with applicable regulations), cited in *Mountain Venture Partnership Lovettsville II v. Planning Commission of the Town of Lovettsville*, 26 Va. Cir. 50 (1991).

The determination of whether an application is complete may also be discretionary. *See, Umstatt v. Centex Homes*, 274 Va. 541 (2007) (the determination of completeness involved an investigation of submitted plans, the conditions existing on the land and the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist).

8-430 The discretion delegated must be exercised according to the delegated standards, and may not be exercised in an arbitrary or capricious manner

In taking a discretionary action, the decision-maker is not compelled to approve the request merely because the given set of facts satisfies the minimum requirements of the applicable standard (in which case, the act would be ministerial in nature). The decision-maker is allowed to exercise a certain amount of judgment regarding the propriety of the request so long as it is within the scope of the authority granted. However, when the decision-maker exercises its discretion, it may not exercise that discretion in an arbitrary or capricious manner. *Glass v. Board of Supervisors of Frederick County*, 30 Va. Cir. 504 (1981). Actions are defined as arbitrary and capricious when they are “willful and unreasonable” and taken “without consideration or in disregard of facts or law or without determining principle.” *School Board of City of Norfolk v. Wescott*, 254 Va. 218 (1997).

One situation where the decision-maker may run afoul of its delegated authority is if it fails to adhere to the standards applicable to the delegation and bases its decision on a standard created *ad hoc*. For example, in *Recycle Am, LLC v. Loudoun County*, 59 Va. Cir. 504 (2001), the board of supervisors denied a waiver from a set back requirement under the county solid waste ordinances. The waiver regulations imposed express

standards to be considered in evaluating such a request, and these standards pertained to whether a reduced setback would create a nuisance. However, the board denied the waiver because such a set back had not been granted for other similarly situated facilities. In finding the board's decision to be arbitrary and capricious, the court said: "This decision sets forth a benchmark, absent from the ordinance, that weighs the outcomes of a request predicated upon a comparison with others rather than adherence to a self imposed merits-based standard."

Another situation where the decision-maker may get itself into trouble is if it believes that the delegation of the authority itself, *e.g.*, "the planning commission *may* grant a waiver if . . ." – confers broad discretion that trumps the delegated standards. This issue arose in *Recycle Am*, and the court said:

[T]he word "may," as used in the waiver provisions of the Solid Waste Management Code, is descriptive of the power granted to the Board to decide the issue and not as a license to exercise unlimited discretion when evaluating individual requests. *Leighton v. Maury*, 76 Va. 865 (1882). To do otherwise would render meaningless the provision relating to the creation of a nuisance.

If the decision-maker has not abused its discretion by acting arbitrarily or capriciously, and it has acted within the ambit of its legislatively delegated authority, then its actions should be sustained. *Schalk v. Planning Commission of City of Winchester*, 1987 Va. Cir. LEXIS 319 (1987).

8-500 Quasi-judicial acts

It is not always easy to determine just when a public body is acting in a quasi-judicial capacity, or in a wholly legislative capacity. In general, it may be said that such a body acts in a quasi-judicial capacity when it grants or denies a privilege or benefit, and in a legislative capacity when it prescribes a course of conduct. *Blankenship v. City of Richmond*, 188 Va. 97 (1948).

8-510 Acts that are quasi-judicial

A BZA acts in a quasi-judicial capacity when it considers a variance. *Ames v. Town of Painter*, 239 Va. 343 (1990); *see, however, Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va. 756 (2004) (in explaining the obligation of a BZA to adhere to the statutory criteria in Virginia Code § 15.2-2309(2) when considering a variance, a BZA acts in an *administrative capacity* when it considers a variance); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals Fairfax County*, 2006 Va. Cir. LEXIS 262 (2006) (BZA seemingly acts in legislative capacity when considering a variance). A zoning administrator acts in a quasi-judicial capacity when making official determinations. *Lynch v. Spotsylvania County Board of Zoning Appeals*, 42 Va. Cir. 164 (1997). The BZA acts in a similar capacity when it considers an appeal from an official determination. *Board of Supervisors of Fairfax County, supra* ("when deciding appeals of decisions made by administrative officers or zoning administrators in the enforcement of the zoning ordinance, members of a board of zoning appeals, in essence, sit as judges in determining the issues presented to them on appeal").

8-520 Effect of act being classified as quasi-judicial

On questions of fact, the findings and conclusions of the BZA are presumed to be correct. *Virginia Code § 15.2-2314*. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the BZA, that the BZA erred in its decision. *Virginia Code § 15.2-2314*.

On questions of law, the court hears arguments on those questions *de novo* ("anew"), as though the BZA had not decided the question. *Virginia Code § 15.2-2314*.

The party challenging the BZA's decision has the burden of proof. *Foster, supra*. Although the trial is not *de novo* and is generally held on the record of the proceedings before the BZA, any party may introduce evidence in court. *Virginia Code § 15.2-2314*.

On appeals from decisions pertaining to variances and special use permits, the appealing party may rebut the presumption by proving by a preponderance of the evidence that the BZA applied erroneous principles of law, or where the BZA's discretion is involved, its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance. *Virginia Code § 15.2-2314*.

The BZA is required to make findings that reasonably articulate the basis for its decision. *Packer v. Hornsby*, 221 Va. 117 (1980).